WITHDRAWAL SHEET
Ronald Reagan Library

Collection: ROBERTS, JOHN G.: Files

Archivist: gcc/bcb

File Folder: JGR/Chada [5 of 9] OA ~~12658~~ 12359

Date: 5/26/98

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1. memo	John G. Roberts ro Fred F. Fielding re Draft State Department Q & A's on Legislative Veto (partial), 1p.	7/28/83	~~P5~~ C) 12/14/00

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]
- P-1 National security classified information [(a)(1) of the PRA].
- P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
- P-3 Release would violate a Federal statute [(a)(3) of the PRA].
- P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA].
- P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA].
- P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA].

C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]
- F-1 National security classified information [(b)(1) of the FOIA].
- F-2 Release could disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA].
- F-3 Release would violate a Federal statue [(b)(3) of the FOIA].
- F-4 Release would disclose trade secrets or confidential commercial or financial information [(b)(4) of the FOIA].
- F-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA].
- F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
- F-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
- F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

THE WHITE HOUSE

WASHINGTON

July 13, 1982

MEMORANDUM FOR THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Applicability of War Powers Resolution to the Situation in Lebanon

In anticipation of your meeting with Congressional leaders this afternoon, we have prepared a synopsis of the War Powers Resolution (attached at Tab A) as it applies to the situation in Lebanon.

REQUIREMENTS OF THE WAR POWERS RESOLUTION

The Resolution imposes three types of duties upon the President:

1) Consultation: Section 3 of the Resolution requires that the President "consult" Congress "in every possible instance" before introducing the Armed Forces into "hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances" and regularly thereafter. As a practical matter, consultation in such instances with more than a select group of Congressional leaders has never been attempted. In the instant case, informal consultation has occurred.

2) Reporting: Relevant to Lebanon, section 4 of the Resolution requests that the President "report" to Congress within 48 hours after U.S. Armed Forces are introduced:

- "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances" [§4(a)(1)]; or
- "into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments" for supply, replacement, repair or training [§4(a)(2)].

3) Termination: The termination provisions of the Resolution apply only to those situations involving hostilities or the imminent threat of hostilities [§ 4(a)(1)]. The Resolution requires that the President must terminate the use of armed forces in those situations within 60 days after a report is submitted or required to be submitted under § 4(a)(1) unless the Congress i) has specifically authorized U.S. involvement by statute or a declaration of war; ii) has extended by law such 60-day period; or iii) is physically unable to meet. (The President may obtain a 30-day extension of the 60-day period by certifying to Congress that the extension is needed to achieve the safe withdrawal of U.S. Armed Forces.) If armed forces are actually engaged in hostilities, Congress may order their removal by concurrent resolution at any time. If troops are introduced "equipped for combat," absent "hostilities" or "imminent threat of hostilities," [§ 4(a)(2)] the termination provisions are not applicable.

RESOLUTION AS APPLIED TO LEBANON

In a letter to you dated July 6, 1982 (attached at Tab B), House Committee on Foreign Affairs Chairman Clement Zablocki concludes that because U.S. troops deployed to Lebanon would be entering a situation involving hostilities or the imminent threat thereof, you must report their deployment under § 4(a)(1) of the Resolution. Zablocki fears that you will seek to avoid the termination provisions of the Resolution by filing a report under § 4(a)(2) instead. While Congress might conceivably invoke the termination provisions of the Resolution even if you filed a report under § 4(a)(2), the legal dispute that might ensue creates a strong Congressional preference for § 4(a)(1) reports in borderline situations where the presence of "hostilities" or the "imminent threat" thereof can be legitimately questioned.

The Executive Branch has consistently defined "hostilities" and "imminent hostilities" more narrowly than Congress, and has noted that both terms are "definable in a meaningful way only in the context of an actual set of facts." Neither term necessarily encompasses irregular , infrequent or isolated violence which may occur in a particular area.

RECOMMENDATIONS

1. That you stress that our current efforts are being directed to the development of a situation where hostilities are not imminent.

2. That you respond to any Congressional inquiries to the effect that the terms of U.S. participation in the Lebanon situation and the circumstances prevailing at the time will determine under which section of the War Powers Resolution you report to Congress. No decision can be made at this time, and we will continue to consult with Congress as events occur.

[NSC concurs with these recommendations.]

Attachments

cc: Edwin Meese III
James A. Baker III
William P. Clark
Michael K. Deaver

A

WAR POWERS RESOLUTION

For Legislative History of Act, see p. 2346

PUBLIC LAW 93-148; 87 STAT. 555

[H. J. Res. 542]

Joint Resolution concerning the war powers of Congress and the President.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That:

SHORT TITLE

Section 1. This joint resolution may be cited as the "War Powers Resolution".

57. 18 U.S.C.A. § 712.

PURPOSE AND POLICY

Sec. 2. (a) It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

(b) Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

(c) The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

CONSULTATION

Sec. 3. The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

REPORTING

Sec. 4. (a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation;

the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

(A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

(b) The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

(c) Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

CONGRESSIONAL ACTION

Sec. 5. (a) Each report submitted pursuant to section 4(a)(1) shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and to the Committee on Foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress has adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (or if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(c) Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a decla-

ration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

CONGRESSIONAL PRIORITY PROCEDURES FOR JOINT RESOLUTION OR BILL

Sec. 6. (a) Any joint resolution or bill introduced pursuant to section 5(b) at least thirty calendar days before the expiration of the sixty-day period specified in such section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and such committee shall report one such joint resolution or bill, together with its recommendations, not later than twenty-four calendar days before the expiration of the sixty-day period specified in such section, unless such House shall otherwise determine by the yeas and nays.

(b) Any joint resolution or bill so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents), and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a joint resolution or bill passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out not later than fourteen calendar days before the expiration of the sixty-day period specified in section 5(b). The joint resolution or bill so reported shall become the pending business of the House in question and shall be voted on within three calendar days after it has been reported, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a joint resolution or bill passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such resolution or bill not later than four calendar days before the expiration of the sixty-day period specified in section 5(b). In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than the expiration of such sixty-day period.

CONGRESSIONAL PRIORITY PROCEDURES FOR CONCURRENT RESOLUTION

Sec. 7. (a) Any concurrent resolution introduced pursuant to section 5(c) shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and one such concurrent

resolution shall be reported out by such committee together with its recommendations within fifteen calendar days, unless such House shall otherwise determine by the yeas and nays.

(b) Any concurrent resolution so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents) and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a concurrent resolution passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out by such committee together with its recommendations within fifteen calendar days and shall thereupon become the pending business of such House and shall be voted upon within three calendar days, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a concurrent resolution passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such concurrent resolution within six calendar days after the legislation is referred to the committee of conference. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than six calendar days after the conference report is filed. In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement.

INTERPRETATION OF JOINT RESOLUTION

Sec. 8. (a) Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—

(1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

(b) Nothing in this joint resolution shall be construed to require any further specific statutory authorization to permit members of United States Armed Forces to participate jointly with members of the armed forces of one or more foreign countries in the head-

quarters operations of high-level military commands which were established prior to the date of enactment of this joint resolution and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.

(c) For purposes of this joint resolution, the term "introduction of United States Armed Forces" includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

(d) Nothing in this joint resolution—

(1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or

(2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.

SEPARABILITY CLAUSE

Sec. 9. If any provision of this joint resolution or the application thereof to any person or circumstance is held invalid, the remainder of the joint resolution and the application of such provision to any other person or circumstance shall not be affected thereby.

EFFECTIVE DATE

Sec. 10. This joint resolution shall take effect on the date of its enactment.

Passed over Presidential veto Nov. 7, 1973.

Congress of the United States
Committee on Foreign Affairs
House of Representatives
Washington, D.C. 20515

July 6, 1982

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

The Department of State informed me this morning of your willingness in principle to provide U.S. troops to a multinational force in Beirut in order to insure the orderly departure of the Palestine Liberation Organization from the city.

While I applaud your intent to fully comply with the War Powers Resolution, I am disturbed to learn that you may file a report pursuant to section 4(a)(2) of the Resolution rather than section 4(a)(1).

Any common-sense assessment of the situation in Lebanon must conclude that, if the United States agrees to participate in this multinational force, it would be introducing its armed forces into hostilities or into a situation where imminent involvement in hostilities is clearly indicated by the circumstances.

Thousands of lives have already been lost since Israel entered Lebanon on June 4. Several cities have been destroyed and countless ceasefires have been broken. The city of Beirut is presently under siege. These conditions clearly meet the section 4(a)(1) test for reporting under the War Powers Resolution should U.S. troops be sent to Beirut.

I trust that you, Mr. President, will report under section 4(a)(1) if the plan to send U.S. troops to Beirut is implemented. A report under section 4(a)(2) would not constitute full compliance with the War Powers Resolution in these circumstances. Rather, it could only be interpreted as an attempt to avoid capriciously the subsequent requirements of section 5 of the War Powers Resolution. Such an action would have incalculable effects on executive-legislative relations on a variety of foreign policy issues.

With best wishes, I am

Sincerely yours,

Clement J. Zablocki

Chairman

CJZ:gbi

WHITE HOUSE LAW LIBRARY
ROOM 528 OEOB
(202) 395-3397

Date 1/5/84

To John Roberts

Room No.

From Angie Nail

✓ To Keep

Chadha file

____ To Borrow (Date Due _____

____ Per Your Request/Per Our Conversation

____ FYI

Message: The discussion of the legislative veto issue begins on p. 140 of the opinion.

In the United States Claims Court

No. 560-82L

* * * * * * * * * * * * * *

CITY OF ALEXANDRIA,	*	Contract; breach of contract; pleading and practice; summary judgment; authority to contract; congressional review; formation of contract; offer and acceptance; implied-in-fact contract; congressional veto; equitable estoppel.
Plaintiff,	*	
v.	*	
THE UNITED STATES,	*	
Defendant.	*	

* * * * * * * * * * * * * *

Kenneth L. Adams, Washington, D.C., for plaintiff. Judith E. Schaeffer, Dickstein, Shapiro & Morin, and Cyril D. Calley, City of Alexandria, of counsel.

Lynn Rubinstein, Washington, D.C., with whom was Acting Assistant Attorney General F. Henry Habicht, III, for defendant. Terry Hart Lee, General Services Administration, and Pauline H. Milius, Department of Justice, of counsel.

OPINION

NETTESHEIM, Judge.

In this breach of contract action, plaintiff, the City of Alexandria ("plaintiff" or the "City"), seeks the difference between the price it paid for a parcel of surplus government real property and a lesser price allegedly agreed upon under a prior contract of sale for the same parcel. Although arguing that this claim is not appropriate for summary disposition due to contested issues of material fact, the City takes the position that if the case proceeds on summary judgment the Government should be estopped from denying the existence of the earlier contract or of an intervening contract, also for a lesser price than the City finally paid. As a final alternative, the City seeks interest on an earnest money deposit given for the first contract.

This case is now before the court after argument on defendant's motion for summary judgment on the issue of

the existence of an express contract, as opposed by plaintiff, and on plaintiff's motion for summary judgment on the issue of estoppel, as opposed by defendant. Defendant cross-moved on this issue in oral argument. Plaintiff also moved orally, over opposition, for summary judgment based on a contract implied in fact.

FACTS

In its opposition to defendant's motion for summary judgment, the City identified twelve issues of allegedly disputed facts which precluded summary judgment. Although, as defendant argues, most of these issues are either conceded or immaterial, the following recitation considers all salient facts in the light most favorable to the City, the non-moving party, and resolves all doubts against the Government, as the movant. See Lehner v. United States, 1 Cl. Ct. 408, 412 (1983) (NETTESHEIM, J.) (citing cases).

The Invitation To Offer at $925,000

On November 8, 1977, the General Services Administration ("GSA") determined the King's Warehouse site ("the lot") in Old Town Alexandria, Virginia, to be surplus government property. Section 203(a) of the Federal Property and Administrative Services Act of 1949, 63 Stat. 385 (1949) (codified as amended at 40 U.S.C. §484(a) (1976)), empowers the Administrator of GSA to supervise and direct sales of such property. The Administrator's authority to dispose of surplus real property has been delegated to the Federal Property Resources Service ("FPRS"), part of GSA's central office, which, in turn, has delegated its authority to the regional administrators.

After an unsuccessful attempt to acquire the lot by a historic preservation grant, the City informed GSA, on November 17, 1978, of its desire to purchase the lot by negotiated sale pursuant to 40 U.S.C. §484(e)(3)(H). 1/ Carlton Brooks ("Brooks"), Director, Real Property Division of the FPRS, replied on November 30 informing plain-

---

1/ Section 484(e)(3) provides in pertinent part:

> Disposals and contracts for disposal may be negotiated . . . [without public advertising for bids] . . . if

tiff that "negotiated sales of suplus Federal real property are based on the property's market value and subject to Congressional review. We are proceeding to obtain the necessary clearances within GSA and will send the City an offer as soon as possible."

The clearances included both the GSA Administrator's and the FPRS's approval of the National Capital Region's (the "Regional Office") disposal plan for the lot. On May 16, 1979, the FPRS authorized the Regional Office to negotiate a sale of the lot to the City at not less than the lot's appraised value of $790,000. If such a price could be negotiated, an explanatory statement was to be prepared for the Administrator of GSA to submit to the Senate Committee on Governmental Affairs and the House Committee on Government Operations (the congressional oversight committees), as required by 40 U.S.C. §484(e)(6). 2/ According to plaintiff, these advance clearances prove that if the contract subsequently negotiated had been submitted to the FPRS for review, it would have been approved.

On June 22, 1979, Regional Administrator Walter V. Kallaur ("Kallaur") sent the City an invitation to offer, pursuant to 41 C.F.R. §101-47.304-4 (1978), on a form

---

1/ (Cont'd from page 2.)

* * *

> (H) the disposal will be to States, Territories, possessions, political subdivisions thereof, or tax-supported agencies therein, and the estimated fair market value of the property and other satisfactory terms of disposal are obtained by negotiation . . . .

2/ Section 484(e)(6) provides in pertinent part:

> [A]n explanatory statement of the circumstances of each disposal by negotiation of any real or personal property having a fair market value in excess of $1,000 shall be prepared. Each such statement shall be transmitted to the appropriate committees of the Congress in advance of such disposal. . . .

styled "Offer For Purchase" ("OFP"). The OFP identified the City as the "offeror" in the transaction and recited both that the offeror offered to purchase the lot for $925,000 cash and that the "Offer for Purchase of Government Property" was subject to the "General Terms Applicable to Negotiated Sales" in the attached GSA Form 2041 and to special terms set forth in the OFP. Form 2041 contained a "Rescission" clause, which provided in part:

> b. An explanatory statement . . . will be submitted to the appropriate committees of the Congress . . . and the offer probably will not be accepted by the Government until after the proposed disposal has been considered by such committees. . . .
>
> c. Any recission, [sic] pursuant to a or b, above, will be without liability on the part of the Government other than to return the earnest money deposit without interest.

In his June 22, 1979 cover letter, Regional Administrator Kallaur requested that the City "review the Offer and, if it is acceptable to you, return two executed copies together with the necessary resolutions and a 10 per cent earnest money deposit." The City has characterized the cover letter and the OFP as an offer by GSA to sell the lot to plaintiff.

Negotiation of the Sale

On August 6, 1979, a meeting took place between Kallaur and Brooks and city officials. At this meeting Kallaur agreed to give plaintiff sufficient time to respond to the OFP so that it could gain the City Council's approval at the next council meeting on September 11. The City expressed a desire to file another application to acquire the lot free under a historic preservation grant. Kallaur agreed by letter dated August 7, 1979, that if the application were successful "or if the City wishes to withdraw its offer before December 31, 1979, we will allow the withdrawal. Otherwise, I will proceed with the sale of the property to the City." Kallaur stated in deposition that he did not mean that he would wait until December 31 to process the offer. "We would process it any time prior to that date whenever they submitted it, if that is what they indicated to us that that is what they wanted to do."

GSA's Handbook for Disposal of Surplus Property, which contains instructions and procedures for the disposal of surplus real property, provides in part:

> If at the time of the submission of the explanatory statement to the committees the appraisal of the property would be more than nine months old, the regional office shall have that appraisal updated . . . .

PBS P. 4000.1-113e (Apr. 19, 1977). This handbook was not in the public domain. The appraisal on which the $925,000 price was based was due to expire on December 16, 1979, under this guideline. At the meeting on August 6, 1979, city officials were not told that the offer at $925,000 no longer would be viable if the explanatory statement had not been submitted to Congress by December 16. The GSA officials, however, did advise city officials that the current appraisal would expire in December and the price might then go up, but that if plaintiff submitted the OFP before the deadline the property would be sold to the City for $925,000. The GSA officials stated that the sale was subject to congressional review, although this was a routine formality.

At the conclusion of the August 6 meeting, Kallaur said that he had been pleased to make a deal (a statement defendant terms unauthorized), and both sides left with the understanding that a deal had been made subject only to the City's compliance with GSA's formalities. A city official requested confirmation by letter that if the City Council approved the purchase the property would be sold for $925,000. Kallaur supplied the requested letter on August 7. Defendant disputes plaintiff's statement that the letter was reviewed by the FPRS without negative comment, but states that this is immaterial, because the Regional Office's disposal plan had been approved. The City contends that Kallaur's August 7 letter and representations at the August 6 meeting provide one basis to estop the Government from denying a contract at $925,000. 3/

On September 11, 1979, the City Council passed a resolution "That the . . . [OFP] . . . whereby the City offers to purchase . . . [the lot] . . . is hereby ap-

---

3/ The City's motion is treated as so arguing.

proved . . . ." and "That Mr. Douglas Harman . . . is hereby authorized to execute said Offer on behalf of the City . . . ." (Emphasis added). On October 9, 1979, the City delivered to GSA Real Property Division Director Brooks the signed OFP, the earnest money deposit of $92,500, and a copy of the City Council's resolution, together with a cover letter from City Manager Douglas Harman requesting credit terms. City official Edward C. Garrity ("Garrity") told Brooks, however, that the City would buy the property regardless of whether credit were extended and that plaintiff had decided not to reapply for a historic preservation grant. Brooks assured Harman that the lot now would be conveyed to plaintiff for $925,000 since the City had done everything it was supposed to do (the authorization to give such an assurance presenting a legal question, according to defendant). The acceptance page of the OFP is unsigned, 4/ although GSA cashed plaintiff's check for $92,500.

Mishandling of the $925,000 Sale

A dispute lingers as to what, if anything, was done about processing plaintiff's offer during the year between its submission in October 1979 and November 1980. Following the City's version of the facts, the court finds that GSA failed altogether to process the offer and was negligent, as stated by Kallaur in his December 5, 1980 letter accompanying his explanatory statement submitted to the FPRS. The record contains documentation that some action

---

4/ This section of the OFP reads in full:

ACCEPTANCE BY THE GOVERNMENT

The foregoing "Offer for Purchase of Government Property" is hereby ACCEPTED by and on behalf of the UNITED STATES OF AMERICA this _____ day of _____, 19___.

UNITED STATES OF AMERICA
Acting by and through the
ADMINISTRATOR OF GENERAL SERVICES

By_____
D. CARLTON BROOKS
Director, Real Property Division
Federal Property Resources Service

was taken in 1980 to obtain FAA and flood plain clearances. This action appears, however, to have been merely preparatory to sending the City a new OFP based on an updated appraisal. City official Garrity avers that in November 1980 GSA's real estate specialist Jack Burrows told him that the paperwork on the sale had been misfiled, a version of events corroborated by Brooks. Nonetheless, it is undisputed that nothing was done to process the sale before the first appraisal expired in December 1979 and that Burrows was reprimanded for his negligence.

City officials claim without contest from the Government that they frequently contacted both Brooks and Burrows throughout this period from October 1979 to November 1980 and were assured repeatedly that there was no problem, that the sale was being processed, and that the lot would be conveyed to the City for $925,000. Although Brooks testified that he did not recall any such communications, defendant concedes that Burrows and Brooks assured the City that the sale was being processed. Garrity avers that had the City been informed that the GSA was not processing the offer, City officials "would have taken any and all steps necessary to correct that situation." This claim of reliance on assurances from GSA that the sale was being processed forms a second basis of plaintiff's claim that the Government should be estopped to deny a sale at $925,000.

The $1,375,000 OFP

On November 19, 1980, at real estate specialist Burrows' instigation, Kallaur sent the City a new OFP inviting an offer to purchase the lot for $1,375,000 based on an updated appraisal. Kallaur acted under the misapprehension that the City had never returned the first OFP, although defendant contends that Kallaur correctly stated in his cover letter, "During the period between the submission of your original offer and your decision not to seek to acquire the property under historic preservation covenants, it became necessary to update the appraisal upon which the original offer was made. . . ." Defendant elsewhere admits that plaintiff informed GSA that it had decided not to reapply for the historic preservation grant at the same time that it delivered the first OFP on October 9, 1979.

When plaintiff received the second OFP and Kallaur's November 19, 1980 cover letter, city official Garrity telephoned GSA's Burrows to ask what was going on. De-

fendant disputes Garrity's averment that Burrows told him the first OFP had been misfiled, yet admits that Garrity went to see Burrows and delivered another copy of the OFP. On November 21 Burrows wrote on a transmittal slip attached to the second OFP, "Inoperative -- Hold action until further notice from this office." Defendant questions whether that note was legally authorized as a matter of law.

The matter was then brought to the attention of FPRS Director Brooks and Regional Administrator Kallaur. Kallaur testified in deposition that he decided

> that this had been an administrative error, a grotesque error, on the part of the Regional Office, that we had failed to discharge our responsibilities properly and that we were obligated to follow through under the terms of the original agreement and to advise [the FPRS and the Administrator] that we had made this mistake and proceed to forward an explanatory statement capturing the error and our proposed correction.

Kallaur and Brooks decided that GSA could and should process the sale at $925,000 and thus ratified Burrows' putting a hold on the second OFP. Again, defendant challenges the authority of Kallaur and Brooks to make such a decision.

On December 5, 1980, Kallaur sent an explanatory statement, pursuant to 41 C.F.R. §101-47.304-12(a), (d), 5/ to the FPRS explaining what had happened. Kallaur advanced his belief that the original offer was still valid and recommended a sale at $925,000. Attached was a GSA form signed by Kallaur requiring the signature of the GSA Administrator below the legend,

---

5/ 41 C.F.R. §101-47.304-12 (1982), provides, as it did in 1979-81, in pertinent part:

> (a) Subject to the exceptions stated in §101-47.304-12(b), the disposal agency shall prepare an explanatory statement, as required by section 203 (e)(6) of the Act, of the circumstances of each proposed disposal by negotiation.

> Authority granted to accept the offer on or after 35 days from the date of the letters [sent to the Chairmen of the Senate and House Committees on Government Operations] and thereafter to consummate the negotiated sale, unless otherwise instructed or antitrust clearance is required.

Defendant considers this form decisive on the issue of the Regional Office's authority to accept the City's offer and also interprets 41 C.F.R. §101-47.304-12(d), see supra note 5, to require the Administrator's approval before an offer may be accepted. 6/

Several days after the matter was brought to the attention of Brooks and Kallaur, Brooks told the City's Garrity that the second OFP (covered by Kallaur's November 19 letter) had been sent by mistake, and assured him the $925,000 sale would be "put back on track." Defendant, however, deems Brooks' authority to give such assurance a question of law. Moreover, defendant disputes plaintiff's

---

5/ (Cont'd from page 8.)

* * *

> (d) Each explanatory statement when prepared shall be submitted to the Administrator of General Services for review and transmittal by the Administrator of General Services by letters to the Committees on Government Operations . . . .

* * *

> (f) In the absence of adverse comment by an appropriate committee . . . on the proposed negotiated disposal, the disposal agency may consummate the sale on or after 35 days from the date of . . . [submission of the explanatory statement].

6/ Although the Regional Office has delegated authority over the disposal of surplus realty, PBS 4000.1-113e, provides in part: "No negotiated offer requiring the submission of an explanatory statement to the appropriate committees of the Congress shall be accepted without the prior approval of the Central Office. . . ."

contention that no one from GSA informed the City that a $925,000 sale would violate statute or internal GSA rules. Defendant cites the November 19 letter, which stated that between October 9, 1979, when the offer was submitted, and "your decision not to seek to acquire the property under historic preservations covenants" (also on October 9, 1979), "it became necessary to update the appraisal upon which the original offer was made. . . ." Of course, this was the November 19 letter that GSA's Brooks told City official Garrity had been sent by mistake. Defendant also argues that the statutory requirement for sale at fair market value was a matter of public notice and that the alleged illegality of a sale based on an expired appraisal rendered immaterial GSA's alleged failure to inform plaintiff that such a sale was illegal. In any event, it is undisputed that GSA told plaintiff not to take action on the second OFP. This forms the basis of plaintiff's attempt to estop the Government from denying the existence of a contract to sell at $1,375,000.

Failure of the $925,000 Sale

During 1980-81 the FPRS was headed by Commissioner Roy Markon ("Markon"), who had approved the original disposal plan in May 1979. This official refused to forward Regional Administrator Kallaur's December 5, 1980 explanatory statement to Congress on the ground that it was based on an expired appraisal. Defendant adds that the statement also lacked the required clearances. Kallaur defended his view to GSA Acting Administrator Raymond A. Kline, who, after receiving advice from General and Regional Counsel, agreed with Kallaur and on March 19, 1981, ordered an explanatory statement to be prepared proposing to sell the lot for $925,000 and providing a rationale for deviating from the requirement of GSA's internal guidelines that explanatory statements be based on updated appraisals.

Markon renewed his attempts to convert Kline to his viewpoint. On May 7, 1981, Kline discussed the case with the Chairman of the House Committee on Government Operations and a staff member. The staff member later contacted Kline, after having reviewed the file and, according to Kline's deposition testimony, expressed doubt that the committee would approve the sale if it were submitted for review because the appraisal period had expired. Kline then abandoned his plan to waive the internal guidelines, concluding that the House committee would obstruct a

$925,000 sale. 7/ By June 1981 Gerald B. Carmen ("Carmen") had assumed office as Administrator of GSA, but he directed Kline to continue handling the sale of the lot. After again contemplating in late June 1981 submission of an explanatory statement based on the $925,000 price, despite the likelihood of congressional opposition, on August 3, 1981, Kline finally ordered Markon to conduct the sale based on a current appraisal according to the guidelines.

On August 25, 1981, City officials met with Administrator Carmen and argued for a sale at the original price. The GSA did not disclose its earlier decision not to proceed with a sale at $925,000. During a November 13, 1981 meeting, GSA informed the City that it would not convey the lot for $925,000. GSA returned plaintiff's deposit without interest on November 20 and sent plaintiff a new OFP for $1.5 million on February 24, 1982. The City purchased the property at that price, having first filed a suit in federal district court seeking specific performance of the $925,000 contract. The suit was transferred to this court in November 1982.

DISCUSSION

The Express Contract Issue

Plaintiff argues that GSA had made the City an offer to sell the property, based on instances in which GSA personnel referred to the Government's invitations to offer as "offers", and that at the August 6, 1979 meeting the parties achieved the requisite meeting of the minds. Defendant erects as barriers to formation of a contract arguments that the OFP was an offer by the City, so that it was not capable of acceptance by the City, and that the GSA officials lacked authority to agree to a binding contract. According to defendant, no contract came into existence because, absent congressional review, GSA's offer could not be accepted. The City contends that although 41 C.F.R. §101-47.304-4 "does state that the GSA issues 'invitations to make an offer,' this procedure is not required by statute and, we submit, was not as a

---

7/ Kline testified, "After they reviewed the file and it was communicated back to me what their conclusion was, it was at that point that I thought it would be useless to go up there and be shot down anyway."

matter of fact and substance followed in this case." Plf's Reply at 19 (emphasis in original).

The regulatory scheme for disposals of surplus property by negotiation is designed to give the greatest protection to the public coffers from disadvantageous bargains struck by GSA. The quoted regulation does more than state that the GSA issues such invitations, but prescribes: "In all advertised and negotiated disposals, the disposal agency shall prepare and furnish . . . written invitations to make an offer, which shall contain . . . all the terms and conditions under which the property is offered for disposal . . . ." (Emphasis added.)

Although the City presents several indications that GSA made an offer, both the OFP and the City Council resolution specified that the City was making an offer. These unequivocal manifestations that an offer was being made by the City, which were signed by authorized city officials, preclude transforming that offer into an offer by GSA that was accepted by the City. 8/ In Russell Corp. v. United States, 210 Ct. Cl. 596, 537 F.2d 474 (1976) (per curiam), cert. denied, 429 U.S. 1073 (1977), the Court of Claims held that a contract did not come into existence in circumstances similar to this case. The GSA Administrator in Russell Corp. had approved the sale, but no representative of the Government had executed the acceptance page. That the offer was not accepted by the authorized signature defeated a claim based on express contract. 210 Ct. Cl. at 608, 537 F.2d at 481-82; see Kellerblock v. United States, 219 Ct. Cl. 608, 611 (1979). See also Prevado Village Partnership, Etc. v. United States, No. 156-82C, slip op. at 8 n.3 (Cl. Ct. Aug. 22, 1983) (LYDON, J.).

Plaintiff's argument that the Regional Office, per Kallaur, had authority to contract does not change the result. In the law of government contracts, no contract can be created binding the Government absent actual authority of the Government's agents to bind the Government. Federal Crop Insurance Co. v. Merrill, 332 U.S. 380, 384 (1947); accord, Prestex Inc. v. United States, No. 558-82C slip op. at 8 (Cl. Ct. Sept. 15, 1983) (LYDON, J.) (citing

---

8/ The discussion concerning lack of authority, see infra at pp. 12-13, disposes of plaintiff's argument that representations by GSA officials could convert the OFP to an offer by the GSA.

cases). Thus, the factual issues eged by plaintiff as to the parties' intentions, state f mind, and understandings do not present themselves if the lack of authority defense prevails.

Two impediments exist to a finding of authority here. The first is that the applicable regulation, 41 C.F.R. §101-47.304-12(d), quoted supra note 5, requires that the Administrator review and transmit the explanatory statement to the congressional oversight committees. 9/ After Kallaur approved the sale at $925,000, Acting Administrator Kline never transmitted the explanatory statements; nor did he sign, or authorize to be signed, the OFP or Kallaur's request for authority to accept the OFP. Thus, Kallaur lacked authority to bind the Government. Although Kline had authority to commit GSA, after his rebuff by the House Committee Kline withdrew his assent by declining to execute Kallaur's request or to continue processing the $925,000 OFP. See Russell Corp., 210 Ct. Cl. at 608.

The second impediment to an authorized acceptance is the requirement of congressional review itself. Congressional comment is not a ministerial act, merely part of the mechanics of processing the offer. The legislative history cited by defendant reveals numerous instances whereir proposed negotiated sales were stopped and prices revised after congressional intervention. See H. Rep. No. 1763, reprinted in 1958 U.S. Code Cong. & Ad. News 2861, 2863-66. Although the City is correct that congressional approval is not required -- at least technically -- notice to Congress is required both by statute, 40 U.S.C. §484(e)(6), quoted supra note 2, and by regulation, 41 C.F.R. §101-47-304-12, (a), (d), quoted supra note 5. Congressional review is referred to explicitly in Form 2041, which accompanied the OFP, although Form 2041 stated only that acceptance "probably" would not occur until after consideration by Congress. Under the procedure for contracting in this case, as prescribed by statute and regulation, congressional review is a step that must be completed before acceptance. See Empresas Electronicas

---

9/ This regulation is sufficient to charge the City with notice of Kallaur's lack of authority finally to bind the GSA. That GSA's more explicit requirement of the Administrator's prior approval for acceptance, PBS 4000.1-113e, quoted supra note 6, is unpublished therefore does not diminish the chargeable notice.

Walser, Inc. v. United States, 223 Ct. Cl. 686, 688 (1980); Russell Corp., 210 Ct. Cl. at 609, 537 F.2d at 482.

The Implied-in-fact Contract Issue

In its briefs, and fairly noticed in its complaint, the City advanced a claim based on contract implied in fact. Judge Harkins has provided a full current discussion on the parameters of this court's jurisdiction to entertain such a claim. Pacific Gas & Electric Co., No. 182-80C, slip op. at 15-16 & nn.5-11 (Cl. Ct. Aug. 30, 1983) (citing cases); see Hargrove v. United States, 1 Cl. Ct. 228, 230 (1982) (MILLER, J.). In brief, this court will recognize as an implied-in-fact contract one founded on the requisite meeting of the minds, which is inferred from the parties' conduct in light of the surrounding circumstances.

Although in an implied-in-fact contract the presence of a manifestation of assent is the overriding factor, two defects preclude a conclusion that a contract implied in fact existed in the circumstances of this case. The first is Kallaur's lack of authority, which has been treated previously. See Prestex, Inc., slip op. at 8 (citing cases); Hargrove v. United States, 1 Cl. Ct. at 230. The second is that the parties were chargeable with knowledge of additional actions under statute and regulation that had to be accomplished before a contract could come into existence. See Prevado Village Partnership, Etc., slip op. at 7-9; Russell Corp., 210 Ct. Cl. at 612, 537 F.2d at 483.

Plaintiff has failed to adduce any facts that would require a trial on the existence of a contract implied in fact.

The Constitutional Issue

Incident to oral argument, the court requested that the parties address the applicability of INS v. Chadha, 103 S. Ct. 2764 (1983), to the case at bar. The statute held unconstitutional in Chadha authorized a unicameral veto of the Attorney General's decision, upon delegated authority from Congress, to allow deportable aliens to remain in the United States. Chadha already has been extended to invalidate legislative vetoes of agency rulemaking. Consumers Union of the United States, Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (per curiam), aff'd mem., 51

U.S.L.W. 3935 (U.S. July 6, 1983); Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), aff'd mem., 51 U.S.L.W. 3935 (U.S. July 6, 1983).

The pertinence of Chadha to this case is that defendant has argued that because the congressional review procedure was not undertaken, consummation of a contract was never authorized. On the other hand, Kline, GSA's Acting Administrator, by ordering preparation of an explanatory statement waiving the requirement of a current appraisal, as recommended by Kallaur, manifested assent to the formation of a contract at $925,000. Kline thereby ratified Kallaur's decision, communicated to the City by Brooks, to proceed with consummating the sale. See Thomson v. United States, 174 Ct. Cl. 780, 357 F.2d 683 (1966). Alternatively, Kline was authorized to approve the explanatory statement and thereby assent directly, not as a ratifier. Kline was inhibited from submitting the explanatory statement and expressly authorizing acceptance only by his expectation of congressional disapproval. The question thus becomes whether congressional review was a valid prerequisite for contract formation.

Involved in Chadha was section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. §1254(c)(2) (1976), which derived from Congress' authority under U.S. CONST. art. I, §8, cl. 4 "To establish an uniform Rule of Naturalization." Section 244(c)(2) in substance allowed either House of Congress to disagree by resolution with the decision of the Attorney General not to deport an alien and bound the Attorney General to the decision of either House.

In this case the statute in question, 40 U.S.C. §484(e)(6), quoted supra note 2, derives from Congress' plenary authority over public lands in art. IV, §3, cl. 2, and merely provides that prior to disposal by negotiation of certain real property an explanatory statement must be transmitted to the appropriate committees of Congress. The implementing regulation, 41 C.F.R. §101-47.304-12(a), (d), (f), quoted supra note 5, requires submission of the explanatory statement and permits GSA to consummate a sale in the absence of adverse comment by an appropriate congressional committee or subcommittee. This case thus does not involve an explicit veto by one House of Congress; rather, a procedure established by statute, regulation, and practice is presented whereby one committee of one House of Congress can intervene in and stop a decision of the Executive Branch to contract.

Compelling similarities between this case and Chadha, however, are apparent. Here, GSA was required to submit for congressional review a contract for a negotiated sale of surplus property prior to consummating the transaction. In practice, as GSA's then-acting administrator Kline testified, the proposed sale would not be consummated without receiving the approval of the House oversight committee. As Kline put it, after having received a preview of disapproval from a committee staff member, "I thought it would be useless to go up there and be shot down anyway." The Acting Administrator deemed himself bound by the requirement of submitting a proposed sale for congressional review to defer to the committee's decision, and GSA's regulations so restricted him. 41 C.F.R. §101-47.304-12(f) (quoted supra note 5).

Assuming, however, that another GSA Administrator were of a different view and regarded the comment of the House committee as purely advisory, Congress would not countenance GSA's going forward. The legislative history to the 1958 amendments to the Federal Property Administrative Services Act of 1949 reveals a number of instances wherein Congress demonstrably viewed its role as one of intervention for the purpose of objecting to proposed sales, primarily due to disagreement with appraisal values. H. Rep. No. 1763, 1958 U.S. Code Cong. & Ad News at 2863-66. 10/ Congress' objections were honored in these instances, and higher sales prices were obtained.

10/ The House Report also characterized the requirement to report thusly:

> Reporting is viewed merely as a procedure for informing Congress of deviation from the customary method of publicly advertised competitive disposal. The function of the committee has not been one of approving or disapproving each negotiated sale submitted to Congress, but rather has been one of general review and of registering objection when it seems apparent that the proposed sale is not in the best interest of the Government.

Id. at 2867. The preceding portions of the House Report to which citation is made in the text are in marked opposition to the quoted language.

Defendant also admits that GSA defers to the congressional recommendation. Def's Reply at 12, 14. Finally, Kline testified plausibly that the spectre of oversight hearings dissuades independent action by the agency when congressional approval is withheld. In practice, then, one House of Congress, by committee, can veto a proposed sale by the Executive Branch to which Congress, pursuant to art. IV, §3, cl. 2 of the Constitution, has delegated its authority to dispose of public property.

On September 23, 1983, the Department of Justice filed a brief through its Lands and Natural Resources Division, the same arm of defendant involved in the case at bar, in National Wildlife Federation v. Watt, Civ. No. 83-2648 (D.D.C. filed Sept. 8, 1983). Plaintiff sought to enjoin the Secretary of the Interior from issuing certain coal leases after Congress, pursuant to section 204(e) of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2753 (codified at 43 U.S.C.A. §1714(e) (West Supp. 1983)), 11/ requested that the

---

11/ 43 U.S.C. §1714(e) provides in full:

Emergency withdrawals; procedure applicable; duration

> When the Secretary determines, or when the Committee on Interior and Insular Affairs of either the House of Representatives or the Senate notifies the Secretary, that an emergency situation exists and that extraordinary measures must be taken to preserve values that would otherwise be lost, the Secretary notwithstanding the provisions of subsections (c)(1) and (d) of this section, shall immediately make a withdrawal and file notice of such emergency withdrawal with the Committees on Interior and Insular Affairs of the Senate and House of Representatives. Such emergency withdrawal shall be effective when made but shall last only for a period not to exceed three years and may not be extended except under the provisions of subsection (c)(1) or (d) of this section, whichever is applicable, and (b)(1) of this section. The information required

leases be withheld temporarily. The statute requires the Secretary to withdraw a proposed lease upon notification from a designated committee of either House of Congress that an emergency exists and that extraordinary measures must be taken to preserve values that otherwise would be lost. The provision is similar to the statute, regulation, and practice in this case, because it allows Congress to study a proposed action before final commitment ensues. 12/

In National Wildlife Federation, the Government put forth a position to which this court deems it bound in arguing the constitutionality of review procedure in this case: "The Chadha decision . . . requires that a provision purporting to authorize a mere congressional committee to alter the duties of the Executive . . . be held unconstitutional, even more so than it required the invalidation of a one-House veto provision . . . ." Govt's Suppl. Br., filed Sept. 26, 1983, at 6. The Government attacked the decision of the district court in Pacific Legal Foundation v. Watt, 529 F. Supp. 982, 1004 (D. Mont. 1982), that the Secretary of the Interior's discretion to modify the committee's action by dictating the scope and duration of a lease withdrawal saved the constitutionality of the veto provision. The Government argued that Pacific Legal Foundation is invalid after Chadha: The Supreme Court's decision "does not leave any room for such legerdemain in statutory construction." Gov't Br., filed Sept.

11/ (Cont'd from page 17.)

> in subsection (c)(2) of this subsection shall be furnished the committees within three months after filing such notice.

12/ Judge Oberdorfer granted preliminary injunctive relief in National Wildlife Federation on nonconstitutional grounds and distinguished Chadha as not reaching the exercise under art. IV of Congress' allegedly proprietary, as opposed to legislative, role with respect to public lands. National Wildlife Federation, No. 83-2648 (D.D.C. Sept. 28, 1983) (order granting preliminary injunction). This distinction would exempt legislation under art. IV, §3, cl. 2 from the requirements of bicameralism and presentment because Congress is deemed a custodian of all public lands.

23, 1983, at 23. The Supreme Court in Chadha held that the bicameral and presentment requirements of art. I, §1, §7, cls. 2, 3 applied to Congress' exercise of its authority under art. I, §8 to establish a uniform rule of naturalization. Defendant argued that the rationale is applicable equally to Congress' exercise of its article IV powers. The court agrees with the Government's position in National Wildlife Federation.

Moreover, the Supreme Court's opinion in Chadha certainly did not bless the practice of unicameral intervention in sales of surplus government property by refusal to review a proposed sale or disapproval or withheld approval of such a sale:

> The Constitution provides Congress with abundant means to oversee and control its administrative creatures. Beyond the obvious fact that Congress ultimately controls administrative agencies in the legislation that creates them, other means of control, such as durational limits on authorizations and formal reporting requirements, lie well within Congress' constitutional power.

103 S. Ct. at 2786 n.19. One of the two authorities cited for this proposition, Javits & Klein, Congressional Oversight and the Legislative Veto: A Constitutional Analysis, 52 N.Y.U.L. Rev. 455, 462 (1977), specifically discusses reports to Congress after an action has been taken:

> Methods such as reporting requirements and congressional committee investigations allow Congress to scrutinize the exercise of delegated lawmaking authority, but they do not permit Congress to retain any part of that authority once it has been delegated. None of these methods effectively enables Congress to review executive proposals before they take effect; none affords the opportunity for ongoing and binding expressions of congressional intent.

Javits & Klein, supra, at 461-62 (emphasis added). Kaiser, Congressional Action To Overturn Agency Rules: Alternatives to the 'Legislative Vetos,' 32 Ad. L. Rev. 667 (1980), is to the same effect.

The Supreme Court in Chadha, however, did sanction traditional "report and wait" provisions whereby Congress reserves to itself the opportunity to review proposed action before it becomes effective and to pass legislation barring its effectiveness if the proposal is found objectionable. 103 S. Ct. at 2776 n.9 (citing Sibbach v. Wilson, 312 U.S. 1 (1944)). The statute, regulation, and congressional and agency practice in this case do not simply reserve to Congress an opportunity to pass legislation barring the proposed sale. What is reserved is the power to disapprove or to withhold approval without passing legislation. The statute, regulation, and practice are not tantamount to a "report and wait" provision or practice.

This constitutional inquiry becomes pivotal because Acting Administrator Kline testified that, if the City's offer had not been waylaid before the first appraisal expired, the proposed contract would have been processed in the normal fashion and been approved administratively. Kline has also testified that he would have approved an explanatory statement recommending that the resurrected offer be accepted. Hence, the sale, but for Kline's being advised that the House committee would not approve it, would have gone forward. Because the requirement of review by Congress is unlawful, the obstacle to contract formation disappears. Kline, the decision maker who had authority to bind GSA, is no longer inhibited by the need for congressional review and has manifested his assent, thereby ratifying Brooks' advice to the City. The contract, implied in fact, then can be enforced by the court.

The court has considered carefully defendant's arguments 13/ and holds that the practice of a committee of

---

13/ The Chairman of the House Committee on Government Operations did not seek to intervene in these proceedings after the court directed the parties to address the applicability of Chadha in argument. The Chairman of the House Committee on Interior and Insular Affairs intervened in the National Wildlife litigation because the Justice Department argued that 43 U.S.C. §1714(e) was unconstitutional. Although the Department of Justice's interest was adverse to that of Congress with respect to the statutes and regulations in the Chadha and National Wildlife cases, the Department views the practice under the statute and regulation in this case as not constitutionally offensive.

the House of Representatives of intervening in and stopping negotiated sales of surplus property proposed by the GSA is an unconstitutional invasion of the separation of powers. Without intervening and stopping a proposed sale, the only way Congress could override the GSA disposal decision would be by enacting further legislation. The action of the House Committee on Government Operations essentially was legislative in purpose and effect and thus was subject to the procedural requirements of art. I, §7, cls. 2-3 of the Constitution -- passage by a majority of both Houses with presentment to the President. As a result of the foregoing, the court holds that GSA is bound to a contract implied in fact to convey the subject property to the City for $925,000.

Reaching the constitutional question is unavoidable. The court is required to address the issue only because the City fails in its claims based on express contract, implied in fact contract -- not impacted by constitutionality, and estoppel. See New York City Transit Authority v. Beazer, 440 U.S. 568, 582 (1979); Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 105 (1944). The court's disposition of the estoppel claims follows.

The Estoppel Issues

Plaintiff grounds its claim to estop defendant to deny the existence of a $925,000 contract on two representations by the Government: 1) Kallaur's letter of August 7, 1979, and related representations, advising the city that if it submitted the necessary documents he would proceed with the sale, see supra note 3; and 2) Brooks' and Burrows' representations to city officials during the

---

13/ (Cont'd from page 20.)

Interestingly, the Chairman, as intervenor in National Wildlife, argued: "[I]f Section 204(e) were viewed as a means of sharing the administration of the wilderness and public lands with the executive on an ongoing basis, the Ninth Circuit's Chadha decision would mandate a finding that section 204(e) was unconstitutional. . . ." Intervenor's Memo in Support of Summary Judgment, filed Sept. 27, 1983, at 7. A shared administration of the disposal by negotiated sale of surplus government property is a precise description of Congress' and the GSA's interaction in this case.

period October 1979 to November 1980 that the $925,000 OFP was being processed. Estoppel as to the $1,375,000 contract is based on realty specialist Burrows' advice to the City, endorsed by Brooks and Kallaur, not to take any further action to complete and submit the second OFP because the $925,000 OFP was still viable.

The doctrine of equitable estoppel also has been explicated recently by Judge Harkins in Pacific Gas & Electric Co., slip op. at 17-18 & nn.12-15 (citing cases); see Biagioli v. United States, 2 Cl. Ct. 304, 308 (1983) (NETTESHEIM, J.). In order to estop the Government, the conduct or representations relied upon must be made by government officers acting within the scope of their authority. Jackson v. United States, 216 Ct. Cl. 25, 41, 573 F.2d 1189, 1197 (1978); Emeco Industries, Inc. v. United States, 202 Ct. Cl. 1006, 1015, 485 F.2d 652, 657 (1973) (citing cases). Kallaur's lack of authority, which was fatal to plaintiff's claim for a contract implied in fact, similarly dooms any estoppel to deny that GSA accepted the City's offer or that a contract otherwise existed based on his letter and other representations of similar effect. E.g., Prestex, Inc., slip op. at 12; see Pacific Gas & Electric Co., slip op. at 18-19. In Manloading & Management Associates, Inc. v. United States, 198 Ct. Cl. 628, 635, 461 F.2d 1299, 1302 (1972), relied on by plaintiff, the contracting officer was authorized expressly to bind the Government in the manner that plaintiff sought to bind it by estoppel.

As to the other leg of the estoppel claim on the $925,000 OFP -- the misrepresentations concerning ongoing processing -- defendant has conceded that the representations were authorized. As to the estoppel based on Burrows' instruction not to proceed on the $1,375,000 OFP, defendant has failed to adduce any evidence that the instruction was unauthorized. 14/ Although Burrows was not authorized to accept or reject an OFP, he had implied

---

14/ Because an estoppel based on representations by Kallaur is defeated by lack of authority, it becomes unnecessary to consider the City's argument that it acted in reliance thereon and suffered detriment by submitting the OFP and deposit and later believing the Brooks/Burrows representations that the OFP was being processed. The court considers these arguments to be sufficiently dealt with by the discussion infra at pp. 23-25.

authority to give the City instructions regarding the formalities and paperwork involved in concluding the transaction. Such authority was inherent in his job as the agent responsible for processing the transaction. The authority question evaporates because Brooks and Kallaur, Burrows' superiors, determined to press forward with the $925,000 OFP when they learned why the $1,375,000 OFP had been sent, and Brooks informed the City of this decision. These officials were authorized, at a minimum, to sponsor (as opposed to accept) an OFP, even one flawed by an expired appraisal.

Four additional elements are necessary for equitable estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. Emeco Industries, Inc., 202 Ct. Cl. at 1015, 485 F.2d at 657. The second element is sometimes expressed as a requirement that the party asserting estoppel have changed his position in reliance on the conduct or acquiescence of government officers, see Russell Corp., 210 Ct. Cl. at 614, 537 F.2d at 485, or have had a reasonable right to act in reliance on defendant's actions or inactions. United States v. Georgia-Pacific Co., 421 F.2d 92, 98 (9th Cir. 1970); Emeco Industries, Inc., 202 Ct. Cl. at 1017, 485 F.2d at 658.

An inquiry therefore must be made whether plaintiff, having shown the requisite authority, satisfies the other four requirements to perfect an estoppel as to either the $925,000 or $1,375,000 OFP.

With respect to the $925,000 OFP, the City has failed to show that it acted to its injury based on the representations of Brooks and Burrows that the OFP was being processed. The City, as the party urging estoppel, must show that it reasonably relied on the representations to its detriment in order to satisfy the fourth element.

Because city officials were misinformed that the offer was being processed, the City argues that it forfeited the opportunity to telephone the GSA officials and have the processing of the OFP put back on track before the first appraisal expired in mid-December 1979 or to institute a lawsuit under the Administrative Procedure Act, 5 U.S.C. §551 (1976), to require the GSA to act with-

in a reasonable time. The City also claims loss of the use of its $92,500 earnest money deposit, as well as the lost opportunity to purchase at $925,000, as a consequence of defendant's representations.

The first two alleged detrimental consequences are speculative. Even assuming, arguendo, that the City could have prodded GSA or secured judicial relief through legal action before the appraisal expired, speculation is invited as to the OFP's fate in the congressional review process. The record is replete with GSA officials' best guesses that congressional review based on a current appraisal would be a mere formality. These opinions qualify as neither admissions nor expert opinions. Congressional action in this case simply is not capable of prediction, even if it could be shown that Congress has acted habitually in a certain fashion. The House Report itself demonstrates that Congress does not always deem current appraisals of estimated fair market value to be reliable.

As to the $92,500 earnest money deposit, Russell Corp. gives some comfort to plaintiff regarding the claim based on the failure to return the deposit "promptly after it was recognized that the deal could not go forward." See 210 Ct. Cl. at 614, 537 F.2d at 485. Defendant rejoins that the City insisted, after learning the fate of the $925,000 OFP in November 1980, that its offer at that figure continue to be considered and therefore should not be heard to complain. Suffice it to say that the City's deposit was not returned promptly when the 1981 efforts to resuscitate the original OFP floundered. Nonetheless, lost use of this sum is not considered a detriment because an earnest money deposit implies by its purpose uncertainty as to whether there will be a contract at all and acceptance of the concomitant risk that one may lose the use of one's money.

Finally, loss of "a good piece of business" does not constitute detriment. Russell Corp., 210 Ct. Cl. at 614, 537 F.2d at 485. The City apparently contends that the loss of the more favorable contract at $1,375,000 constitutes detriment on that claim. This claim fails for the same reason.

In most of the cases cited by plaintiff, the parties incurred considerable expenses acting in reliance on government conduct. See Broad Avenue Laundry & Tailoring v. United States, 681 F.2d 746 (Fed. Cir. 1982) (increased wages paid to employees by contractor); United States v. Georgia-Pacific Co., 421 F.2d 92 (plaintiff improved

forest land relying on Government's abandonment of claim thereto); Merchant's National Bank v. United States, 689 F.2d 181 (Ct. Cl. 1982) (bank financed sale of buoys to Government, relying on buoys having passed government inspection); Emeco Industries, Inc., 202 Ct. Cl. 1006, 485 F.2d 652 (expenses incurred preparatory to performance under contracts with Government); Dana Corp. v. United States, 200 Ct. Cl. 200, 470 F.2d 1032 (1972) (extra expense incurred in packaging equipment furnished Government); Manloading & Management Associates, Inc. v. United States, 198 Ct. Cl. 628, 461 F.2d 1299 (same as Emeco); Pacific Far East Lines v. United States, 184 Ct. Cl. 169, 394 F.2d 990 (1968) (unprofitable contract entered into in reliance on Government's previous inclusion of such contracts in excess profit calculations under subsidy contract with Government); Branch Banking & Trust Co. v. United States, 120 Ct. Cl. 72, 98 F. Supp. 757, cert. denied, 342 U.S. 893 (1951) (contract performed fully). 15/

The court concludes that no detriment was suffered because of the uncertainty of receiving congressional approval and because the lost use of the earnest money deposit and the loss of the contract do not constitute sufficient detriment in the circumstances of this case. The City therefore cannot succeed on its claims for equitable estoppel.

CONCLUSION

Defendant's motion for summary judgment on the existence of an express contract is granted, but is moot; plaintiff's motion for summary judgment based on estoppel

---

15/ Several of the cases cited by plaintiff do not conform to the pattern. Corniel-Rodriquez v. INS, 532 F.2d 301 (2d Cir. 1976); United States v. Wharton, 514 F.2d 406 (9th Cir. 1975); Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970). These cases recognize as detriment serious or manifest injustice as a consequence of the Government's conduct. Although Wharton has superficial similarity on the facts, plaintiffs there stood to lose the farm on which they had lived for 50 years. The City ultimately lost only a prospective acquisition. As shown by the cases discussed in the text, the Court of Claims adopted a more stringent standard for detrimental reliance to which this court deems itself bound. See Biagioli, 2 Cl. Ct. at 308.

is denied, and defendant's cross-motion is granted, but is moot. Plaintiff's oral motion for summary judgment based on a contract implied in fact is granted, and the Clerk of the Court shall enter judgment for plaintiff in the amount of $575,000. 16/

IT IS SO ORDERED.

Costs to the prevailing party. 17/

October 20, 1983

C. Nettesheim

Christine Cook Nettesheim
Judge

16/ Plaintiff's claim for interest on the earnest money deposit must fall before the prohibition of 28 U.S.C. §2516(a) (1982). See Pacific Coast Medical Enters., Inc. v. United States, 3 Cl. Ct. 140, 145 (1983) (NETTESHEIM, J.) (citing cases), appeal docketed, No. 83-1426 (Fed. Cir. Sept. 27, 1983).

17/ By its amended complaint, the City did not ask for attorneys' fees. Although this court does not intend to foreclose plaintiff from making an application pursuant to 28 U.S.C. §2412(d) (Supp. IV 1980), assuming that plaintiff qualifies, the foregoing strongly indicates that the Government's litigating position was reasonable in light of all the pertinent facts. See Gava v. United States, 699 F.2d 1367, 1370 (Fed. Cir. 1983). The dispositive Supreme Court decision was brought to the parties' attention only after briefing was completed.

Congressional Digest

December 1983

Controversy Over The Legislative Veto

Pro & Con

Washington, D.C.

The Legislative Veto

He Who Decides a Case Without Hearing the Other Side . . . Tho He Decide Justly, Cannot Be Considered Just—SENECA

FOREWORD=

LEGISLATIVE OVERSIGHT is a standard function of the law-making process. Hearings are conducted to monitor the performance of laws and how they are administered. Some statutes, however, contain provisions, popularly called "legislative vetoes," authorizing Congress to take direct action on Executive Branch administration of the law.

The type of legislative veto varies and some statutes provide for more than one kind.

A legislative veto may be exercised through the negative vote of both Houses, one House, or their committees, as specified in the statute affected.

A vote by both Houses of Congress, known as the "two-House veto," can disapprove Executive Branch proposals by passing a concurrent resolution, which does not require a Presidential signature. Most two-House veto provisions provide that unless such a resolution is passed by both Houses within a specified period of time, the proposal will become effective at the end of that period. A common deferral period for Congressional review is 60 days.

The "one-House veto" authorizes either the House or Senate to reject a specified Executive Branch proposal by the passage of a simple resolution. Generally a proposal must be submitted in advance to both Houses, which will take effect unless rejected by either House during a stated period, frequently 60 days.

A combination procedure employed in some statutes enables the rejection of an Executive Branch proposal by a one-House veto, providing such veto is not disapproved by the other House.

In some cases authority is provided to specific committees to disapprove executive actions. This involves a committee in one or both Houses in a procedure similar to the one-House and two-House vetoes.

A number of statutes require that an affirmative action be taken by the Congress before certain Executive Branch actions may take effect. The process may involve two-House; one-House; two-House committee; or one-House committee approval action, similar to the disapproval procedures. They also vary as to the time in which action must be completed.

In some instances the statutes require a process of informal consultation and notification between the Congress and the Executive Branch.

An arrangement made by President Hoover in 1932, whereby if the Congress did not agree with his executive agencies reorganization plan it could nullify it, is generally considered to be the origin of the legislative veto. The device was used sparingly until well after World War II, when the growth of the Federal government accelerated.

Some supporters of the legislative veto see it as a method of controlling the proliferation of bureaucratic regulations, which were a product of the laws expanding the scope of the Federal government. Presidents have seen it as an intrusion on the powers of the Executive Branch. Its use was expanded in the time of strong Congressional policy disputes with President Nixon, and proliferated under President Carter, who also opposed its usage.

On June 23, 1983, the U.S. Supreme Court declared unconstitutional the one-House veto provision of an immigration law. It cited the separation of powers principle and the "presentment clause" whereby legislative acts must be presented to the President for his consideration. There is some disagreement over the impact of the decision on other statutes containing legislative veto provisions, but it is generally regarded to be considerable. The debate in Congress over what should be done regarding legislative vetoes is underway.

The Supreme Court Decision

THE U.S. SUPREME COURT, in a decision handed down on June 23, 1983, in the case of Immigration and Naturalization Service v. Chadha et al, *ruled by a vote of seven to two that the one-House legislative veto contained in a section of the Immigration and Nationality Act, is unconstitutional.*

A syllabus (headnote) of the decision was released at the time the opinion was issued. The syllabus states that it constitutes no part of the opinion of the Court "but has been prepared by the Reporter of Decisions for the convenience of the reader." Following are excerpts from the syllabus:

Section 244(c)(2) of the Immigration and Nationality Act (Act) authorizes either House of Congress, by resolution, to invalidate the decision of the Executive Branch, pursuant to authority delegated by Congress to the Attorney General, to allow a particular deportable alien to remain in the United States. Appellee-respondent Chadha, an alien who had been lawfully admitted to the United States on a nonimmigrant student visa, remained in the United States after his visa had expired and was ordered by the Immigration and Naturalization Service (INS) to show cause why he should not be deported. He then applied for suspension of the deportation, and, after a hearing, an Immigration Judge, acting pursuant to §244(a)(1) of the Act, which authorizes the Attorney General, in his discretion, to suspend deportation, ordered the suspension, and reported the suspension to Congress as required by §244(c)(1). Thereafter, the House of Representatives passed a Resolution pursuant to §244(c)(2) vetoing the suspension, and the Immigration Judge reopened the deportation proceedings. Chadha moved to terminate the proceedings on the ground that §244(c)(2) is unconstitutional, but the judge held that he had no authority to rule on its constitutionality and ordered Chadha deported pursuant to the House Resolution. Chadha's appeal to the Board of Immigration Appeals was dismissed, the Board also holding that it had no power to declare §244(c)(2) unconstitutional. Chadha then filed a petition for review of the deportation order in the Court of Appeals, and the INS joined him in arguing that §244(c)(2) is unconstitutional. The Court of Appeals held that §244(c)(2) violates the constitutional doctrine of separation of powers, and accordingly directed the Attorney General to cease taking any steps to deport Chadha based upon the House Resolution.

Held:

1. This Court has jurisdiction to entertain the INS's appeal.

2. Section 244(c)(2) is severable from the remainder of §244. Section 406 of the Act provides that if any particular provision of the Act is held invalid, the remainder of the Act shall not be affected. This gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or any part thereof, to depend upon whether the veto clause of §244(c)(2) was invalid. This presumption is supported by §244's legislative history. Moreover, a provision is further presumed severable if what remains after severance is fully operative as a law. Here, §244 can survive as a "fully operative" and workable administrative mechanism without the one-house veto.

3. Chadha has standing to challenge the constitutionality of §244(c)(2) since he has demonstrated "injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury."

4. The fact that Chadha may have other statutory relief available to him does not preclude him from challenging the constitutionality of §244(c)(2), especially where the other avenues of relief are at most speculative.

5. The Court of Appeals had jurisdiction under §106(a) of the Act, which provides that a petition for review in a court of appeals "shall be the sole and exclusive procedure for the judicial review of all final orders of deportation ... made against aliens within the United States pursuant to administrative proceedings" under §242(b) of the Act.

6. A case or controversy is presented by these cases.

7. These cases do not present a nonjustifiable political question on the asserted ground that Chadha is merely challenging Congress' authority under the Naturalization and Necessary and Proper Clauses of the Constitution. The presence of constitutional issues with significant political overtones does not automatically

(Continued on page 314)

invoke the political question doctrine. Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by the courts simply because the issues have political implications.

8. The congressional veto provision in §244(c)(2) is unconstitutional.

(a) The prescription for legislative action in Art. I, §1—requiring all legislative powers to be vested in a Congress consisting of a Senate and a House of Representatives—and §7—requiring every bill passed by the House and Senate, before becoming law, to be presented to the President, and, if he disapproves, to be repassed by two-thirds of the Senate and House—represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered procedure. This procedure is an integral part of the constitutional design for the separation of powers.

(b) Here, the action taken by the House pursuant to §244(c)(2) was essentially legislative in purpose and effect and thus was subject to the procedural requirements of Art. I, §7, for *legislative* action: passage by a majority of both Houses and presentation to the President. The one-House veto operated to overrule the Attorney General and mandate Chadha's deportation. The veto's legislative character is confirmed by the character of the congressional action it supplants; *i.e.*, absent the veto provision of §244(c)(2), neither the House nor the Senate, or both acting together, could effectively require the Attorney General to deport an alien once the Attorney General, in the exercise of legislatively delegated authority, had determined that the alien should remain in the United States. Without the veto provision, this could have been achieved only by legislation requiring deportation. A veto by one House under §244(c)(2) cannot be justified as an attempt at amending the standards set out in §244(a)(1), or as a repeal of §244 as applied to Chadha. The nature of the decision implemented by the one-House veto further manifests its legislative character. Congress must abide by its delegation of authority to the Attorney General until that delegation is legislatively altered or revoked. Finally, the veto's legislative character is confirmed by the fact that when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action in the Constitution.

Scope of Veto Provisions

A NUMBER OF LAWS containing legislative veto provisions have expired, while others have recently been enacted or are in the legislative process. Following is a compilation made from Congressional studies of some statutes in effect in June 1983 with legislative veto provisions. Some statutes have more than one such provision or have had them modified by amendments adopted since the original law was enacted.

Irrigation on Indian Reservation Projects, 1936
(Two House approval)

Strategic Materials Stockpiling Act Amendments, 1946
(Two House approval)

Government Printing and Binding Amendment, 1949
(Joint Committee on Printing approval)

Federal Civil Defense Act of 1950
(Two House disapproval)

Immigration and Nationality Act of 1952
(One House disapproval)

Atomic Energy Act of 1954
(Two committees may waive waiting period)

Watershed Protection and Flood Prevention Act Amendment, 1956
(One committee disapproval)

Small Reclamation Projects Act Amendment, 1957
(One committee disapproval)

Atomic Energy Act Amendment, 1957
(Two committees may waive waiting period)

Immigration and Nationality Act Amendments, 1957
(One House disapproval)

Atomic Energy Act Amendment, 1958
(Two House disapproval)

National Aeronautics and Space Act of 1958
(Two House disapproval)

Defense Reorganization Act
(One House disapproval)

Public Buildings Act of 1959
(Two committee approval)

Foreign Assistance Act of 1961
(Two House disapproval)

Government-Owned Utilities Used for Bureau of Indian Affairs, 1961
(Two committee approval)

Restoration to Indian Tribes of Unclaimed Payments, 1961
(Two committee approval)

Surveys of Watershed Areas for Flood Prevention, 1962
(One committee approval)

Trade Expansion Act of 1962
(Two House approval)

Naval Petroleum and Oil Shale Reserves, 1962
(Consultation with two committees)

Agricultural Trade Development and Assistance Act Amendments, 1964
(One committee disapproval)

Authorization of Construction, Repair and Preservation of Certain Public Works, 1966
(Two committee approval)

Postal Revenue and Federal Salary Act of 1967
(Disapproval by one House or enactment of law)

National Traffic and Motor Vehicle Safety Act Amendments 1970
(Two House approval)

Defense Production Act of 1950, Amendment, 1970
(Two House disapproval)

Federal Pay Comparability Act of 1970
(One House approval)

Indian Claims Judgments Funds, 1973
(Two committee approval and one House disapproval)

War Powers Resolution, 1973
(Continued use of armed forces subject to approval by enactment of law, or removed by concurrent resolution.)

Amendments to the Mineral Leasing Act of 1920, 1973
(Two House disapproval)

Department of Defense Authorizations, 1974
(One House disapproval)

District of Columbia Self-Government Act, 1973
(Two House disapproval; and one House disapproval)

Public Works, Rivers and Harbors and Flood Control Authorization, 1974
(One committee disapproval)

Congressional Budget and Impoundment Control Act of 1974
(One House disapproval)

Department of Defense Authorizations for 1975
(Two House disapproval)

Atomic Energy Act Amendments, 1974
(Two House disapproval)

Education Amendments, 1974
(One committee disapproval; and two House disapproval)
Conveyance of Submerged Lands to Guam, Virgin Islands and American Samoa, 1974
(Notification by two committees)
Federal Election Campaign Act Amendments of 1974
(One House disapproval)
Atomic Energy Act Amendments, 1974
(Two House disapproval)
Foreign Assistance Act of 1974
(Two House disapproval)
Federal Nonnuclear Research and Development Act of 1974
(One House disapproval)
Federal Rules of Evidence 1948
(One House disapproval)
Trade Act of 1974
(One and two House approval and disapproval; and consultation with committees)
Export-Import Bank Amendments
(Two House approval)
Amendment to Social Security Act Child Support Provisions
(One or two House disapproval)
Board for International Broadcasting Authorization for Fiscal Year 1976
(Two House disapproval)
Sinai Early Warning System Agreement, 1976
(Two House disapproval)
International Development and Food Assistance Act of 1975
(One House disapproval; two House approval; and two committee approval)
Energy Policy and Conservation Act
(One House disapproval; and two House approval)
Home Mortgage Disclosure Act of 1975
(Two House approval)
Naval Petroleum Reserves Production Act, 1976
(One House disapproval)
International Security Assistance and Arms Export Control Act of 1976
(Two House disapproval)
National Emergencies Act, 1976
(Two House approval)
Federal Land Policy and Management Act of 1976
(Two House disapproval)
Emergency Unemployment Compensation Extension Act of 1977
(Two House approval)
International Navigational Rules Act of 1977
(Two House disapproval)
International Security Assistance Act of 1977
(Two House disapproval)
Wartime or National Emergency Presidential Powers, 1977 (Two House disapproval)
Department of Energy Act of 1978—Civilian Application (One House disapproval; and approval by two Houses)
Nuclear Non-Proliferation Act of 1978
(Two House disapproval)
Outer Continental Shelf Lands Act Amendments of 1978 (One House disapproval; and two House disapproval)
Civil Service Reform Act of 1978
(Two House disapproval)
Airline Deregulation Act of 1978
(One House disapproval; and two House approval)
Full Employment and Balanced Growth Act of 1978
(Two House modification)
Education Amendments of 1978
(Two House disapproval)
Surface Transportation Assistance Act of 1978
(Two House approval)
Natural Gas Policy Act of 1978 (Two House disapproval and approval; and one House disapproval)
Emergency Interim Consumer Product Safety Standard Act of 1978 (Two committee approval)
Federal Trade Commission Improvements Act of 1980
(Two house disapproval)
Department of Education Organization Act, 1979
(Two House disapproval)
Export Administration Act of 1979
(Two House approval and disapproval)
Energy Security Act
(21 separate legislative veto provisions)
District of Columbia Retirement Reform Act, 1979
(One House disapproval)
Multiemployer Pension Plan Amendments Act, 1980
(Two House disapproval)
Marine Protection Research and Sanctuaries Act Authorization, 1980 (Two House disapproval)
Farm Credit Act Amendments of 1980
(Two House disapproval)
Comprehensive Environmental Emergency Response, Compensation, and Liability Act, 1980
(Two House disapproval or one House disapproval that is not disapproved by the other House)
Veterans' Rehabilitation and Education Amendments of 1980 (Approval by Director of the Office of Technology Assessment)
National Historic Preservation Act Amendments of

(Continued on page 314)

Scope of Veto Provisions

From page 293

1980 (Two House disapproval)
International Security Development Cooperation Act of 1980
(Two House disapproval)
Coastal Management Improvement Act of 1979
(Two House disapproval)
Federal Insecticide, Fungicide and Rodenticide Extension Act, 1980 (Two House disapproval)
Health Planning Amendments of 1979
(Consultation with two committees)
Omnibus Reconciliation Act of 1981
(One House disapproval; two committee approval; and disapproval by two Houses or disapproval by one House that is not rejected by the other House)
Department of Defense Authorization Act, 1982
(Two House disapproval)
Agriculture and Food Act of 1981
(Two House committee approval)
Appropriations—Department of the Interior, 1981
(Two House committee approval)
International Security and Development Cooperation Act of 1981 (Two House disapproval)
Urgent Supplemental Appropriations Act, 1982
(Two House committee approval)
Department of Housing and Urban Development—Independent Agencies Appropriation Act, 1983
(Two House committee approval)
Department of Housing and Urban Development—Independent Agency Appropriation Act, 1983
(Two House committee approval)
Continuing Appropriations, Fiscal Year 1983
(Two House committee approval)
Further Continuing Appropriations, 1983
(Two House approval)
Department of the Interior and Related Agencies Appropriation Act, 1983
(Two House committee approval)
Nuclear Waste Policy Act of 1982
(One House disapproval)

Following are laws recently enacted which contain legislative veto provisions:

Department of Housing and Urban Development-Independent Agencies Appropriation Act, 1984.

Legislative Branch Appropriations, 1984.

National Aeronautics and Space Administration Authorization for FY83.

Supplemental Appropriation Act of 1983.

Department of Transportation and Related Agencies Appropriations Act, 1983.

Recent Action in the Congress

THE IMPACT OF THE SUPREME COURT DECISION on the legislative veto is under study in the Congress. Activity has centered largely on certain major laws, each involving intricate questions.

Arms Sales

One area where Congress has had great influence in recent years, has been in the Arms Export Control Act. Amended in 1976 as Public Law 94-329, the law permits Congress to veto most foreign arms sales through a concurrent resolution within 30 days of receiving a Presidential report. The veto provision "applies to individual weapons or military equipment worth $14 million or more." Congress has never vetoed an arms sale, although attempts to block sales to Saudi Arabia occurred in 1978 and 1981. Because the veto has become an integral part of the Arms Export Control Act, there is concern that the Supreme Court's decision would render the act invalid.

Byrd Bill

Last April, Senate Minority Leader Robert C. Byrd, West Virginia, Dem., introduced S. 1050 prohibiting "the President from making foreign arms sales valued at $200 million or more unless Congress approves by passing a joint resolution." Congressional sources suggest that the Byrd "... proposal might avoid the constitutional questions raised by the Supreme Court's decision because it would require action by both the President and Congress on arms sales." In effect, the Supreme Court may have told Congress that it could not veto an action—such as an arms sales—without first passing a bill or joint resolution which would be submitted to the President for his signature or veto. According to one critic, the Byrd proposal would "cause even greater practical problems for the President than the existing legislative veto. By banning large arms sales unless Congress passed a joint resolution approving them, the proposal would in effect create a one-house veto: if either House of Congress failed to pass such a resolution, a proposed arms sale would be killed." Another alternative being considered would permit the President to make arms sales unless Congress should pass a joint resolution to block it. In effect, this proposal would need a two-thirds majority from both Houses to block the sale. Congress would then have to override an almost certain presidential veto.

War Powers Resolution

The War Powers Resolution (see "The War Powers Act Controversy, Pro and Con," the November 1983 issue of *The Congressional Digest*) has two provisions which may require examination in light of the new decision. Section 5(c) provides that "at any time that U.S. Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution." Because a concurrent resolution does not require the signature of the President, it appears to some to be invalidated under the reasoning applied by the Court's decision.

Section 5(b) of the War Powers Resolution requires the President to "terminate the use of armed forces reported or required to be reported under Section 4(a)(1) after 60 days unless Congress declares war, extends the period for 30 days, or enacts a specific authorization for such use." Since this declaration would be made by a joint resolution of Congress or a separate bill requiring the signature of the President, it should not be affected by the *Chadha* decision.

The War Powers Resolution also contains a "separability clause" in Section 9, which states that "if any provision of the resolution is held invalid, the remainder of the joint resolution and the application to any other circumstances shall not be affected." On July 20, 1983, Edward Schmults, Deputy Attorney General, reported to the House Committee on Foreign Affairs, that "the Supreme Court's decision does not affect any of the procedural mechanisms contained in the War Powers Resolution other than that procedure specified in Section 5(c), which purported to authorize Congress to effectively recall our troops from abroad by a resolution not presented to the President for his approval or disapproval."

Reagan Administration Position

Deputy Secretary of State Kenneth W. Dam also stated that the reporting and consultation provisions of the War Powers Resolution would not be affected by

the Supreme Court's decision in the *Chadha* case, and the Reagan Administration does not intend to change its practice under them. He stated that "the provision asserting a right of Congress by concurrent resolution to order the President to remove troops was clearly unconstitutional, but would have no significant impact on the conduct of the policy." In his view, the issue of the time limit set on President's use of troops abroad did not fall within the scope of the Supreme Court's decision.

Chairman Clement J. Zablocki, Wisconsin, Dem., of the House Committee on Foreign Affairs, said after the Court handed down its decision that the War Powers Resolution might be remedied by replacing the concurrent resolution veto provision with a joint resolution. He also noted that a President would almost certainly veto any joint resolution calling for him to withdraw U.S. military forces abroad. Congress would then be forced to find the two-thirds majority in both Houses to be able to enact such a resolution, overriding his veto.

The full effect of the Supreme Court's decision on the War Powers Resolution will remain in question until it is further tested by the courts. The Resolution comes under a different category than immigration legislation, which prompted the Supreme Court's decision. The War Powers Resolution deals with a particular situation in which the Constitution gives Congress specified powers—in particular to declare war and raise an army and navy; and the President other specified powers: in particular, to be Commander-in-Chief. The Senate Foreign Relations Committee held hearings on the future of the War Powers Resolution in light of the *Chadha* decision on September 29.

Hazardous Waste

On November 3, the House voted 204 to 189 against an amendment sponsored by Elliott H. Levitas, Georgia, Dem., to the Resource Conservation and Recovery Act. The Levitas amendment would have required congressional approval for various hazardous-waste regulations. The Levitas amendment provided an "approval veto," under which proposed Federal rules would not take effect unless they were to be approved by both Houses of Congress and the President. The opposition, led by Rep. James J. Florio, New Jersey, Dem., has sought a "disapproval resolution," which would not require the President's signature. Florio noted that the Levitas amendment would turn Federal agencies into mere advisory bodies which would allow business lobbyists to kill any rule they desired through congressional inaction. Florio called the amendment "a great opportunity for all the special interests to stop regulations from taking effect. You will be politicizing the rule-making process, when the whole justification (for regulatory agencies) is for the expertise of the agency to come into play."

Countering, Levitas called the vote "an isolated defeat," stating "I'm satisfied that when the issue returns . . . those of us who think elected officials ought to make these decisions will prevail." Florio also noted that the Congress does not have either the time nor the ability to act as a Federal regulatory agency. But Levitas said that he would limit the veto to approximately 200 rules each year dealing with economic issues. He said that "special interests also have great influence with agency rule-makers."

Federal Trade Commission

The next battle likely to take place will be whether to subject the Federal Trade Commission (FTC) to a legislative veto. The Supreme Court in July had thrown out an earlier veto of a controversial FTC rule related to used-car sales. In 1980, Congress included a veto provision in the FTC authorization (Public Law 96-252), allowing it to block any regulation of the agency if both Houses passed a resolution of disapproval. The only FTC rule to be so vetoed was in 1982, a proposal requiring used-car dealers to disclose information on auto defects before a sale. Last year, the constitutionality of the used-car rule veto was challenged. On October 22, 1982, the United States Court of Appeals for the District of Columbia overturned the veto. The Senate has appealed the decision to the Supreme Court.

Expiring Authority

Congress is now allowing certain authority to expire which had been previously delegated to the President, subject to a legislative veto. A number of recently introduced reauthorization bills, instead of renewing that delegated authority, would require the President to submit legislation if he intends to take actions that he otherwise could have taken earlier under the expiring delegated authority.

Act Now to Legislative Veto?

CON

by Hon. Wendell H. Ford
United States Senator, Kentucky, Democrat

From an address delivered on the floor of the United States Senate on July 19, 1983.

AS THE SENATE COMMERCE COMMITTEE is the authorizing committee for many of the regulatory agencies, the members of the committee have been faced with the controversy over the legislative veto for a number of years. The issue, from this perspective, is not how to rein in the executive branch and the President through the War Powers Act or the Budget Act; rather, the issue has been how to control unelected, unaccountable Federal officials in a constitutional and effective manner. Viewing the issue from this perspective as chairman and then ranking Democrat of the Commerce Committee's Consumer Subcommittee, I have been an outspoken opponent of the legislative veto, as I believed this procedure to be not only unconstitutional but also ineffective.

"...I have been an outspoken opponent of the legislative veto ..."

Therefore, I am pleased that on July 6, 1983, the Supreme Court gave further breadth to its earlier June 23, 1983, ruling in the INS against Chadha case declaring the legislative veto unconstitutional. This latest Court action, affirming lower court decisions striking a one-House veto provision in the Natural Gas Policy Act of 1978 and a two-House legislative veto in the Federal Trade Commission Improvements Act of 1980—hereinafter FTC Act of 1980—dooms all such legislative vetoes.

In Chadha, the Court rejected out of hand many of the theories put forward by my colleagues in arguing that the veto was necessary to control the agencies. The Court said that the efficiency, convenience, or utility of such devices in facilitating the functions of Government were insufficient bases for the veto in the face of explicit and unambiguous provisions prescribing the separate and distinct functions of the branches.

"The Court decided that the use of the veto was a lawmaking action and must conform to the traditional lawmaking process ..."

The Court decided that the use of the veto was a lawmaking action and must conform to the traditional lawmaking process provided by article I, section 7 of the Constitution to insure the separation of powers. The Court discussed the importance of passage of legislation by both Houses of Congress, stating that bicameralism assures careful consideration by the Nation's elected officials, satisfies the "need to divide and disperse power in order to protect liberty," and protects the respective interests of the small and large States.

But it was the Court's discussion of the presentment clause that spelled the death knell for the FTC two-House veto, a veto that would have survived the bicameralism requirement alone. The majority opinion said that presentment of legislation to the President for his approval or disapproval provides a defensive weapon against potential legislative intrusions on the powers of the Executive or on ill-considered measures. It allows the presence of a national perspective that might be provided by the one official elected by a national constituency.

As Senate floor manager of the FTC authorization in 1980, I stated during

(Continued on page 299)

that debate on the legislative veto issue: "The only way Congress can be assured that this agency—or, for that matter, any agency—is following through, is through regular and vigorous oversight. If it is determined that Congressional intent is not being met, then [legislative] steps must be taken to put the agency back on the proper course."

Though the two-House legislative veto was finally attached to the FTC Act of 1980, I continue to believe there is no substitute for more carefully considered statutes. I recognize this process imposes more work, some delay, and may be politically more difficult. But let me offer as an example of just such a legislative approach the effort to define the term "unfair" in the FTC Act. The FTC has had authority since the Wheeler-Lea amendment to the FTC Act in 1938 to protect consumers against "unfair or deceptive acts or practices." The Congress had, through broad, ambiguous language, given five Commissioners the sweeping power to regulate anything they believed to be, in their discretion, unfair, but Congress became increasingly concerned in the 1970's about some FTC actions under this broad mandate. My distinguished colleague from Missouri, Senator Danforth, and I wrote to request the FTC to develop a statutory definition of "unfair" to put boundaries around this term. The Senate Commerce Committee collected outside views on the issue, held extensive hearings, and proposed statutory language to better clarify and define the term. The committee also determined, through this process, to decline to further define the term "deceptive acts or practices," since case law had placed limits on the term which were deemed appropriately specific.

"...there is no substitute for more carefully considered statutes."

Though it is now almost 5 years since this process began, I feel certain that the next FTC authorization bill to become law will contain this definition of "unfair." I am also pleased to note that Commissioners are already applying this proposed analysis to form their opinions as to what is an unfair act, such as with the recently considered credit practices rule.

I contrast this slower, admittedly more tedious approach of reasoned lawmaking to that of the unconstitutional FTC congressional veto procedure. That procedure provided no opportunity for amendment, simply an up or down vote on a rule. Congress could find some aspects of a rule it liked and some it disliked but would be forced to weigh its likes and dislikes in an absolute way. Congress could say no to what the agency did but could not take upon itself to say what the agency should have done.

"I am convinced that we must refrain from a reactionary response to the Supreme Court's decision ..."

With the Supreme Court's recent decisions, Congress must revisit the issue of its role in insuring responsible regulatory agencies. Finding a remedy for the frustrations of a large and often times ineffective Federal Government is an important challenge.

I am convinced that we must refrain from a reactionary response to the Supreme Court's decision as we look at individual agency authorizations and at proposed omnibus regulatory reform bills. Rather, we must focus our efforts on strengthening the authorization process. Nor can we reasonably attempt the task of reviewing each and every regulation for sufficient evidence. That is the task of the courts.

The Supreme Court noted in the Chadha decision that provisions which required agencies to report to Congress and wait before implementing proposed

(Continued on page 301)

FORD, cont. from page 299

actions are constitutional. The other restriction adopted by the House during the CPSC debate provided such a report and wait provision—no agency rule could take effect for a certain period of days. In this time, Congress could follow a formalized procedure to enact a joint resolution of disapproval. Although this procedure, like the veto, provides only for an up or down vote, it passes Constitutional muster by requiring a Presidential signature. This process permits Congress to focus its attention on those matters that are truly controversial or that constitute an abuse of authority.

"...I will work to insure that any new agency procedures enacted in response to the recent Supreme Court decisions strikes a proper balance..."

As the Senate considers authorization legislation for the FTC and the CPSC in the next few months, I will work to insure that any new agency procedure enacted in response to the recent Supreme Court decisions strikes a proper balance between improved agency accountability while the traditional regulatory process is maintained. However, any legislative response must be coupled with regular and periodic oversight of the agencies, for there simply can be no legislative substitute for this congressional responsibility.

---

by Hon. Neal Smith

United States Representative, Iowa, Democrat

From remarks delivered on the floor of the U.S. House of Representatives on June 27, 1983.

I AM SURPRISED BY THE REACTION that the news media and some Members of Congress have given to the Supreme Court's decision declaring the legislative veto unconstitutional. It should not have surprised anyone and the decision does not have the importance that has been attached to it.

"The legislative veto is a rather sterile tool..."

I always thought it was rather elementary that it was unconstitutional because a provision in a bill permitting the Congress to veto executive department action either means: First, that legislative power was delegated; or second, exercising the veto would be an usurpation of executive power. Those who defended the constitutionality and logic of the legislative veto who were not caught on one argument, were caught on the other.

The legislative veto is a rather sterile tool anyway because time constraints are so great that it makes it impossible for Congress to exercise the veto power on thousands of executive actions effectively, and it has not been effective. It has been used only a very few times.

The decision did not shift power significantly as has been indicated because the legislative veto was of little importance compared to the power of the purse which still remains in Congress. By attaching limitations to appropriations bills limiting the use of Federal funds in appropriations bills that the President must sign to secure money he wants for programs, rules, regulations, and actions by departments can be rendered null by denying the use of any money for the next year to administer them. Appropriations which originate in the House

(Continued on page 303)

SMITH, cont. from page 301

of Representatives are for 1 year at a time. Therefore, even if a department puts a rule or regulation into effect, it could be used only until the next appropriations bill is passed and some of the limitations have applied to prevent regulations being put into effect during the period the rule is being considered and before it is effective. As an example of effectiveness of limitations on an appropriations bill and the power of the purse, I personally have sponsored amendments to three different appropriations bills which killed three embargoes. Those amendments prohibited the use of funds to administer the embargoes, so they were effectively dead. There are hundreds of other examples passed with the concurrence of the majority of the House and Senate each year. I am very surprised that the news media and some Members of Congress seemed to have completely missed this perspective and overlooked the fact that the power of the purse not only has been the principal tool to control excesses in the executive branch of the Government but also still remains that principal effective tool.

"...the power of the purse not only has been the principle tool to control excesses in the executive branch of the Government but also still remains that principle effective tool."

---

by Hon. John J. Moakley

United States Representative, Massachusetts, Democrat

From an address presented on the floor of the U.S. House of Representatives on June 29, 1983.

THE SWEEPING SUPREME COURT decision in Chadha against INS, invalidating all forms of the legislative veto deals with a matter so focused at the inner subtleties of relations between the executive and legislative branches, that it is hardly surprising that much public, official, and media discussion has substantially distorted both the significance and the effect of the decision. In some respects, the Chadha decision means a good deal more than has been recognized yet and, in others that have caused undue alarm, may mean a good deal less.

"...the decision is a significant one and will force some very fundamental changes in the manner in which our Government operates."

Although my position has been characterized in opposition to the legislative veto, I think it is very important to understand that no one is really an opponent of the veto; Members have simply had honest differences on how and where it should be applied. Every President since Herbert Hoover has argued that the veto is unconstitutional, yet each of them has proposed a veto at one point of another.

The question for Members has been the application of the veto in particular contexts. And I suspect that every Member has voted for and against the concept. So the Supreme Court decision should delight no one. Certainly the decision is a significant one and will force some very fundamental changes in the manner in which our Government operates. But assertions that the decision strikes a devastating blow to the Congress as regards its power relative to the President misgauges the long range effects of the way Congress will handle this new balance in future legislation. But it also misjudges even the immediate con-

(Continued on page 305)

sequences of what the decision really means with respect to about 300 statutes touched by it.

The legislative veto has been in use for over 50 years and both Congress and the President have found the device convenient. Typically the way the device has come into being is that Congress and the President reach an agreement that the executive will be granted a specific power, which would not exist except for the enactment of the law, and Congress ties a limitation to that delegation—that the executive decision will be subject to a form of congressional nullification. It is important to note that the legislative record is rather clear that all administrations, notwithstanding their official posture of opposition to the veto, have been the authors of such compromises nearly as often as Congress.

"Increasingly . . . there has been alarm about the proliferation in the uses to which the legislative veto has been put."

In general, the approach is rather convenient. The President obtains some political advantage in that the fundamental principle of legislative physics—inertia—is turned to his advantage. Instead of sending up a recommendation and waiting for the whole process of enactment to run its course through subcommittees, committees, and the floor in each House and through conference, the executive issues a proposed regulation—or some other form of executive action—and, if any step of the nullification process falters during a set number of days, the matter becomes effective as the functional equivalent of law. Congress, for its part, retains roughly the same degree of control it would have had in the normal legislative process but structures the situation, where speed or flexibility is needed, to compensate for its own institutional weaknesses.

In this context, the veto works best when it is enacted as part of a negotiated agreement between the branches to improve management flexibility or response to emergency situations. The best examples of the former are laws which have given the executive authority to temporarily defer spending or implement less than departmental reorganizations, subject to congressional nullification. The War Powers Act is the best and strongest example of the latter.

". . . in the past few years, congressional exuberance with the device has led to the birth of proposals for a generic legislative veto . . ."

Historically, the courts have been very reluctant to intervene in these kinds of political agreements between the other branches. Indeed, as recently as 1978, the Supreme Court allowed to stand a lower court ruling which affirmed a law which had allowed the President to adjust Federal pay scales annually, subject to a legislative veto.

Increasingly, however, there has been alarm about the proliferation in the uses to which the legislative veto has been put. The veto is on weakest grounds when foisted by Congress for its own convenience or inability to face hard choices. And such uses have become disturbingly more common in recent years than the cautious power sharing agreements between the branches which gave birth to the device.

And suddenly, in the past few years, congressional exuberance with the device has led to the birth of proposals for a generic legislative veto—a proposed law which would give Congress the power to review and nullify each regulation issued by the entire Government, about 7,000 a year. The issue reach a head last year when the Senate passed the proposal 69 to 25. A similar House proposal, which was not acted on, was cosponsored by a substantial majority of the House.

The results of such a proposal could have been disturbing and the potential

(Continued on page 307)

MOAKLEY, cont. from page 305

for genuine paralysis in entire, important segments of the regulatory process was the great risk posed by a broad, generic veto.

And, unlike the hundreds of specifically linked agreements enacted since 1932, a generic veto, I believe, is nothing more or less than an unconstitutional effort to turn the entire process of National Government on its head, transferring to each branch the functions for which it has the least expertise and legitimacy.

"...a generic veto ... is nothing more or less than an unconstitutional effort to turn the entire process of National Government on its head ..."

It was becoming increasingly clear that the use of the legislative veto was a runaway train and there was increasing doubt of any ability to restrain the device to its traditional and accepted uses. It was in response to this trend, I feel, that the Supreme Court has now been forced to intervene in a matter it had successfully sought to avoid deciding for a generation.

In this regard, the decision should not be viewed as a disaster or as a victory for anyone. Congress, admittedly, has lost a tool which has, in its better applications, proved useful and efficient. But, by restraining Congress from immersing itself in every item of regulation and adjudication, the court has saved Congress from drowning in detail it lacks the institutional capacity to manage, and freed it to act within the scope of its legitimate role for shaping national policy.

Clearly, the Chadha decision will force vast institutional adjustments to be made by Congress to prepare itself to work effectively under this new arrangement but I sincerely believe the long term effects could be salutory for Congress, the President and the Nation.

In the long run, the Congress will be strengthened in relation to the President, the bureaucracy, and the courts. It will be forced to write laws with greater specificity. Far less substance will be left for regulatory or judicial interpretation and powers of a legislative character will be delegated with narrower limitation both as to scope and duration.

"In the long run, the Congress will be strengthened in relation to the President, the bureaucracy, and the courts."

But, I believe that initial discussion of the decision has even more significantly misjudged the short-term effects. The specific decision of the court applies to a single provision of the immigration laws and is correctly characterized as having found that provision unconstitutional. To the extent that it is interpreted as having shifted power from the legislative branch to the executive, however, that is correct only because the Court was able, in this case, to make two findings; the operative language of the ruling is, "We hold that the Congressional veto provision in section 244(c)(2) is severable from the Act and that it is unconstitutional."

The grounds on which the Court held the veto unconstitutional are so broad as to make clear the intention of the Court that its decision would govern lower courts in the review of more than 300 provisions of law that have used the device—a review that will probably take a decade or more.

It seems doubtful that any of these 300 laws will survive subsequent challenge; in the Chadha decision, the Supreme Court has left itself and the lower courts almost no room to maneuver on that matter.

As the courts begin to sort out the 300 remaining laws, Chadha will turn out to have been a rather exceptional case and the finding of severability will be impossible in the majority of cases.

Under a 1967 law, previously noted, Congress gave the President authority to revise the Federal pay schedules annually, subject to congressional disapproval.

(Continued on page 309)

On the same constitutional basis on which Chadha was later decided, a group of Federal jurists sued for a pay raise proposed by the President but disapproved by Congress. The court ruled that it was inconceivable that Congress would have given the President the power to adjust pay if the determination were not subject to congressional review. The court was able to rule that the two matters were not severable and, if the veto of the President's authority was unconstitutional, that authority would fall with it. As a result, it was possible to hold that no claim existed without reaching the constitutional merits and, on appeal, the Supreme Court declined to review the case.

"I think that this model is likely to be repeated in most court reviews stemming from the Chadha decision."

I think that this model is likely to be repeated in most court reviews stemming from the Chadha decision. And the manner in which it is repeated will satisfy no one.

At the end of the last session, an appropriation was made for the MX missile but it could be spent only if Congress subsequently approved the release of the money. The method by which that approval was made is clearly overturned by the Chadha decision and the history of the law is that the appropriation would not have been made in the absence of the review. The review provision was adopted as an amendment that rejected a straight appropriation. And so the only proper legal course open to the President at this moment to handle MX funding is to come to Congress again for an appropriation everyone already thought he had.

The same situation will hold equally true for agencies and other intrumentalities of the Federal Government who now may think the Chadha decision frees them from congressional interference.

Those who would argue that the power of the D.C. City Council to make laws is severable from the congressional review of those laws will find little comfort in the legislative history of the enactment of home rule legislation and will find that issue further complicated by a specific constitutional requirement that Congress "exercise exclusive legislation in all cases whatsoever, over such District ...."

"The severability of a veto ... leaves little doubt that congressional authority to overrule regulations of the Federal Trade Commission was voided by Chadha."

Undoubtedly some cases will be discovered where it will be possible to find delegations severable from the congressional review mechanism applicable to determination under the delegation. But even in such cases, the effect of such shifts of power are likely to be smaller than expected.

A clear example would be the Federal Trade Commission. The severability of a veto, adopted in the context of a routine 1980 authorization, for an agency established in 1914, leaves little doubt that congressional authority to overrule regulations of the Federal Trade Commission was voided by Chadha.

But neither is there any question that the ability of the Commission to issue rules at all, and indeed the very existence of the FTC beyond September 30, depends entirely on the enactment of a pending authorization to which any change in the Federal Trade Act is probably germane.

Likewise, the nuclear waste bill, adopted last year, authorized the Secretary of Energy to fix a tax on nuclear generation of electricity to be placed in a trust fund for the development of a nuclear waste repository, subject to a legislative veto. During consideration of that bill, an amendment was adopted which required Congress to act by law, rather than a veto, to overturn State objections

(Continued on page 311)

to siting decisions; the legislative history of the bill confirms that this change was made in response to constitutional reservations about the veto. That history, combined with an unequivocal severability clause, will probably permit the tax to stand without congressional review. But, although the delegation of taxing powers to the Executive is an extraordinary precedent, I am inclined to believe that Congress will find it has lost rather little power. The Executive wins freewheeling authority to tax utilities and deposit the proceeds in a trust fund. But any expenditure from that fund remains totally subject to the congressional authorization and appropriation process and to any requirements—including alterations in the tax—which Congress may choose to place in such bills.

"...I am inclined to believe that Congress will find it has lost rather little power."

In fashioning institutional remedies to the current situation, I would hope that all branches of government have registered a valuable lesson to be learned from Chadha. The process of government is—and quite legitimately—a political one. And the Nation is best served when that process is allowed to work, even with some tensions, with flexibility and a fair regard by each branch for the legitimate role of the others.

Throughout their history, the appropriations committees have handled routine adjustments during a fiscal year through a process known as reprogramings. The system is clearly not sanctioned by the Chadha decision, but that does not matter because the system is beyond the reach of the courts as long as both branches operate in good faith. Slightly simplified, the process is that, if the administration wants to transfer money from one purpose to a related one within the same appropriation, a letter is sent to the relevant subcommittees of the House and Senate Appropriation Committees. The committees vote on the matter and the administration abides by the decision. The committees are aware that the administration is under no statutory obligation to comply with arbitrary instructions and the administration is aware that appropriations run for only a year and are usually revised to reflect any difficulties the committees have noted during the prior appropriation. But there is no rule of Congress nor any Federal law on the subject for any court to review. It is simply an accommodation based on restraint and a decent respect by each branch for the responsibilities and privileges of the other.

"In 1974, Congress responded to the constitutional threat by extinguishing impoundment powers and replacing them with the comparatively cumbersome congressional budget process."

Where understood practices and comities between the branches are stretched beyond their understood terms, the branch damaged must be expected to respond with all the powers within its reach. The survival of our constitutional system requires that self-defense.

Presidential impoundment powers had actually proven useful tools for fiscal flexibility which served the purposes of both branches for a generation, under a variety of Democratic and Republican Presidents and Democratic and Republican congressional chambers. But President Nixon dramatically abused the system. Indeed, it is not unreasonable to characterize his actions as an attempt to use impoundment to give the Presidency something the Constitution had deliberately denied it—an item veto of appropriation. In 1974, Congress responded to the constitutional threat by extinguishing impoundment powers and replacing them with the comparatively cumbersome congressional budget process.

The development of the War Powers Resolution is a case of obviously similar retrenchment of an informal system stretched too far.

(Continued on page 313)

MOAKLEY, cont. from page 311

The legislative veto, likewise, proved a useful and effective tool to both branches to provide comparable administrative and regulatory flexibililty. But the zealousness with which Congress attempted to toss it onto a variety of laws began to shift the constitutional balance in such a manner that the Supreme Court was forced to rule more sweepingly than it might have wanted, on an issue I suspect it would have preferred not to address at all. Indeed, the record is rather clear that in 1978 the Supreme Court "ducked" a case that presented an opportunity to rule on the identical issue posed by the Chadha case.

I am not distraught over the current situation, for reasons I think I have outlined clearly. But as we survey the results of the Chadha decision, it is rather clear that the courts' attempts to sidestep the issue in previous years was wise and that the interests of neither the President nor Congress have been advanced by this definitive constitutional resolution of the issues.

"I am not distraught over the current situation, for reasons I think I have outlined clearly."

The immediate task involves all three branches and will be facilitated by the greatest possible caution and restraint by each. I am not prepared, at this juncture, to put forward specific recommendations.

No single committee of Congress can undertake these next steps. They involve the entire institution, and I am aware of no committee which does not have some law within its jurisdiction touched by Chadha. It is not necessary that all these laws be repealed or modified by Congress, nor that most of them become subject to judicial rulings.

In some cases, resolution will be forced on Congress. For example, at some point an individual will appear before the District of Columbia courts, charged with a matter which would not be a crime save that the previous Congress overturned revision of a certain D.C. criminal ordinance. The individual's attorneys will argue his case on constitutional grounds. Under Chadha, the congressional review mechanism is likely to fall, although there are constitutional peculiarities unique to that veto which could separate the case. Whether the courts strike down only the veto or the entire home rule delegation, the Committee on the District of Columbia will face an inescapable responsibility to fashion a legislative remedy.

"The immediate task involves all three branches and will be facilitated by the greatest possible caution and restraint by each."

In many cases, a decision will be made deliberately to avoid any clarification. It is possible that Congress and the President will simply decide, for example, to observe all the procedures of title X of the Congressional Budget and Impoundment Control Act, as a political accommodation. As I have stated, I expect that the congressional review of deferrals under title X would be struck down under the Chadha decision. But the nonseverability of Presidential deferral authority is sufficiently clear that neither branch has any incentive to test the law. So long as both branches operate with some comity, and avoid any effort to use the deferral section to deal with entitlements, I am inclined to doubt that their accommodation can ever come within reach of the courts.

The genius of our constitutional system is that the Presidency and Congress will always exist and have to work together. In the resolution of any confrontation, even one as sweeping as Chadha, the question is whether the two, in reaching accommodations that replace the veto, have learned the lessons of recent history and can apply them with common-sense.

PRO

Should Congress Preserve The

by Hon. Dennis DeConcini
United States Senator, Arizona, Democrat

From an address presented on the floor of the United States Senate on July 27, 1983, on the occasion of his introduction of S.J. Res. 135, a joint resolution proposing a Constitutional amendment for the establishment of a legislative veto.

AS A LEGISLATOR, I am troubled by Chadha. I am troubled because Chadha erodes the fundamental position of the legislative branch as the lawmaker of our Government. We, the Members of Congress, must act to retain our power to make the laws in this Nation.

"We . . . must act to retain our power to make the laws in this Nation."

My proposed amendment will restore congressional power over the lawmaking functions of Government by enabling Congress to oversee the manner in which the executive branch uses any legislative power which Congress had delegated to it. My proposed amendment will allow Congress to exercise a one House or two House legislative veto.

The text of this proposed amendment is very clear and concise. It states: "Executive action under legislatively delegated authority may be subject to the approval of one or both Houses of Congress, without presentment to the President, if the legislation that authorizes the executive action so provides."

The amendment permits Congress to select a one or two House legislative veto. Congress merely has to specify in the enabling legislation which sort of veto it believes is appropriate.

Under this amendment, Congress would sanction independent and departmental agency actions taken by the executive branch of our Government. Congress would express these sanctions by a vote of approval or disapproval.

"Under this amendment, Congress would sanction independent and departmental agency actions taken by the executive branch of our Government."

This amendment would not permit Congress to veto actions constitutionally assigned as executive functions. For example, a legislative veto on an inherently executive function, such as that of initiating prosecutions, would not be permissible under the provisions of this amendment. Only executive action taken under power which was delegated from Congress to the executive branch would be subject to a legislative veto.

The amendment essentially restores the status quo which existed before the Chadha decision.

In Chadha, the Supreme Court limited the doctrine of separation of powers, as embodied in the Constitution, to the interaction of the bicameral and presentment clauses. That is the fundamental basis of my disagreement with the Court's decision. I do not agree with the Supreme Court's interpretation that these clauses of the Constitution incorporate the doctrine of separation of powers as the framers of the Constitution intended that doctrine to be interpreted and employed.

I consider the spirit of the doctrine of separation of powers to flow throughout the Constitution as a whole. To understand the constitutionality of any law, we must look not only to the written words of the Constitution, but also to the spirit which that document embodies. *(Continued on page 298)*

The requirement of presentment of legislative action to the President and the process of bicameral action was founded upon the framers' fear of a concentration of power in one branch of the Government at the expense of another branch.

The framers perceived that the accumulation of all powers, be they legislative, executive, or judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. When the framers formed the Constitution, they put into effect measures which they believed would curb abuses of power by our Government.

"It is the checks and balances aspect of the doctrine of separation of powers which the Chadha decision so grievously violates."

The framers created a three-branch Government to oversee our Nation's business. The judicial branch was created with the power to interpret our laws. The executive branch was empowered to enforce our laws. And the congressional branch was deemed to be the lawmaking body within our Government.

The purpose of separating the authority of government is to prevent unnecessary and dangerous concentration of power in one branch. For that reason, the framers saw fit to divide and balance the powers of government, so that each branch would be checked by the others. Virtually every part of our constitutional system bears the mark of this judgment. It is the checks and balances aspect of the doctrine of separation of powers which the Chadha decision so grievously violates. To understand this violation, we must review the development of our Government during this century.

This Nation has entered a modern industrial and technological age. Problems and needs of a national scope have required a congressional response. From the end of the last century, with the establishment of the first independent agencies, through the period of the Great Depression, with the creation of agencies under Franklin Roosevelt's New Deal, to the post-Vietnam era, with the formation of consumer and environmental agencies, Congress has met the challenges of the modern epoch.

"For every statute Congress passes, the bureaucracies have put out 18 regulations."

Especially since the time of the New Deal, the modern bureaucracy has mushroomed. Congress wisely recognized that many modern problems which required a response were in fact so complex in scope that only the creation of a special administrative body could adequately address the situation. Consequently, Congress delegated more and more of its legislative authority to Federal agencies.

The escalating growth of Federal agencies reveals itself in the statistics concerning our Government. Between 1930 and 1939, a total of 154 Federal agencies were created. This contrasts with 552 agencies created between 1970 and 1979. In 1939, agency regulations filled 5,007 pages of the Federal Register. In 1979, this number had increased to 77,468 pages. In 1982, Federal agencies drafted approximately 105,000 pages of regulations.

For some time, the sheer amount of law made by agencies has surpassed in quantity the lawmaking engaged in by Congress through the traditional legislative process. For every statute Congress passes, the bureaucracies have put out 18 regulations.

There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term. When agencies are authorized to prescribe law through substantive rulemaking, the administrator's regulation is not only due deference, but is accorded "legislative effect." These regulations bind courts

(Continued on page 300)

and officers of the Federal Government. They may preempt State law. They can grant rights to and impose obligations upon the public. In sum, they have the force of law.

There have been approximately 300 veto provisions placed in legislation over the past 50 years. The majority were enacted since 1970. It is not surprising that the number of veto provisions has grown proportionally with the growth of the agencies.

"There have been approximately 300 veto provisions placed in legislation over the past 50 years."

The history of the legislative veto makes it clear that it has not been a sword which Congress has used to aggrandize itself at the expense of the other branches. Rather, the veto has been a means of defense. The veto reserves the ultimate authority necessary if Congress is to fulfill its designated role as the Nation's lawmaker. The legislative veto is commonly seen to be a check upon rulemaking by administrative agencies and upon broad-based policy decisions by the executive branch.

The legislative veto is more than efficient, convenient, and useful. It is an important, if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences. It preserves Congress control over lawmaking.

The loss of the legislative veto means the reconsideration of hundreds of existing statutes. I foresee a trend toward more specific laws, granting very detailed authority. Committee scrutiny will increase. The progress of needed legislation will be slowed.

The absence of the legislative veto opens a battleground between Congress and the President. We will nip-and-tuck over the appropriation of Federal funds. We will do battle with an extensive use of riders to appropriation bills. Confrontation will erupt over the deferral of appropriated funds.

"The Constitution does not contemplate total separation of the three branches of government."

Such extensive ramifications demonstate that this body needs to approve an amendment to overturn the decision in Chadha. We must reinstate the legislative veto as an effective congressional tool. We need the power to attach a legislative veto to the broad delegation of powers which modern-day government requires. I believe that the doctrine of the separation of powers is violated by a scheme of government which allows the delegation of legislative power to the President and the departments under his control, but forbids a check on the exercise of that power by Congress. I believe that the legislative veto is a mechanism by which our elected representatives preserve their voice in the governance of the Nation. It is consistent with the purposes of article 1 and the principles of the separation of powers, which are reflected in that article and throughout the Constitution.

The history of the separation of powers doctrine is a history of accommodation and practicality. The Constitution does not contemplate total separation of the three branches of government.

A legislative veto over agency actions is a necessary check on the expanding power of the agencies, both executive and independent, as they engage in exercising authority delegated by Congress. As President Reagan suggested when he was a candidate, it is the legislative veto which presents a way to check the excesses in the Federal bureaucracy.

The Court's decision in Chadha, that all "lawmaking" must be shared by Con-

(Continued on page 302)

gress and the President, ignores the fact that legislative authority is routinely delegated to the executive branch and to the independent agencies. If congressional action under the legislative veto technique is "legislative" action that must be shared, why is the same true of executive or administrative promulgation of orders, rules, and regulations, which the legislative veto attempts to control.

"This amendment allows Congress to reserve a check on legislative power for itself."

This amendment allows Congress to reserve a check on legislative power for itself. Absent the veto, the agencies receiving delegations of legislative power may issue regulations having the force of law without bicameral approval and without the President's signature.

The fact that the Supreme Court has handed down its opinion that the veto is unconstitutional does not alter or dilute the original rationale which persuaded Congress to adopt and utilize the legislative veto in the first place. The crux of the issue is this: Who shall be responsible for the laws of the land?

In a democracy, it is the elected legislators which the electorate holds accountable. I fear that without a legislative veto, fundamental policy decisions in our society will be made not by the body elected by the people to make the laws, but by appointed officials, not answerable to the public.

"The legislative veto offers the means by which Congress could confer additional authority, while preserving its own constitutional role."

The legislative veto offers the means by which Congress could confer additional authority, while preserving its own constitutional role. Under my amendment, the President would retain his power initially to approve or disapprove the delegation of the power which has a legislative veto attachment. Congress could make a wholesale delegation of power to the executive branch, or it could attach a veto provision to any delegation. Such policies would have to be worked out between the President and the Congress.

This amendment would restore the ability of Congress and the President to determine the best method to control the actions of the Executive and independent agencies. Only within the last half century has the complexity and size of the Federal Government's responsibilities grown so greatly that the Congress must rely on the legislative veto as the most effective, if not the only means, to insure their role as the Nation's lawmakers.

---

by Hon. James T. Broyhill

United States Representative, North Carolina, Republican

From an address presented on the floor of the U.S. House of Representatives on June 29, 1983, in the course of a colloquy under previous order of the House on the subject of the Supreme Court's Chadha decision concerning the legislative veto.

ON THURSDAY, JUNE 23, 1983, the Supreme Court, in Immigration and Naturalization Service against Chadha, held the one-House veto unconstitutional on the theory that the Congress legislated a result at variance with the decision by the Attorney General on a deportation case in violation of the bicameralism and presentment clauses of article I of the Constitution.

(Continued on page 304)

BROYHILL, cont. from page 302

Because of the Court's broadly written opinion, it is generally believed that all legislative veto mechanisms, which are estimated to appear in approximately 200 Federal laws, are in jeopardy and will, in short order, be found to be unconstitutional.

Indeed, a preliminary analysis of the statutes which fall under the jurisdiction of the Committee on Energy and Commerce indicates that there are at least 24 statutes which contain some form of legislative veto.

"...I feel that the legislative veto served as an important device for Members of Congress..."

As a strong proponent of the use of legislative veto as a means of curbing the excesses of overzealous bureaucrats, I feel that the legislative veto served as an important device for Members of Congress to assure themselves and their constituents that the laws enacted by the Congress were being carried out in a manner consistent with congressional intent.

Many important issues remain up in the air as a result of the Supreme Court's decision. For example, what is the status of the congressional veto of the Federal Energy Regulatory Commission's incremental pricing rule on natural gas? On May 20, 1980, Congress disapproved by a vote of 369 to 34 a rule promulgated by the Federal Energy Regulatory Commission which expanded the application of incremental natural gas pricing from industrial boiler fuel users, the only industrial users of natural gas now covered by incremental pricing, to all industrial facilities which use natural gas.

If incremental pricing is expanded to all industrial users of natural gas, this could cost industries millions of dollars in increased energy costs. Those industries that can, may well switch to other fuels. If they do, this will increase the fixed costs that residential natural gas consumers must bear, and increase oil imports. The uncertainty facing industrial natural gas users is, itself, disrupting their ability to plan.

"...I doubt the effect of this opinion will go unanswered by the Congress."

To cite another example, the question arises as to the status of the Federal Trade Commission's used-car rule which both House of Congress overwhelmingly disapproved last Congress. Will the Federal Trade Commission simply implement the rule despite the clear and unequivocable knowledge of congressional intent on this particular issue? I hope not, but if the Federal Trade Commission decides to act in this manner, legislative veto, as we know it, will not be available to resolve the matter.

The Commission's used-car rule was disapproved by the Congress on the basis that it did not comport with congressional intent in the Magnuson-Moss Act. It is this very problem that the legislative veto was designed to deal with.

Indeed, an interesting theoretical question to ponder is whether the Federal Trade Commission—or any other regulatory agency—will in the future be more severely restricted in its mandate in the aftermath of the Supreme Court's decision in Chadha than it was before?

Some are interpreting the decision as significantly diminishing the power of the Congress. I do not dispute this analysis. However, I doubt the effect of this opinion will go unanswered by the Congress.

As those of us in the Congress continue to analyze this Court opinion, we must search, in the interim, for an appropriate response to assure that authority delegated by the Congress is exercised in a manner consistent with the will of this representative body.

(Continued on page 306)

Should we pull back on the amount of authority that has previously been delegated to the independent regulatory agencies and the executive branch? Or should we try to limit our response to making the legislative veto pass constitutional muster?

"Whatever course we take, I believe a legislative response is necessary and proper."

Another question comes to mind. Will the Democratic leadership inevitably regret the new House rule respecting riders on appropriations bills that was instituted at the beginning of this Congress? Without the authority to reverse executive decisions or agency rulemakings, Congress could well become increasingly frustrated with their lack of ability to insure that congressional intent is followed through the use of limiting language on appropriations measures. The House rule which makes this avenue of approach practically impossible may well become a deeply regretted one by its proponents.

It appears to me that the key question is, how should we, as elected officials, respond to the elimination of this review. Whatever course we take, I believe a legislative response is necessary and proper.

The ramifications of this decision are enormous. Congress must fully explore alternative mechanisms to check the exercise of unbridled regulatory authority. In the weeks and months ahead, I intend to participate fully in the debate as these questions are explored and an appropriate answer is formulated.

"I have been a strong proponent of the legislative veto . . . as a means of curbing the excesses of overzealous bureaucrats."

All of our colleagues, of course, are aware of what has happened and there has been general discussion of this for the last several days. And because of this decision, it means that some 200 Federal laws, where we have inserted the legislative response to agency actions, are in jeopardy and apparently have been ruled as unconstitutional.

I have been a strong proponent of the legislative veto. I have been a strong supporter of this as a means of curbing the excesses of overzealous bureaucrats. I do feel that the legislative veto has served as a most important device for Members of Congress to respond to those agency and departmental decisions that are made that affect our constituents to assure ourselves and our constituents that the laws that we have enacted are being carried out in a manner that is consistent with congressional intent.

---

by Hon. Elliott H. Levitas

United States Representative, Georgia, Democrat

From an address presented on the floor of the U.S. House of Representatives on June 29, 1983, in the course of a colloquy on the subject of the Supreme Court's legislative veto decision.

I TAKE THIS TIME AS THE FIRST OPPORTUNITY since the Supreme Court decision in the case of Immigration and Naturalization versus Chadha dealing with the legislative veto to address some very important matters that have been thrust upon us as a result of that decision. I am sorely tempted to describe and discuss and comment on the merits or demerits of the decision itself. I will simply say

(Continued on page 308)

that I commend to my colleague a careful reading of the dissenting opinion of Justice White, whose opinion I believe, like many of the great dissents of Justice Holmes and Brandeis, will one day become the law.

"The legislative veto system evolved over a number of years and even predated the Constitution of the United States in the English parliamentary system."

I will not comment on the merits of the majority opinion. That is, for the time being, the position of the Court, and I view this rather as a player in a baseball game who has seen the umpire call out one of his teammates on a bad call, and everybody in the stands saw that it was a bad call, but nevertheless the call was out and it stands. That player cannot stand around for the rest of the game complaining about the bad call.

What he does do is go forward and do his best and find other ways to win the ball game.

And that is what I think we must do and I think that is the juncture that we are presently at.

The legislative veto system evolved over a number of years and even predated the Constitution of the United States in the English parliamentary system.

But the system was simply a mechanism by which the Congress was enabled to delegate to the President or to the executive branch of Government or to independent agencies, discretion to take certain actions, do certain things, with the understanding that Congress, in the exercise of its plenary legislative power under Article I of the Constitution, would be able to look at that action, made pursuant to the delegation of authority, and if the Congress decided that that action was excessive or contrary to the intent of Congress or arbitrary or oppressive or, if you will, just plain stupid, it was within the province of the elected branch of Government, Congress, to reject that action.

"The bureaucrats, the unelected officials in Washington are not accountable to the people."

Beginning with the latter days of the Hoover administration when President Hoover wanted to reorganize the Government, and proposed reorganization plans to the Congress to change the structure of Government, it was agreed to, provided there was a legislative veto.

And over the course of the last 50 years this mechanism has increased.

Let me say that I am not at all sure that this has necessarily resulted in better government.

It has, in some instances, resulted in Congress delegating powers which perhaps it should not have delegated as broadly as it did, or even at all. But at least the system was working in the sense that there was a balance between the powers that were delegated on the one hand and those that were retained to the Congress on the other hand.

The American people look to their elected Representatives and hold them accountable for their government. The bureaucrats, the unelected officials in Washington are not accountable to the people. They are in most instances not even known by the people and have never suffered the inconvenience of running for public office and do not have to stand for election every 2 or 6 years in order to be evaluated on their performance.

So, it was with the Congress that this power lay. And in one fell swoop this Supreme Court decision has abolished this mechanism which, indeed, was working, and was retaining power for the people and in one fell swoop, eliminated almost 200 laws that had been put on the books in the last 50 years.

Now, we find ourselves in a position where our system of government as it

(Continued on page 310)

evolved is involved in a train wreck of government. And we now have the responsibility to pick up the pieces and structure some new way of going forward in order to balance off the powers of the respective branches of government and to preserve for the American people their rights in elected government.

Now, what can be done? And what must we do?

Well, I think in the short term we are going to have to look at some very new approaches to dealing with this problem. We are going to have to be innovative and imaginative because in the last analysis Congress cannot lose in this struggle because we are the legislative branch of Government.

"...in the last analysis Congress cannot lose in this struggle because we are the legislative branch of Government."

So, some of the things we are going to have to do will, henceforth, be much more circumspect and specific and restrained in delegating any authority, and we must be very careful that we keep the agencies and the executive branch on a short leash.

The end result of this whole matter could very well be, that the Presidency, not this President, but the Presidency itself and the agencies of government, will end up with much more limited power and much more limited discretion because Congress simply cannot afford to make broad delegations of authority without some check upon it.

So, in the short term we are going to have to be very careful at looking at certain specific pieces of legislation cutting back delegations already made and being careful about some of those in the future and in some instances forego it altogether.

We are going to have to keep these agencies on short leash and under short rations as far as appropriations are concerned so if they get out of hand they cannot be out of hand for too long before they have to come back to Congress for their budgets.

"The end result of this whole matter could very well be that the Presidency ... and the agencies of government, will end up with much more limited power and much more limited discretion."

There are mechanisms available, one of which was demonstrated today, where in some instances, and obviously it would not apply in all instances, there could be a requirement that in order for a regulation or a rule to take effect it must be adopted as legislation, itself, by the Congress.

And obviously if that is done and one House of Congress fails to pass the joint resolution, we have in effect exercised a legislative veto. There are problems with that which we may have to address. And there are circumstances when it could work, particularly in the case of major rules. It might be a feasible way.

Another system would be to utilize the rules of the House of Representatives and to change the rules of the House of Representatives in conjunction with legislation, legislation which would provide for a report-and-wait period, where an agency action is taken by the executive branch or one of the agencies and a rule or regulation is issued and they report to the Congress and wait some period of time before it goes into effect. Then under changed rules of the House we would provide that any committee that has jurisdiction over the agency issuing that rule or over the legislation creating that authority, would have the right to consider, and, if they so desire, report a resolution of disapproval to the House of Representatives.

And the House of Representatives, if it adopted that rule, would provide, again, by the rules of the House, that no appropriation could be made or would be in order that would fund a regulation disapproved or action disapproved under this procedure.

(Continued on page 312)

That does not affect the validity of the rule; it is not legislation; but it goes to the purse strings which the Supreme Court, the same Supreme Court in decisions has said are exclusively the province of the Congress, to decide and we will have made the decision not to fund the regulation or the action in question.

There are many ways to skin this cat. There are other procedures that we can look at and other avenues we can follow. The report-and-wait mechanism itself can be expanded into broader usage.

"...someone will propose ... that we must consider even a constitutional amendment to provide the Congress with the authority to exercise its legislative control..."

But, in the last analysis, someone will propose, and I think perhaps correctly, that we must consider even a constitutional amendment to provide the Congress with the authority to exercise its legislative control over the agency in a manner that preserves for the American people their rights and privileges through their elected Representatives.

And one last observation I would make at this point is this: I really believe we are at a crossroads, a critical crossroads in the evolution of our governmental system as a result of this Supreme Court decision which has brought about this train wreck of government. We are not going to solve this problem or sort out or restructure our system in the next three or four weeks or three or four months and I am afraid perhaps not even in the next three or four years. It is going to take a long time to sort this out and get the government back on the right track.

I therefore would propose that in cooperation with the President we convene a conference on sharing of powers, or separation of powers, a conference that would bring together leaders from the administration, leaders in the Congress, some of the great academic minds in the universities around this Nation, people at the think tanks in this Nation such as the American Enterprise Institute or the Brookings Institution; representatives from labor and business, and public interest groups, all of whom have an interest and a stake in this.

"...the Supreme Court's decision, however destructive it may have been, is not the last word on this subject."

We should bring the best thinking together and to bear on how we sort out a system which will retain control to the people through their elected representatives without the intrusion, inappropriately, into the discretions that are necessary in the Presidency and the agencies of Government.

But this we must do. The Supreme Court's decision, however destructive it may have been, is not the last word on this subject. And it now befalls us, as a Congress, and it befalls the administration, representing the Presidency, and it befalls the people of this country a means of coming back and sorting it out, because if we do not, we will simply see chaos and confrontation and government that is not only bad, but simply does not work.

The legislative veto is no longer available to the Congress as it had been previously. It is now our responsibility, on behalf of the American people, to see that we put in place mechanisms which will achieve the purposes that were sought to be achieved by the legislative veto before the Supreme Court's decision.

I hope that the Court—although I have little expectation—will give it consideration and provide a further opportunity to review this matter.

It is very likely that Congress has delegated too much power to the executive branch and to the agencies, and we have probably done it very sloppily and poorly when we have done it on many occasions.

If nothing else, the Supreme Court decision may force us to do a better job of legislating, and for that, regardless of what else, we may give them thanks.

WHITE HOUSE LAW LIBRARY
ROOM 528 OEOB
(202) 395-3397

Date 1/10/84

To John Roberts

Room No.

From Angie Nash

____ To Keep

____ To Borrow (Date Due_____

____ Per Your Request/Per Our Conversation

✓ FYI

Message: I have two copies of this hearing. One to circulate and one to be used in RL library. Please let me know if you would like to borrow a copy.

THE SUPREME COURT DECISION IN INS v. CHADHA AND ITS IMPLICATIONS FOR CONGRESSIONAL OVERSIGHT AND AGENCY RULEMAKING

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

THE SUPREME COURT DECISION IN *INS* v. *CHADHA* AND ITS IMPLICATIONS FOR CONGRESSIONAL OVERSIGHT AND AGENCY RULEMAKING

JULY 18 AND 21, 1983

Serial No. 18

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

25-103 O WASHINGTON : 1983

CONTENTS

HEARINGS

	Page
July 18, 1983	1
July 21, 1983	197

WITNESSES

Bruff, Harold, professor, University of Texas School of Law	214
Prepared statement	218
Cogan, Neil H., professor of constitutional law, Southern Methodist University	234
Prepared statement	237
Dam, Hon. Kenneth W., Deputy Secretary of State, prepared statement	119
Dooling, John J., counsel, Committee on Rules	245
Eckhardt, Hon. Robert C., former Representative in Congress from Texas	168
Prepared statement	169
Moakley, Hon. John Joseph, a Representative in Congress from Massachusetts	245
Prepared statement	255
Morrison, Alan, director of litigation, Public Citizen	142
Prepared statement	143
Schmults, Hon. Edward C., Deputy Attorney General, Department of Justice	2
Letters from, dated August 16, 1983, to:	
Hon. Sam B. Hall, chairman, Subcommittee on Administrative Law and Governmental Relations	114
Hon. Clement R. Zablocki, chairman, Committee on Foreign Affairs	116
Prepared statement	8
Smith, Richard B., chairman, Coordinating Group on Regulatory Reform, American Bar Association	197
Prepared statement	200

APPENDIXES

Appendix 1:	
Bailey, Patricia P., Commissioner, Federal Trade Commission, excerpt from the statement of	284
Hearing on July 13, 1983, excerpts from transcripts of	294
Leighton, Richard, attorney, excerpt from the statement of	294
Miller, James C., Chairman, Federal Trade Commission, excerpt from the statement of	283
Pertschuk, Michael, Commissioner, Federal Trade Commission, excerpt from the statement of	286
Scanlon, Terrence M., Vice Chairman, Consumer Product Safety Commission, statement of	290
Sloan, Edith Barksdale, Commissioner, Consumer Product Safety Commission, letter from, dated July 12, 1981, to Hon. Peter W. Rodino, Jr	293
Statler, Stuart M., Commissioner, Consumer Product Safety Commission, letter from, dated July 8, 1983, to Hon. Peter W. Rodino, Jr	291
Steorts, Nancy Harvey, Chairman, Consumer Product Safety Commission, excerpt from the statement of	287
Zagoria, Sam, Commissioner, Consumer Product Safety Commission, statement of	288
Appendix 2: American Bar Association, 1983 annual meeting in Atlanta, Ga., Monday, August 1, 1983	301

WHITE HOUSE LAW LIBRARY
ROOM 528 OEOB
(202) 395-3397

Date 12/20/83

To John Roberts

Room No.

From Brad Reynolds

_____ To Keep

_____ To Borrow (Date Due _____

_____ Per Your Request/Per Our Conversation

✓ FYI

Message:

Chadha file

WAS THERE A BABY IN THE BATHWATER? A COMMENT ON THE SUPREME COURT'S LEGISLATIVE VETO DECISION*

PETER L. STRAUSS**

Examining the Supreme Court's recent decisions in the legislative veto case, Professor Strauss stresses the importance of a distinction no Justice observed between use of the veto in matters affecting direct, continuing, political, executive-congressional relations, and use of the veto in a regulatory context. Only the latter, he argues, had to be reached by the Court; and only the latter presents the constitutional difficulties that troubled the Court. The utility of the veto in the political context makes the opinions' sweep regrettable.

The Supreme Court's decisions in the legislative veto cases[1] attracted headlines and public commentary rarely experienced by the Court. Written following what was evidently a difficult internal process,[2] the Chief Justice's majority opinion in the principal case, *Immigration and Naturalization Service v. Chadha*,[3] seems intended to sweep all of the 200-plus legislative veto provisions from the statute books, in addition to the one provision necessarily before the Court in the case. That impression is confirmed by subsequent summary actions affirming unanimous opinions of the District of Columbia Circuit striking down legislative vetoes affecting regulatory agency rulemaking,[4] as well as by

** Professor of Law, Columbia University. A.B. Harvard 1961; LL.B. Yale 1964. Many friends and colleagues have made helpful suggestions on early drafts of this paper; I want especially to thank Bruce Ackerman, Owen Fiss, Henry Monaghan and Benno Schmidt.

1. The principal decision, in which the Court wrote at length, was Immigration and Naturalization Serv. v. Chadha, 103 S. Ct. 2764 (1983). At the end of its term, the Court also summarily decided two cases involving legislative vetoes of rules adopted by regulatory agencies. *See* Process Gas Consumers Group v. Consumer Energy Council of America, 103 S. Ct. 3556 (1983), *aff'g* Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982); United States Senate v. FTC, 103 S. Ct. 3556 (1983), *aff'g* Consumers Union v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (en banc).

2. The *Chadha* case was first argued in the October 1981 term of Court, and then set for reargument during the last term. Reargument is ordered rarely; in this case, two dissents from the reargument order on the ground that the Court was ready to decide the case suggest a high level of dispute. *See* 102 S. Ct. at 3507 (1982) (Brennan and Blackmun, JJ., dissenting).

3. 103 S. Ct. 2764 (1983).

4. Process Gas Consumers Group v. Consumer Energy Council of America, 103 S. Ct. 3556 (1983), *aff'g* Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982);

the disapproval evident in three separate opinions in *Chadha*.[5] The immediate and pained response of Congress[6] suggested as well the understanding that it had been deprived, in all contexts, of a valued legislative tool.

This comment looks closely at the opinions in the *Chadha* case, so far as they concerned the legislative veto issues, to assess their reasoning and the warrant for so embracive an approach. It concludes that both opinions suggesting an overall approach to the issues, the majority opinion and Justice White's dissent, fail in their analysis by approaching the legislative veto as if the issues it presented were always the same, and as if Congress were far more limited in its function and in its relationship with those who execute the nation's laws than in fact it is.

Legislative vetoes have been used in a variety of settings, though perhaps less universally than the press excitement over the *Chadha* decision would lead one to believe.[7] According to figures supplied by the Congressional Research Service, Congress had exercised a total of 230 legislative vetoes between 1930 and 1982: 111 of these terminated proposed suspensions of deportation for 229 individual aliens under the immigration and naturalization laws (the remainder of the 5701 suspensions proposed took effect); 65 were exercised under the Budget

United States Senate v. FTC, 103 S. Ct. 3556 (1983), *aff'g* Consumers Union v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (en banc).

5. Justice Powell, concurring on a rationale specific to the case, and Justices White and Rehnquist in dissent, underscored the breadth already apparent in the majority opinion by the attention they gave it. *See* 103 S. Ct. at 2788-92 (1983) (Powell, J., dissenting); 103 S. Ct. at 2792-2816 (1983) (White, J., dissenting); 103 S. Ct. at 2816-17 (1983) (Rehnquist, J., dissenting).

6. Shortly after the decision, the House overwhelmingly adopted a bill that would replace the requirement that rules adopted by the Consumer Product Safety Commission be subject to the possibility of a legislative veto with alternative equivalents: that no rule would become effective until enacted by Congress in statutory form (thus essentially depriving the Commission entirely of its rulemaking authority); and that proposed rules could not take effect for a prolonged period (90 "legislative days") during which Congress can enact a statute of disapproval. *See* 129 CONG. REC. H4758-84 (daily ed. June 29, 1983) (proceedings related to H.R. 2668, 98th Cong., 1st Sess. (1983)). Of course only one of these measures can be expected to appear in any ultimate statute. The effect of the vote was to underscore what might have been expected, and was indeed recognized in the majority opinion, namely that Congress would insist on strong continuing oversight of regulatory rulemaking, whether or not the legislative veto remained an available option for achieving that end. Midsummer hearings in both the Senate and the House were characterized by statements of resolution, at least on the part of the participating congressmen, that the close oversight of executive branch activity suggested by the veto will continue; and acceptance by executive branch spokesmen that it properly would continue. *See, e.g., Congress Digs in After Legislative Veto*, N.Y. Times, July 31, 1983, at E4, col. 3.

7. Although the approximately 200 current legislative veto provisions attest Congress' recent regard for the technique, they affect only a small proportion of the authority Congress has delegated to government agencies. Legislative proposals on the brink of enactment during the past few Congresses would have extended the veto to all agency rulemaking, and were widely and accurately regarded as portending a major expansion in use of the device.

Control and Impoundment Act, disapproving a minute proportion of the alterations regularly made by the President in the budget and appropriations legislation Congress enacts yearly; 24 disapproved a few of the many reorganizations the President proposed in the internal organization of the federal government. Of the 30 remaining legislative vetoes exercised, some concerned foreign relations, international commerce or defense, issues also dominated by presidential initiative and high political interest; only the remainder dealt with the regulatory matters that may have loomed most important in the Court's consideration.[8]

Faced with uses of the legislative veto that allowed the President and Congress to resolve directly constitutional and policy differences on issues of high political and small legal moment, uses that accommodate a necessarily continuing dialogue between Congress and the President on matters internal to government (its budget and structure), uses for deciding questions of individual status such as deportability, and uses for oversight of agency conduct such as public rulemaking directly affecting obligations of the public, the Court might have been expected to distinguish among these uses or, at least, to decide in a way that reserved consideration of those uses not presented in *Chadha*. The Court did not do so; the argument of this essay is that the Court's actions would have been far more acceptable, reaching precisely the same result in the matters before it, had it attended to the multiplicity of settings in which the veto has been used.

Such an argument may seem like just another assertion of the law professor's preference for neatness and modesty in judicial action or, worse yet, an arid exercise of 20-20 hindsight, unaccommodating to the political realities of reaching decision on a pressured, busy Court. I believe there is more. The importance of measures like the reorganization acts does not lie in whether Congress should reserve a veto, however infrequently such a veto is exercised, but in whether, in the absence of the veto power, Congress would permit such an efficient mechanism for the President's construction of lines of coordination and control for those whose performance of duty he is constitutionally obliged to oversee, rather than insist on the use of ordinary legislative processes. Seen in this light, the use of legislative veto provisions may empower the President as much as Congress. Use of the veto as an instrument of the continuing political dialogue between President and Congress, on matters having high and legitimate political interest to

8. Smith & Struve, *Aftershocks of the Fall of the Legislative Veto*, 69 A.B.A. J. 1258, 1258 (1983).

both, and calling for flexibility for government generally, does not present the same problems as its use to control, in random and arbitrary fashion, those matters customarily regarded as the domain of administrative law. That none of the disputants before the Court may have found it in their interest to argue for such distinctions and that the Court itself did not suggest them, only illustrates once more the problems presented by the Court's limited capacity to entertain and decide issues of national importance, and the resulting temptation to make doctrine governing the future, rather than decision of the pending case the centerpiece of the Court's effort.

I. THE SETTING

Jagdish Chadha is an East Indian. Brought up in Kenya, but retaining his British Commonwealth passport, he came to the United States on a student visa, and then stayed beyond its expiration. For that reason he was deportable, but Kenya would not receive him back (he having declined an opportunity to elect Kenyan citizenship) and other Indians of Kenyan birth holding Commonwealth passports had encountered difficulty in being admitted to Great Britain. An immigration judge of the Department of Justice's Immigration and Naturalization Service—a civil servant strongly protected against political interference in his judgment[9]—found that these and other factors established Mr. Chadha's claim to a compassionate suspension of deportation under section 244 of the Immigration and Nationality Act.[10] That section defines the factors that must be present to support such a finding, but under that section the immigration judge's conclusion that they are present does not end matters.[11] Reflecting the prior practice of granting all such relief through private bills, the statute provides that any finding favoring suspension must be transmitted to Congress, and takes effect only if neither House repudiates it by resolution during the following two sessions.[12] In Mr. Chadha's case, the House of Representatives voted such a resolution at the last moment, without printed text, debate, or significant explanation. The ostensible purpose of the resolution was to restore the effectiveness of the order of deportation previously entered against him and five other immigrants. After surmounting a number of procedural obstacles not important to this tale, Mr. Chadha's claim to a constitutional right not to be deported in this manner reached the Supreme Court. The principal argument there concerned the validity of the "legislative veto," which might best be described as the condition Congress had attached in conferring on immigration judges the authority to suspend deportations—that the suspension would not become final if, during a limited time, it was disapproved by a simple resolution of either house.[13]

Seven Justices, in two opinions, agreed that the legislative veto was unconstitutional. Chief Justice Burger, for himself and five others, wrote a sweeping indictment of legislative vetoes; Justice Powell concurred, although he would have decided the case on narrower grounds applicable principally to the immigration statute. Justice White, in dissent, vigorously objected to the breadth of the majority's approach, and concluded that section 244 met constitutional standards. Finally, Justice Rehnquist dissented on the nonconstitutional ground that the Court could not appropriately sever the provisions authorizing suspension of deportation from the legislative veto aspect of the statutory scheme; accordingly, even if Mr. Chadha were right about the legislative veto, the relief provisions must also fall and Mr. Chadha thus could not gain from the outcome.

9. Although neither statutory administrative law judges nor judges are bound (in terms) by the Administrative Procedure Act, 5 U.S.C. §§ 551-559, §§ 701-706 (1976), *cf.* Marcello v. Bonds, 349 U.S. 302, 309-10 (1955) (the particular provisions of the Immigration Act supersede the more general provisions of the Administrative Procedure Act on which they were modelled), immigration judges serve under statutes and well-established rules and administrative arrangements which provide equivalent safeguards against political oversight; their decisions are required to be taken "only upon a record." 8 U.S.C. § 1252(b) (1982); 1A C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 5.7 (1982); 2 *Id.* § 8.12(b) (1983).

10. 8 U.S.C. § 1254 (1982). The section provides:

> the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence. . . .
>
> (1) [when the alien is deportable for reasons not listed in (2) and has been physically present in the United States for seven years] and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or
>
> (2) [when the alien is deportable for reasons relating to criminal or subversive activity and has been physically present in the United States for ten years since the commission of such acts] and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1254(a) (1982).

11. A finding that they are absent is subject to judicial review. *See* 8 U.S.C. § 1252 (1982).

12. 8 U.S.C. § 1254(c) (1982).

13. As in so many legal matters, how one characterizes the legislative scheme under discussion tends to ordain the results reached. The Chief Justice's majority opinion treats the immigration law judge's action and the House resolution as distinct legal acts — *as if* the suspension were a final act, then reversed by the resolution. Justice White's dissent takes a more integrated view: the suspension is conditional, and cannot be regarded apart from the possibility of legislative oversight. Neither characterization is obviously "right"; in a process that prides itself on rationality, the reasoning ought to display consciousness of this fact, and to include an effort to explain the outcome on other grounds.

II. The Majority Opinion

The Chief Justice's opinion for the majority turns on a characterization of the House resolution as a "legislative action" subject to the formal requirements of article I of the Constitution. The formal requirements, set out in some detail in the text of the opinion,[14] are not controversial: legislation is to be enacted by the House and Senate acting in concert; and "every" such exercise of their legislative powers must culminate in the presentment of the enacted matter to the President for his possible veto.[15] No one doubts that these requirements must be met before Congress can adopt some new statement of affirmative principle as law, binding upon the citizenry or government. The action at issue in this case, however, was at least arguably different: a standardless, contentless expression of disapproval of executive action, taken under circumstances that permitted neither the possibility of expressing more than a simple negative nor any impact beyond the resolution's fact-specific effect on Mr. Chadha's existing deportation order. The problem for the Court was whether the formalities of legislation properly apply to such an action.

Although noting that "[n]ot every action taken by either House is subject to the bicameralism and presentment requirements,"[16] the Chief Justice essentially overcomes this problem by assertion. The question, he says, is whether the action "is properly to be regarded as legislative in its character and effect."[17] That question, in turn, apparently depends on the identity of the actor and whether the actor meant its actions to have force. Because, under the statute, the House action operates to defeat the executive's conditional authority to suspend Mr. Chadha's deportation, it "had the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch;"[18] that purpose and effect, according to the majority of the Court, in itself establishes the action's legislative character.

This "altering . . . legal rights" inquiry presents numerous difficulties. It is no measure of legislative activity in the functional sense. Judicial activity also "alter[s] . . . legal rights, duties and relations of persons . . . outside the . . . branch." Executive activity also has this effect, at least if rulemaking and administrative adjudication by the executive departments may still be authorized. An exercise of the authority of government is not, ipso facto, an exercise of the particular slice of that authority central to the acting branch; although Article III courts act judicially in a formal sense when they adopt rules of procedure or naturalize a citizen (that is, they are judges acting), they are not thereby adjudicating a case or controversy, performing the central judicial function employing prototypical judicial procedures. The functional requirements are central for Congress as well. Even when it acts bicamerally and with presentment, Congress will not be permitted to act in ways that alter legal rights if a court finds Congress' actions *not* to be legislative in character.[19] Indeed, the House has unquestioned authority to act in some ways that alter legal rights and duties of persons outside the branch, without resorting to bicameral action or requiring presentation to the President. In both the investigation of possible future legislation and the exercise of oversight functions, the House has authority to command the presence of witnesses, official and unofficial, and to attach consequences to their failure to cooperate.[20] Where stat-

14. 103 S. Ct. at 2780-84. The framers were much less careful in defining the manner in which the President or the Supreme Court would exercise the power vested in them, a difference readily taken as an indication of the extent to which they feared legislative hegemony. *Cf.* G. Wills, Explaining America 128-29 (1981) (the structure of the Constitution, placing the legislature before the executive and judiciary, reflects a hierarchy consistent with legislative supremacy).

15. *See* U.S. Const. art. I, §§ 1, 7. Justice White concurred in the lengthy portion of the majority opinion that describes, in general terms, the history and power-dispersing purposes of these formal requirements of presentment and bicameralism. *See* 103 S. Ct. at 2792 (White, J., dissenting). These purposes include: providing the President with a means of self-defense against a runaway Congress (and through the President, providing the people with a protection against the tyranny to be expected if any one branch of government should achieve hegemony); providing checks against the enactment of improvident or ill-considered measures; and providing for a legislative process that would produce distilled visions of the national good. 103 S. Ct. at 2782-84.

16. *Id.* at 2784.

17. *Id.* (citing S. Rep. No. 1335, 54th Cong., 2d Sess. 8 (1897)).

18. *Id.* at 2784.

19. *See* United States v. Brown, 381 U.S. 437, 441-46 (1965) (framers of the Constitution adopted the bills of attainder clause to prevent the legislature from overstepping the bounds of its authority by performing the functions of other departments); Barenblatt v. United States, 360 U.S. 109, 111-12 (1959) ("Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government."); United States v. Lovett, 328 U.S. 303, 315 (1946)("[L]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."); *cf.* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 471 ("[The bill of attainder clause does not] limit Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all."); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1308-12 (1970) (discussing scope of Congress' investigative authority).

20. To be sure, judicial enforcement is customarily provided, but only as a matter of convenience rather than constitutional necessity. *See* Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227-28 (1821). In any event, the judicial inquiry is not *de novo*; in contrast to the enforcement of subpoenas for executive agencies, a court enforcing a congressional finding of contempt reviews a determination that an offense has already been committed. *See* Barenblatt v. United States, 360 U.S. 109, 116 (1959); McGrain v. Daugherty, 273 U.S. 135, 161 (1927); 2 U.S.C. § 192 (1982). The result of judicial enforcement is a penalty, not a further opportunity to comply; thus, the legal obligation is mature when Congress acts.

utes have previously so authorized, the request of a committee, although less than the full House, imposes a legal obligation on agencies to conduct investigations,[21] or to cooperate with an investigation by congressional functionaries,[22] a mechanism not readily distinguished from the legislative veto on the formal grounds the Court chose. None of these investigatory powers are addressed in the Constitution. In this respect, the argument that "when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action,"[23] is insufficient.[24] Finally, and most importantly, to characterize what the House did in Mr. Chadha's case as "altering . . . legal rights" begs the question. Under the statutory scheme as Congress enacted it, Mr. Chadha's technical right to remain in the country could not be conferred by the INS alone; it is conferred only if the INS acts *and then only if neither house of Congress acts*. To say that he has acquired a right which the House is now purporting to take away is to assert a conclusion, not to support it by reasoning.

The Chadha decision would be less important—as the result in the case is the right one[25]—if it did not call into question so much that had been thought established about the dispersal of governmental authority. The opinion repudiates the now deeply engrained proposition that Congress' legislative authority may be exercised conditionally; yet that proposition was the initial engine by which delegation of "legislative powers" was effected, with the conditions, in this instance, supervised by the courts.[26] The Court recognizes the possible inconsistency when

21. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935).

22. 31 U.S.C. §§ 712(4), 716(a) (1976 & Supp. V 1981).

23. *Chadha*, 103 S. Ct. at 2786.

24. The cases supporting congressional investigatory power describe it as a necessary and inevitable adjunct of the legislative process, *see, e.g.*, McGrain v. Daugherty, 273 U.S. 135, 174 (1927); the legislative veto, as an oversight technique, may not seem so central. Yet, under the Constitution, Congress is made the principal judge of what is "necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8. Absent other factors, that empowerment would seem to extend to the legislative veto as well as to the issues of investigation. My purpose here is not to suggest that those other factors do not exist; in many cases they do. But the issue does not seem capable of being settled by simple textual analysis.

25. *See infra* notes 49-59 and accompanying text.

26. *See, e.g.*, J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."); Field v. Clark, 143 U.S. 649, 691 (1892) ("in the judgment of the legislative branch of the government, it is often desirable, if not essential for the protection of the interests of our people, against the unfriendly or discriminating regulations established by foreign governments, in the interests of their people, to invest the President with large discretion in matters

it worries in a lengthy footnote that its reasoning might be seen as casting some doubt on rulemaking or other forms of agency action.[27] Although, "to be sure, . . . rulemaking . . . may resemble 'lawmaking,' "[28]—indeed, the end product of rulemaking resembles lawmaking far more than did the House Resolution here—the Court concludes that no such inconsistency is presented. Why? In part the Court again appears to rely on either simple assertion, or some equivalence between the identity of the House and the character of its action, when it quotes Justice Black's troubling opinion in *Youngstown Sheet & Tube Co. v. Sawyer*[29]: " 'The President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.' "[30] Of course, the President and the agencies *are* lawmakers, in any conventional sense of the term, when they engage in rulemaking pursuant to constitutional or statutory authorization.[31] However one might label what the Department of Justice and the House did in considering the cancellation of Mr. Chadha's deportation for compassionate reasons, the action of each seems to have been of the same nature and to have had precisely the same kind of legal effect on Mr. Chadha's rights. Depending on the characterization employed, one could say either that the Department effected a suspension of an individual deportation order which the House cancelled, or that, between the two, the conditions for cancellation of a deportation order were not met. The Court does not adequately explain why one actor is regarded as behaving "legislatively," and the other is not. The Court seems to make the *Youngstown* passage mean that the "President does not act legislatively because he is the chief executive; the House does, because it is part of Congress. What the President does is ipso facto executive; what Congress does, legislative."

Whether an action is "legislative in character and effect" might have been thought a function of its characteristics, rather than the identity of the actor. This approach would have led the Court to consider the arguable differences between "legislative" and "adjudicative" ac-

arising out of the execution of statutes relating to trade and commerce with other nations"); The Brig Aurora, 11 U.S. (7 Cranch) 382, 388-89 (1813) (Congress may exercise its power conditionally).

27. *Chadha*, 103 S. Ct. at 2785 n.16.

28. *Id.*

29. 343 U.S. 579 (1957).

30. *Id.* at 587, *quoted in Chadha*, 103 S. Ct. at 2785 n.16.

31. Note the striking insistence on the accuracy of that characterization in Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979), where the Court insists on clear statutory authorization for what administrative lawyers describe as "legislative rulemaking," that is, rulemaking with statute-like effect, *just because* of its clearly legislative character.

tion. This question has much bedeviled administrative law theorists.[32] Furthermore, it seems to underlie the Court's interpretation of the Constitution's prohibitions of inappropriate legislative action—the bills of attainder and ex post facto clauses.[33] From these familiar perspectives, one generally describes "legislation" in terms of its future effect, its application to an indeterminate class, its character as a statement of positive law intended to govern future proceedings, and the contemplation that there will be such proceedings for its application, requiring the application of judgment. "Adjudication," in contrast, is characterized by its impact on events already transpired, its immediate application to named parties before the tribunal, and the subordinate (in relative terms) character of the lawmaking function. The distinction is, to be sure, imperfect; legislatures have long granted boons to particular individuals, and the restrictions on their inflicting particularized harms for past (mis)conduct are uncertain of application.[34] Whether the prospective, lawmaking function of courts is merely an accident of their authority to decide or rather a fundamental aspect of their function is, increasingly, a matter in dispute.[35] Yet, had the Court taken this tack, it would have found it difficult to describe the House Resolution that affected Mr. Chadha as properly "legislative." The Resolution applies only to named persons, on the basis of determinations made by the House about facts already fixed; it creates no general principle for future application, and the proceeding envisioned is one in which only ministerial tasks are to be performed. Indeed, the majority noted, but declined to decide, a question whether an order to deport Mr. Chadha enacted by both houses and signed by the President—thus fulfilling all the formal requisites of legislation—would have been proper, for just this reason.[36]

32. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:2 (2d ed. 1979).

33. U.S. CONST. art. I § 9; *see supra* note 19.

34. *Compare* New Orleans v. Dukes, 427 U.S. 297, 306 (1976)(city ordinance grandfathering two established pushcart vendors over all competitors upheld against equal protection challenge) *with* United States v. Brown, 381 U.S. 437, 461 (1965) (disqualification of identified group from union office is bill of attainder); *see also* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 468-84 (1977).

35. *Compare* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S FEDERAL COURTS AND FEDERAL JURISDICTION 81 (2d ed. 1973) *with* Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

36. *Chadha*, 103 S. Ct. at 2776 n.8, 2785 n.17. This was the basis of Justice Powell's concurrence. That Congress grants relief to individuals through private bills hardly establishes the appropriateness of its determining whether an individual now in line for some administrative relief ought to be denied that relief in light of his conduct or situation; the bills of attainder clause might prohibit this mode of action. *But cf.* Artukovic v. INS, 693 F.2d 894, 897 (9th Cir. 1982) (statute forbidding further stays of deportation for alleged Nazi war criminals is neither bill of attainder nor ex post facto legislation; deportation is not punishment and grounds for it may be retroactively established; significant procedural protections are required, however, in administrative process for deciding whether an individual is in the described group).

The Court also gives a reason with some functional bite for its want of concern with rulemaking: the Department's actions are authorized, and consequently limited, by a statute; that fact, with the attendant processes of judicial review, makes the bicameral and presentment processes unnecessary as a check.[37] But this, too, may prove too much. The House's action was also authorized and limited by a statute, could occur only within its terms, and no doubt was subject to judicial correction if these terms were exceeded.[38] That the House's judgment *within those bounds* did not have to be explained and was not open to review suggests other bases on which the statutory mechanism could be questioned. In addition to the attainder questions already suggested, the Court has strongly hinted that the absence of judicial control or other participatory procedures to protect one whose interests are at risk raises constitutional questions, especially when individual liberty in its most elementary sense is at stake.[39] Yet it is hard to understand how these difficulties turn the House's exercise of its very limited options into a "legislative" act. One might as well note, as the Court did,[40] that the judgment suspending Mr. Chadha's deportation order was equally free of the possibility of review (unless in Congress, pursuant to the act), even if entered in an entirely unauthorized manner.[41] But the Court did not for that reason find it to be legislative.[42]

37. *See Chadha*, 103 S. Ct. at 2785 n.16.

38. If, for example, the House had sought to act after the statutory time had expired, or to attach a condition to Mr. Chadha's right to remain in the country, it seems clear that habeas corpus would have relieved him of any deportation order and established his right to permanent residence.

39. *See Chadha*, 103 S. Ct. at 2785 n.16; Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858, 2870 n.23 (1982); *cf.* Landon v. Plasencia, 103 S. Ct. 321, 329 (1983) (resident alien temporarily outside the United States entitled to due process protections).

40. *Chadha*, 103 S. Ct. at 2787 n.21. Curiously, the Court seemed to take reassurance from the fact that the most lawless of acts by the INS suspending an otherwise valid deportation order would not be subject to correction in any forum.

41. For example, the agency might act in response to a bribe, or, less dramatically, it might act without considering one of the required factors or consider an irrelevant one.

42. Doubts expressed by the majority and Justice White as to whether Congress *could* constitutionally have provided for review, seem misplaced, or at best the product of the particular statutory arrangements chosen in this case. It is, of course, commonplace that a disappointed intervenor might be able to seek such review (e.g., an environmental organization seeking review of a decision to authorize construction of a power plant) and where a government agency participating in the administrative hearing is not identical with the agency that is making the decision, appeals by the interested agency are not constitutionally problematic. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 693 (1974); Secretary of Agriculture v. United States, 347 U.S. 645, 647 (1954); United States v. FMC, 694 F.2d 793, 799-810 (D.C. Cir. 1982). Thus, the Secretary of Labor is authorized to seek review of adverse determinations on policy issues by the Occupational Safety and Health Review Commission, an independent agency within his Department. 29 U.S.C.

Perhaps nowhere in the opinion is the essentially assertive character of the majority's analysis clearer than in its final footnote.[43] The footnote seeks to address Justice White's argument in dissent—namely that, viewed as a whole, the legislative scheme, involving the House, Senate, and Department of Justice, satisfies all the functional values of bicameralism and presentment because suspension of the deportation order cannot occur without the concurrence, in effect, of all three entities; and that the ability of one house to block suspension by passing a resolution of disapproval under the current legislation is not different in any realistic way from the ability of one house to block suspension under the prior arrangements by refusing to enact a private bill. The Court's response is to state that the private bill approach provides "an opportunity for deliberation and debate. To allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Art. I."[44] Because the recommendation for suspension is presented to both houses, it is difficult to see how the opportunity for "deliberation and debate" is any less present than it previously was; if anything, inertia favors the private person seeking relief from deportation under the present regime, instead of under a regime in which success depends upon having both houses enact a proffered bill. In terms of enactment "by mere silence," this mechanism is not readily distinguishable from the mechanism, approved by the Court in *Chadha*,[45] by which such measures as the Federal Rules of Civil Procedure are adopted; the Rules lay before both houses of Congress for a period, and become law unless, within a stated period, a blocking statute is enacted.[46] Indeed, every rulemaking authorization provides means which "in effect enact Executive proposals into law by mere silence," and the Court plainly meant to protect those authorizations from question. Those rules become "law" in a

§§ 656, 661 (1976). The issue appears to be one strictly of jural identity, readily manipulated by statute, not a constitutional prohibition on government officers seeking judicial review of decisions favorable to private claims. Indeed, one way of stressing the independence of immigration law judges within the Department of Justice would have been to make their judgments judicially reviewable at the Attorney General's behest. It is certainly imaginable that the Attorney General would disagree with some policy or even factual determination made by such a judge, and the applicant's assurance of objectivity in the proceedings is precisely that the Attorney General is afforded no internal, bureaucratic controls over the determination. The result is a situation no different from what obtains when the government is disappointed in the outcome of a trial. Although government appeals from judgments of acquittal in criminal trials may be constitutionally objectionable, this is for reasons of fairness, rather than concern for whether there could exist a "case or controversy."

43. *Chadha*, 103 S. Ct. at 2787 n.22.

44. *Id.*

45. 103 S. Ct. at 2776 n.9.

46. 28 U.S.C. § 2072 (1976).

sense much more closely statutory than the result of the House's action in Mr. Chadha's case. The latter creates no deposit on the law, gives no binding instructions to those who must continue to administer the law; it governs the individual's case alone. Although that, in itself, may be the source of objection, it makes speaking of the House's action as "legislative" curious indeed.

Perhaps one should take seriously the notion that whatever is done by the House or Senate is definitionally legislative, not because of the characteristics of what is done but because of the identity of the body acting. The same propositions would then apply to the President and the Supreme Court; their actions would, of necessity, be "executive" or "judicial," respectively. Some suggestion that the Court intends that approach is found in a repeated "presumption" that a governmental body is acting within its intended sphere.[47] What follows, however, is that there is then no magic in the word "legislative" to aid in determining whether the House and/or Senate are acting constitutionally. Because the House and Senate often act outside the structure of presentment and bicameralism, and in fact use it only when enacting laws, one must have reasons not supplied by the label "legislative" for insisting upon that structure, or for otherwise finding constitutional fault with the legislative scheme. That observation triggers the kind of functional inquiry that Justices White and Powell undertook, but the majority appeared to eschew.[48]

III. Justice Powell's Concurrence

Justice Powell, in his solitary concurrence, sought a less sweeping means of resolving the case, finding Congress to have "assumed a judicial function in violation of the principle of separation of powers" when it undertook to review determinations that particular persons are eligible for suspension of deportation orders. His opinion draws both on the history of concerns that led to adoption of the bills of attainder clause and the nature of the decision made, "that six specific persons did not comply with certain statutory criteria,"[49] in reaching the con-

47. *Chadha*, 103 S. Ct. at 2784.

48. Such an inquiry also seems present in the Court of Appeals for the District of Columbia Circuit's thoughtful opinion in Consumer Energy Council v. FERC, 673 F.2d 425 (D.C. Cir. 1982), which was subsequently affirmed by the Supreme Court. 103 S. Ct. 3556 (1983). In *Consumer Energy*, the court understood the particular veto as necessarily altering the scope of discretion delegated to an agency, finding this more objectionable because unexplained. 673 F.2d at 465. That characterization has force only if discretion must be structured—that is, where the delegation doctrine would require "law to apply," and not in the predominantly political setting that characterized early use of the veto. *See infra* notes 78-93 and accompanying text.

49. *Chadha*, 103 S. Ct. at 2791.

clusion that the House had here assumed a function of the kind ordinarily entrusted to courts or other adjudicatory bodies. To be sure, as both the majority and Justice White noted, courts do not ordinarily review agency decisions *favoring* citizens against government, at least absent a conflict with the claims of other individuals. Putting aside the question whether such a function could be conferred on federal courts consistent with the case or controversy requirement,[50] however, the determinations to be made are nonetheless characteristically judicial. They involve the determination of historical facts concerning particular individuals and the application of preexisting policy to those facts. Such determinations are, as Justice Powell noted, "generally . . . entrusted to an impartial tribunal" in our model of government;[51] the absence of the ordinary accoutrements of a hearing in the process that led to the House resolution underscored the objectionable nature of the procedure. The Immigration and Naturalization Service, although enjoying broad discretion in the details of the procedures it employed, could not make a determination adverse to the interests of a resident alien free of the constraints of the due process clause applicable to "adjudications," as they might be judicially interpreted.[52] That the House could adopt this measure without being subject to checks—whether internal constraints, procedural safeguards, or the possibility of effective external review—demonstrated that the dangers feared by the Framers had matured.[53]

Perhaps the greatest difficulty with Justice Powell's view lies in Congress' traditional practice of making individual determinations through the mechanism of the private bill, whether for the satisfaction of damage claims against the United States, or the granting of admission to residence or citizenship. These acts, too, are functionally judicial, in the sense that they apply to particular, named persons, rely on determinations of individual, often historical facts, establish no general principle for future application, and foresee no subsequent proceedings in which their application must be determined. Justice Powell's response is to look to the reasons for the restriction: "when the Congress grants particular individuals relief or benefits under its spending power, the danger of oppressive action that the separation of powers was designed to avoid is not implicated."[54] It is the denying character-

50. *See supra* note 42 and accompanying text.

51. *Chadha*, 103 S. Ct. at 2791 n.8.

52. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 35, at 350-53; *cf.* Landon v. Plasencia, 103 S. Ct. 321, 330 (1982); Artukovic v. INS, 693 F.2d 894, 897 (9th Cir. 1982).

53. Justice Powell joined the summary affirmance in United States Senate v. FTC, 103 S. Ct. 3556 (1983), without opinion.

54. *Chadha*, 103 S. Ct. at 2792 n.9.

istic of the House Resolution in *Chadha* that brings those restrictions into play. This response is not wholly satisfactory: the line between benefit and burden is elusive at the margins; the fact that a benefit has been conferred may raise questions sounding in equal protection. This is particularly true where (as often enough occurs in connection with economic legislation) the conferring of a benefit on one individual or group cannot easily be separated from the disadvantaging of another;[55] and the deportation context, rightly or wrongly, has long been viewed as involving regulation rather than punishment.[56] Yet Justice Powell's distinction corresponds well with core notions of the legislative function. Congress has in fact regularly rid itself of private bill functions, including this one. Particularly in light of established practice, the bills of attainder and ex post facto clauses stand as testimony to the importance of the distinction.

Justice Powell's argument about appropriate legislative function ought not to be confused with the separation of powers issues most commonly raised in recent litigation. In recent cases the issue considered has been "the extent to which [the challenged legislative arrangements] prevent [some other branch] from accomplishing its constitutionally assigned functions,"[57] and whether the complainant, real or imaginary, has been a member of the offended branch. Justice Powell does not contend that section 244 infringes judicial power; that is, he does not assert that it is objectionable for what it does to the authority of judges, although the other opinions seem so to regard his claim.[58] His argument, rather, stresses the unfairness to the claimant, Mr. Chadha, of having to submit to the possibility of disability resulting from a negative congressional judgment about the historical facts of

55. The Supreme Court has occasionally found state economic legislation that favored a closed class unconstitutional on equal protection grounds, *see* Morey v. Doud, 354 U.S. 457, 469 (1957); *cf.* Railway Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring), but has regularly sustained against such challenges statutes conferring monopolies or containing grandfather clauses, perhaps the most common form of such legislation. *See Morey*, 354 U.S. at 467 n.12; New Orleans v. Dukes, 427 U.S. 297, 306 (1976) (overruling *Doud* in a grandfather clause context); *see also* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 471 (1977) (bills of attainder clause not to be interpreted as "a variant of equal protection").

56. The court in Artukovic v. INS, 693 F.2d 894, 897 (9th Cir. 1982), rejected on this basis a challenge to a statute terminating the Attorney General's authority to suspend deportation of aliens guilty of Nazi war crimes; the statute evidently applied to past actions of a limited class of individuals, and so might have seemed fairly open to ex post facto/bills of attainder challenge. Congress had provided in that statute, however, that the judicial function of determining whether a given individual was among the described class was to be performed by an administrative officer, employing significant procedural protections; this feature of the statutory scheme seemed of singular importance to, and was enforced by, the court.

57. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977).

58. *See* 103 S. Ct. at 2787 n.21 (Burger, C.J.); 103 S. Ct. at 2810 (White, J., dissenting).

his particular case. Justice Powell thus directly invokes the values of citizen protection against governmental tyranny that underlie both the separation of powers notion generally and the attainder prohibition in particular.[59] Whether the courts' (or the President's) continuing capacity to function is thus impaired—the characteristic focus of recent separation of powers inquiries—has at best secondary importance.

IV. Justice White's Dissent

Justice White's intellectual approach to the legislative veto question, although flawed, seems more consistent with the Court's recent analyses of separation of powers/checks and balances issues than the majority's approach. Before the Chief Justice expressed concern in his opinion about "hydraulic pressures" bursting the boundaries that separate the branches of government,[60] the Court had seemed to be moving away from the idea of "air-tight" categories and toward a Madisonian view, stressing function rather than formality. Under the latter view, the central issues would be the tendency of a challenged device to place a given branch beyond effective control by others[61] or to create an "unnecessary and dangerous concentration of power in one branch," or to interfere with a core function of another branch, to a degree unwarranted by "overriding need" to accomplish some other objective.[62]

59. *See* Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 Yale L.J. 330, 343-48 (1962) (John Hart Ely's note discussing separation of powers and the bill of attainder clause).

60. *Chadha*, 103 S. Ct. at 2784.

61. *Id.* at 2786.

62. Buckley v. Valeo, 424 U.S. 1, 120-23 (1976). The functional approach suggested by the Court in *Buckley* was not restricted to application in presidential power cases arising out of the Nixon presidency, Nixon v. Administrator of Gen. Servs. 433 U.S. 425, 441-43 (1977); United States v. Nixon, 418 U.S. 683, 707 (1974) ("In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence."), but seemed to be paralleled by analytic developments in other contexts in which the structural constraints of the Constitution were the central issue. Thus, debate over the tenth amendment, revived by the Court's decision in National League of Cities v. Usery, 426 U.S. 833 (1976), resolved into near unanimity as to the statement of relevant inquiry (if not its application): whether a challenged measure threatens the integrity of the states in the constitutional scheme. *See* EEOC v. Wyoming, 103 S. Ct. 1054 (1983); Hodel v. Virginia Surface Mining & Recl. Ass'n., 452 U.S. 264, 283-93 (1981). Allocation of authority between state and nation, like that between executive and legislature, can be understood as a means of protecting individuals from overwhelming government; deciding what is required to preserve that protection for citizens, rather than a cataloguing of activities inherent to the states qua states, has characterized the recent judicial debates. The same may also be suggested for the public debate—not yet captured in litigation—over whether the Constitution constrains Congress' authority to make exceptions to the appellate jurisdiction of the Supreme Court. What would prevent the judicial branch from accomplishing its constitutionally assigned functions is widely accepted as the appropriate inquiry to be made. *See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1365 (1953). *But cf.* Wechsler, *The Court and the Constitution*, 65 Colum. L. Rev. 1001, 1005 (1965) ("I see no bars for this view [prohibiting alteration of appellate jurisdiction motivated by hostility to decisions of the Court] and think it antithetical to the plan of the Constitution for the courts—which was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power.").

That perspective seems to require, as Justice White argues at length, that the impact of the legislative veto here be considered for its tendency to rearrange power. In other words, the statutory scheme must be viewed as a whole.[63]

For Justice White, the legislative veto "has become a central means by which Congress secures the accountability of executive and independent agencies"[64]—"an important if not indispensable political intervention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress' control over lawmaking."[65] In light of the relatively limited use of the device to date, one wonders if he does not overstate the case.[66] His judgment is particularly questionable respecting use of the veto for regulatory oversight; at least until recently, enhancing the accountability of independent regulatory agencies and preserving congressional control over public rulemaking were not significant uses for the legislative veto, in either actual or political terms.

A. *The Political Uses of Legislative Vetoes*

The political uses of legislative vetoes warrant special analysis. Justice White's detailed account of the history of the legislative veto reflects its initial use in reorganization acts, and subsequent expansion to problems of national security and foreign affairs. In these contexts it seems proper to characterize the veto, as he does, as a means by which Congress could "transfer greater authority *to the President* . . . while preserving its own constitutional role."[67] Withdrawals of federal lands,[68] international agreements and tariffs, pay adjustments, war powers, national emergency legislation, and the impoundment issue

63. This is closely related but not identical to the severability question. Although Justice White agreed with Justice Rehnquist that the congressional review provisions were not properly severable from the suspension provisions, one could defensibly reach the opposite view as a matter of statutory interpretation and still conclude that the impact of the veto provision could only be assessed appropriately by considering the scheme as a whole.

64. *Chadha*, 103 S. Ct. at 2793.

65. *Id.* at 2795.

66. *See supra* notes 7-8 and accompanying text.

67. *Chadha*, 103 S. Ct. at 2793 (emphasis added).

68. *See* United States v. Midwest Oil Co., 236 U.S. 459 (1915).

each concern chiefly public measures, primarily related to the internal organization of government and affecting the interests of private persons only indirectly; they reflect areas of direct presidential initiative and responsibility. In these contexts, too, the veto represents an accommodation between the branches, often mutually desired as Justice White demonstrated, on matters of legitimate interest to each. Reorganization acts, measures concerned with budgetary adjustment (impoundment), foreign relations, and war (matters of the character Chief Justice Marshall long ago referred to as "[q]uestions in their nature political"[69]) rarely appear in a form likely to attract or, more importantly, to justify judicial review. They may all be described fairly as a setting for horse-trading between the President and Congress: the authority subject to the veto will be that of the President himself; no alternative means of control is obvious; precise congressional standard-setting or structural arrangements are probably inadvisable; and a sharing of political authority is warranted by Congress' legitimate interests in the subject matter and the consequent desirability of committing Congress to support of the action to be taken. They evoke Justice Jackson's more enduring analysis in *Youngstown Sheet & Tube Co. v. Sawyer*[70] that the power of government is at its peak when the President and Congress work supportively of each other's authority.[71] To the extent Justice White speaks of the legislative veto in terms of Congressional accommodation directly with a powerful President requiring more power—as a means of preserving balance while accomplishing needed delegation to that other potential tyrant—his dissent is persuasive.[72]

69. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

70. 343 U.S. 579, 587 (1952).

71. My colleague Benno Schmidt observes that this alliance between Congress and the President may permit a Congress, spurred perhaps by self-interest in avoiding responsibility for difficult decisions, excessively to evade its responsibility, as occurred in the Gulf of Tonkin Resolution, and in effect to confer *too much* authority on the President. Professor Schmidt's observation is not an easy one to answer. "Delegation" may remain a viable issue, even in the political arena, for issues of the largest moment. *Cf. infra* note 79. For the settings that chiefly concern me, where the President and Congress must deal *continuously* with each other on a series of matters of middling importance, that problem—certainly not one that appeared to concern the Court—is not presented.

72. In a detailed review of the history of political dispute over the legislative veto issue, Justice White seeks to show that Presidents have most frequently objected to veto provisions that empowered mere committees of Congress to act. 103 S. Ct. at 2793 n.5. He does not address these committee vetoes, but strongly hints he would disapprove. Even for measures characterizable as committee vetoes, however, it may be possible to suggest similar differentiations. *See infra* notes 92-102 and accompanying text.

B. *The Regulatory Uses of Legislative Vetoes.*

At other points Justice White's dissent is far less persuasive, notably those bearing on the regulatory context, where it speaks only in terms of Congress' accomplishment of its own "designated role under Article I as the nation's lawmaker,"[73] independent of any relational concerns. The legislative veto did not begin to appear with any frequency in that context until the 1970's. In that setting, Justice White's assertion that the legislative veto should be understood as a check on the President corresponding to the bicameral legislature/presidential veto regime, one of the principle engines of his analysis, is at best questionably relevant. The difficulties arise for two reasons: first, ordinarily the President is not the delegate under these statutes and his authority to direct the proceedings over which the veto is reserved is, at best, controversial; second, even if he were the delegate, reservation of an unconditional congressional negative would not protect Congress' "designated role . . . as the nation's lawmaker." Illuminating these difficulties is the burden of the following paragraphs. To observe them is to suggest a possibility for discrimination among various types of legislative vetoes that neither Justice White nor the majority seemed to wish to entertain.

Thus, one premise of Justice White's argument is that, as the President is the source of the action subject to the veto, the effect of the mechanism is merely to invert the ordinary processes of legislative action; the agreement of all three actors is in any event required, and in that way the essentials of the constitutional scheme are preserved. That premise will not always be true; some proposals subject to legislative vetoes come from the President, but others come from rulemakers not subject to direct presidential control or, as here, administrative judges acting "on the record,"[74] and thus also not subject to presidential direction. In particular, congressional delegations of regulatory authority are most often made *not* to the President, but to some agency or official —whether executive branch or independent regulatory commission.[75]

73. *Chadha*, 103 S. Ct. at 2795-96.

74. *See supra* notes 9-10 and accompanying text.

75. Justice White draws no distinction between independent regulatory commissions and executive branch agencies; indeed, at points he goes out of his way to suggest legislative vetoes are especially important for the former, because they are not subject to presidential supervisory control. His dissents from the Court's summary affirmances in the two regulatory cases, *see supra* note 1, underscore this proposition.

This aspect of his position has its roots in his separate opinion in Buckley v. Valeo, 424 U.S. 1, 284-85 & n.30 (1976). The majority opinion in that case had placed within the reach of the appointments clause in article II of the Constitution any officer of government administering the laws of the United States in relation to its citizens—independent regulatory commissions along

The legal authority to act is then that of the delegate, and even for indisputably executive agencies the President's power of direction appears limited in ways that make it difficult to characterize him as the delegate.[76] It is, then, a question, rather than a matter for easy assertion, whether a provision for legislative veto of proposed agency action merely rearranges the preexisting authority of the three political branches while preserving the checks each is intended to possess against the actions of the others. The more difficult Congress makes it, in its original delegation, for the President to participate and instruct, the greater the reason to suspect that the legislative veto does in fact operate as a device for evasion of the President's participation in governance rather than the simple redressing of an imbalance created by the practical need to delegate.

The second difficulty with the "functional equivalency" argument in the regulatory context is that presidential (or agency) shaping of rules followed by an up-or-down congressional "veto" is not the equivalent of the Article I legislative process. The possibility that any one of the three political arms of government can prevent the enactment of legislation is only part of the constitutional scheme. Of at least equal significance is that, where legislation is to be created, the opportunities for shaping and constructive change are to be focused in two of them, the House and the Senate. Congress does not act as a law*maker* when it leaves to other entities all possibility of shaping and accommodating that go into the drafting of a rule, reserving for itself only the possibility of an unconditional negative;[77] it then serves the same function as the President does respecting the legislation Congress *does* en-

with what are more traditionally regarded as executive branch agencies –thus resurrecting the question to what extent or in what circumstances the President can be excluded. *See* Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies*, 75 Nw. U.L. Rev. 1064 (1981); Strauss, *Separation of Powers and the Fourth Branch: The Place of Agencies in Government* (forthcoming). One would think the arguments supporting the veto are much weaker in circumstances in which the proposal subject to it can no longer fairly be characterized as the President's, and indeed the suggestion can be made that Congress has found a way around the President's own participation in the legislative process and the constitutional requirement of a unitary executive.

76. *See* United States v. Nixon, 418 U.S. 683, 695-96 (1974) (departmental regulation freed special prosecutor from direction by President in prosecutorial choices, a quintessentially executive activity); Sierra Club v. Costle, 657 F.2d 298, 407-08 (D.C. Cir. 1981) (discussion of President's involvement in rulemaking). In this case, in particular, Mr. Chadha would doubtless have had a telling complaint if the President had called the Attorney General on the telephone and instructed him to tell the sitting immigration law judge that Chadha's deportation order was not to be suspended, because the President had concluded that the statutory criteria were not met, the governing statute requires that judgment be made "on the record." 8 U.S.C. § 1252(b) (1982); *see supra* note 9.

77. *See* Kurland, *The Impotence of Reticence*, 1968 Duke L.J. 619, 629.

act. The drafters of the Constitution meant the shaping of legislation to be done by Congress; and that adjustment seems important to the overall scheme. Unlike the political contexts in which legislative vetoes were first developed, agency rulemaking results in what are unmistakably laws unmistakably constraining the conduct of persons outside government.

To be sure, the constitutional design has suffered considerable erosion. Even absent the legislative veto, Congress' work has frequently been wanting. We permit Congress to delegate notably open-ended rulemaking authority to agencies, subject only to the now limited constraints of the delegation doctrine: that the authority has been clearly delegated;[78] and that the authority be described with clarity sufficient to permit a court to assess whether it has been exceeded. Even so, and putting aside the question whether the courts are not now, and properly, reinvigorating these controls, use of the legislative veto to control agency rulemaking—the generation of statute-like prescriptions binding upon the citizenry—aggravates the delegation problem rather than ameliorates it. Congress may have been encouraged by the availability of the veto both to employ vague standards of delegation to proxy statute-shapers, and to respond to its proxies' "excesses" with unexplained, ad hoc negatives rather than with the construction of revised statutory prescriptions.[79] For these reasons, the authority of Congress to bestow rulemaking power on agencies (subject to judicial check) need not be found to imply authority to reserve a legislative veto.[80] The latter involves the assertion of a right to act without finality in a manner likely

78. Chrysler Corp. v. Brown, 441 U.S. 281, 317-19 (1979).

79. *Cf.* Consumer Energy Council v. FERC, 673 F.2d 425, 465-70 (D.C. Cir. 1982), *aff'd, sub nom.* Process Gas Consumers Group v. Consumer Energy Council of America, 103 S. Ct. 3556 (1983) ("[T]he effect of a congressional veto is to alter the scope of the agency's discretion. In this case, the practical effect probably was to withdraw the discretion altogether . . . . In other cases, exercise of the legislative veto may enable one house of Congress effectively to dictate that a specific type of rule be promulgated."). Tying the analysis to the delegation issue, as the District of Columbia Circuit suggested but the Court did not, suggests that a different outcome might be appropriate where "delegation" issues would not ordinarily be thought a concern. *Cf.* Curran v. Laird, 420 F.2d 122, 129-31 (D.C. Cir. 1969) (en banc) (no delegation problem existed where legislation providing for a reserve fleet committed management of it to agency discretion) where the court stated:

> That the matter before us for consideration lies in the special zones of the exceptions, rather than the ordinary area of judicial reviewability, is established by several cardinal aspects of the issues. The case involves decisions relating to the conduct of national defense; the President has a key role; the national interest contemplates and requires flexibility in management of defense resources; and the particular issues call for determinations that lie outside sound judicial domain in terms of aptitude, facilities and responsibility. . . . [O]ur decision does not involve personal rights and liberties, does not involve constitutional claims, and does not involve a right expressly granted by statute that qualifies what would otherwise be non-reviewable discretion.

80. *Chadha*, 103 S. Ct. at 2802.

to be harmful, not helpful, to Congress' "designated role."[81] It evokes untempered the fears of arbitrary political action by Congress that so strongly prompted the Framers' efforts to design institutions that would avoid the threat of legislative tyranny.[82] In contrast, a Congress granting to agencies what, from its perspective, is a final authority to make rules may be encouraged by that prospect to more precision in standard-setting. Such precision is desirable both to facilitate judicial review and to protect the citizen against arbitrary action. Additional protection may be derived if the actual rulemaker is obliged to act on ostensibly rational, apolitical grounds, freed to some extent from the directory, political influence of the President or Congress.[83] Room thus exists at least for suspicion that legislative vetoes will produce less careful initial drafting by providing a mechanism whereby difficult issues can be cheaply revisited.[84] The threat of their exercise may also enhance the aggressiveness of political oversight by congressmen or congressional committees. In sum, the existence of a legislative veto in a regulatory statute may look much more like political self-aggrandizement than "a means of defense"[85] against the Imperial Presidency.[86] The record of the exercise of legislative vetoes in the regulatory context, although infrequent, is not reassuring, either as to its impact on Congress' primary function of legislating or as to its use as a means of political accommodation.[87]

Both these difficulties with the "functional equivalency" argument might also be raised with respect to three devices which the majority did not seem to intend to call into question: the lay-before technique for rulemaking, by which the judiciary's own procedural rulemaking is accomplished, in which proposed rules are laid before Congress and become effective only if not disapproved by statute within a stated period; congressional use of appropriations lines, essentially insulated from presidential disapproval by his inability to effect an item veto, to control particular agency endeavors; and congressional delegation of rulemaking authority to a body, such as an independent regulatory commission, ostensibly placed beyond the President's usual executive branch oversight. Each of these devices may effectively defeat presentment of the agency's development of law while maintaining substantial congressional controls. In this way, each might be characterized as an end run around the President's veto power. At least the first two also seem to provide Congress with an effective technique by which to escape any need for statutory precision. Congress remains able to enact vague standards subject to its own subsequent, ad hoc correction. These are troublesome observations, but the result may be to call into question these techniques as well.[88] Short of that, one may remark that, unlike the legislative veto, each device contains significant self-corrective or limiting factors. Lay-before statutes require Congress to surrender substantially greater control than the legislative veto and to that extent encourage initial drafting precision. In creating independent agencies, Congress also relinquishes substantially more control

81. To be sure, the "Lockean principle that the grant of legislative power is one 'only to make laws, and not to make legislators' has fallen before the inexorable momentum of the administrative state." Monaghan, Marbury *and Administrative Law*, 83 COLUM. L. REV. 1, 25 (1983). Authority finally conferred may be executed, however, with an assurance and subject to an external check that authority granted in conditional form may not. To put the same argument in a somewhat different way, Congress may be seen more fully to have acted "to make legislators" when the authority it confers is subject to its own informal controls and, perhaps, removed from executive controls.

82. G. WILLS, EXPLAINING AMERICA 213-14, 260-64 (1981); *see* Consumer Energy Council v. FERC, 673 F.2d 425, 464 (D.C. Cir. 1982), *aff'd, sub nom.* Process Gas Consumers Group v. Consumer Energy Council of America, 103 S. Ct. 3556 (1983).

83. The "to some extent" is advertent; judge-like insulation of the rulemaker would be inappropriate. Rulemaking, in my view, properly continues to be performed "off the record," in a technical sense; its very focus on policy-making warrants provision for political oversight in some form, *see* Strauss, *Disqualification of Decisional Officials in Rulemaking*, 80 COLUM. L. REV. 990, 995 (1980), albeit subject to what might be described as Marquis of Queensbury rules. *Cf.* District of Columbia Fed'n of Civic Ass'n's v. Volpe, 459 F.2d 1231, 1246 (D.C. Cir. 1971) (rulemaker's decision would be invalid if based in whole or in part on pressures emanating from certain Congressmen) *cert. denied*, 405 U.S. 1030 (1972). For policy-making intended to influence planning choices (major purchases and other compliance activities by the public at large), the alternative of remitting all control to the random, episodic, party-distorted, and necessarily long delayed world of judicial review is unsustainable. One might note in this respect the constitutional responsibility for oversight inherent in the President's authority to demand "the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the duties of their respective Offices," U.S. CONST. art. II, § 2, cl.1, as well as Congress' yearly, and intended, control over agency priorities through the appropriations process.

84. The legislative veto provision at issue in Consumer Energy Council v. FERC, 673 F.2d 425, 437 (D.C. Cir. 1982), *aff'd sub nom.* Process Gas Consumers Group v. Consumer Energy Council of America, 103 S. Ct. 3556 (1983), is a case in point. The Federal Energy Regulation Commission (FERC) had adopted a rule, with high financial consequences for the energy industry, in compliance with a directive in President Carter's energy legislation. The reservation of a legislative veto substantially resulted from the fact that the legislation had been highly controversial and difficult to pass and because authorization of this particular rulemaking had been especially controversial. When the rule was adopted by FERC and forwarded to Congress for its consideration of the legislative veto issue, no substantial discussion of the compliance of FERC with the statute, or of the justification for the rule under the statute, occurred. Instead, the House exercised its veto because it was convinced that the original statutory authorization for rulemaking had been in error and that the program FERC was implementing, entirely faithfully so far as anyone was concerned, ought never to have been adopted.

85. *Chadha*, 103 S. Ct. at 2796 (White, J., dissenting).

86. Understandably, Justice White's history of presidential bargaining for legislative vetoes in return for accretions to the President's own power has no application in this context.

87. *See supra* note 84 and accompanying text.

88. *See* Strauss, *Separation of Powers and the Fourth Branch: The Place of Agencies in Government* (forthcoming).

than it could retain with the legislative veto. Finally, appropriations measures are episodic, politically linked with other matters, and imprecise in their impact. More generally, to uphold any of these devices it need not be conceded that Congress can *validly* exclude the President from political oversight of activities for which Congress maintains its own political connections.

V. Preserving the Political Veto

This consideration of the "functional equivalency" argument suggests a broad distinction between use of the legislative veto as a check on the chief executive, and use of the legislative veto as a check on any agency to which power has been delegated. The New Jersey Supreme Court, in a pair of recent decisions,[89] drew just such a distinction. It struck down a provision for general legislative veto of proposed agency rules, while upholding a specific provision establishing legislative veto procedures for projects proposed by the state's building authority that would require long-term leases by state agencies. In the former setting, the court thought the legislative veto threatened both to impair the balance of power within state government and to diminish the quality of initial legislative efforts.[90] The latter measure concerned essentially political accommodations, with no diminution of gubernatorial control; the legislature's opportunity to disapprove a proposal could be thought of as creating a form of moral obligation to make the future appropriations meet the proposal's terms.[91] In this respect, the New Jersey court evidently believed that the opportunity for a legislative veto was not merely unobjectionable, but in fact served a positive function in the arrangements of state government.

A recent panel opinion in the United States Court of Appeals for the District of Columbia Circuit, *American Federation of Government Employees v. Pierce*,[92] may suggest the difficulties in failing to make such distinctions. The case involved an annual appropriations bill for the Department of Housing and Urban Development which had provided, in part, that none of the funds it made available "may be used prior to January 1, 1983, to plan, design, implement, or administer any reorganization of the Department without the prior approval of the

89. General Assembly v. Byrne, 90 N.J. 376, 379, 448 A.2d 438, 439 (1982); Enourato v. N.J. Building Authority, 90 N.J. 396, 401-02, 448 A.2d 449, 451-52 (1982).

90. *Byrne*, 90 N.J. at 395-96, 448 A.2d at 448-49.

91. *Enourato*, 90 N.J. at 401, 405, 448 A.2d at 451, 453.

92. 697 F.2d 303 (D.C. Cir. 1982).

Committees on Appropriations."[93] Provisos such as these are neither uncommon, nor counted in totaling up the number of legislative veto provisions or the frequency of their exercise. Presumably the Congress enacting such a proviso is not yet prepared to appropriate funds for the stated purpose, and the measure reflects a compromise with an executive seeking added flexibility that Congress is not required to afford. Even without such provisos, it is commonplace for an agency subjected to a line-item budget, and uncertain about its authority or wishing to reallocate its funds, to call the relevant appropriations committee and explain its plan; with committee approval, or perhaps absent objection, the changed expenditures can be made within the limits established by the overall appropriation. The enforcement of budgetary limitations is almost wholly internal to the political branches of government, and a matter of intense and appropriate congressional interest. Judicial controls could be invoked only with great difficulty[94] and the provisions rarely if ever implicate private claims of right. So long as the line-item budget is employed—and it is hard to construct either the argument that Congress *must* enact an aggregate budget for each agency or the belief that, as a political matter, it soon will[95]—it is useful to both sides to have an informal technique for adjustments of expenditure within the overall aggregate appropriation to a given agency.

The District of Columbia Circuit's opinion, rendered prior to *Chadha*, finds the proviso offensive, both as a departure from the bicameral-presentment requirements of "legislative action" and as a "means for Congress to control the executive without going through the full lawmaking process, thus unconstitutionally enhancing congres-

93. Department of Housing and Urban Development—Independent Agencies Appropriation Act, 1983, Pub. L. No. 97-272, 96 Stat. 1160, 1164 (1982).

94. In most circumstances, the interest involved in enforcing a required limitation on expenditures of governmental funds would be a "generalized grievance" about governmental adherence to law insufficient to sustain constitutional standing. In *American Fed'n of Gov't Employees*, 697 F.2d at 305, however, the court held that only a member of the House of Representatives Appropriations Committee had a sufficient personal stake and then only because of its relationship to the Committee's authority.

95. Indeed, it seems likely that Congress will learn to substitute appropriations controls for the legislative veto; the *Chadha* court was quite explicit in reaffirming the continuing power of the purse. Those who drafted the Constitution believed that ultimate control inevitably lay with Congress because it possessed the power of the purse. *See, e.g.*, THE FEDERALIST No. 78, at 522-23 (A. Hamilton) (J. Cooke ed. 1961); *cf.* G. WILLS, *supra* note 82, at 128, 135 (Congress is given what might be called "shoot-out" power, the weapons for a final showdown with both other branches.). In this respect, those who see in the legislative veto decisions added power for the executive in its relations with Congress seem certain to be disappointed; and that will likely be more, rather than less, the case if the appropriations authority cannot itself be rendered flexible by mechanisms like committee approvals.

sional power at the expense of executive power."[96] Nothing in *Chadha* suggests a need to reconsider this judgment. Yet, if one considers the budgetary process as a whole, neither of these characterizations is, or at least need be,[97] apt. Appropriations measures originate with the President and must be signed by him; his Office of Management and Budget, with but few exceptions, controls both the initial submissions and requested alterations. Housing and Urban Development Secretary Pierce is unlikely to have taken the steps that brought about the lawsuit in *American Federation of Government Employees* without the initial assurance of presidential backing, as he would not have sought committee approval for the otherwise forbidden expenditures without that assurance.[98] The limited duration of appropriations measures and the practical difficulty the President in any event faces in exercising his veto authority over such measures also suggest a presentment issue far less substantial than that involved when an agency is authorized, for an indefinite term and without presidential participation, to adopt rules as binding as statutes on the public at large, rules which are then made the subject of legislative veto procedures.

Similarly, viewing such practices as means for enhancing congressional control over the executive without use of the full legislative process,[99] and hence violative of separation of powers, is questionable on these facts and, in addition, apparently insufficient. The full legislative process is used at least annually; although the "one bite at the apple" theory invoked by Justice White in general defense of the legislative veto raises problems when applied to measures of indefinite duration and broad authority, it seems less problematic in the budgetary context. The District of Columbia Circuit panel's characterization of such measures as involving "enhanced control" rather than "enhanced flexibility," "enhanced precision," or "enhanced executive authority" seems at the least to depend on a careful understanding of the particular context in which control will be exercised. It seems doubtful that Congress would be willing to make the questioned appropriation absent some technique for later assuring itself, or its trusted agents, that an appropriation that now seems unjustified has in fact become warranted by intervening events. If that is so, it is hard to treat these measures as if only Congress gains in power and the President necessarily loses. As already noted,[100] the Court's recent separation of powers cases make threat to core function, not marginal enhancement of political clout in a necessarily fluid relationship, central in any event. Even if such measures enhanced Congress' control, it is impossible to make that assessment unless one can show (as was not urged here) a generality of use and impact. As Judges Wald and Mikva suggested in the course of explaining, sua sponte, their unavailing wish to set the case for argument en banc, the government gains in flexibility when arrangements such as these can be made.[101] Indeed it is difficult to understand how these arrangements present the risks of one-branch or even one-house hegemony, of government out of control, that initially produced the allocation of governmental authority that characterizes our Constitution.

96. *American Fed'n of Gov't Employees*, 697 F.2d at 306.

97. Imagine a situation in which an independent regulatory commission has secured "conditional" authority to spend, albeit with the post-appropriations approval of its appropriations committee, sums which the President did not request. The President has had the chance to approve the condition, as he could have had an unconditional appropriation for this unwanted expenditure; absent the possibility of a line-item veto, either is at best a crude instrument of control.

Perhaps it could be argued in such a case that Congress had evaded the functional equivalent of presentment inherent in the presidential budget process and the presidential Office of Management and Budget's controls over agency budget proposals and requests for funding. Or, at some point, the very thickness of a forest of conditional appropriations might persuade one that Congress had passed over from enhancing executive flexibility at the price of congressional participation, to attempting to seize the reins of control more firmly than the appropriations authority already envisages. The distinction here might not be unlike that that permits the courts to swallow most delegations, but caused them to pause before the sweeping empowerment of the National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195, 196 (1933), *see* Schechter Poultry Corp. v. United States, 295 U.S. 495, 539-42 (1935); or that permits substantial federal regulation of state concerns, but not to the point of extinguishing state control of essential functions. *See supra* note 62.

98. The case arose out of an alleged disobedience of the statutory provision, when the Secretary announced a reduction in force in the Department, effective before January 1, 1983, and apparently signaled that funds *had* been expended to design and implement a departmental reorganization; the only plaintiff found to have standing to sue was a member of the House Appropriations Committee asserting that his statutory claim to approval had been defeated, and he was then met with a determination that that claim was unconstitutional. *See American Fed'n of Gov't Employees*, 697 F.2d at 305-06.

99. It might be remarked that use of hearings and other oversight measures are also means for enhancing congressional control over the executive without use of the full legislative process, although in this instance the obligation of the executive to respond is marked by political expediency rather than legal constraints. I do not mean to ignore that difference. Yet one must avoid the attitude, which might be taken from the Court's opinion, that congressional controls over executive agencies are undesirable—that it suffices to leave all control in the hands of the courts. Putting aside that any such proposition is infected with a disqualifying degree of self-interest in the courts, judicial controls are simply incapable of providing timely oversight or invoking political responsibility in the exercise of discretion within the law. *Cf.* Sierra Club. v. Costle, 657 F.2d 298, 410 (D.C. Cir. 1981) ("Cases like this highlight the critical responsibilities Congress has entrusted to the courts in proceedings of such length, complexity and disorder."). The expectation, indeed the purpose of those who drafted the Constitution was to assure that the political branches constantly checked one another; that there may be excesses in the process that threaten to undo the balance the Constitution sought is not to be mistaken for disapproval of the continuing struggle.

100. *See supra* note 62 and accompanying text.

101. *American Fed'n of Gov't Employees*, 697 F.2d at 308-09.

With two exceptions, measures such as these seem precisely parallel to the earliest delegation cases, cases in which Congress set tariff levels and then permitted the President to vary them if he found that specified conditions had been met. Those legislative actions were upheld despite their conditional character. The two exceptions are, first, that Congress did not set forth standards for the congressional committees' exercise of the releasing authority that it granted; and, second, that a part of the legislature, rather than the executive, determined whether or not the conditions had been met. If the lack of adequate standards threatened public interests as, for example, it seems to do for legislative vetoes of agency rulemaking,[102] that would provide a basis for distinction. "Delegation" has continued bite in that context. But an exceptional measure for freeing the executive branch to spend funds within general appropriation limits for purposes not otherwise authorized is hard to characterize as presenting such a threat *to the public*; its internal implications, as already suggested, are at the least a function of context. That a congressional committee, rather than the President or some agency, determines whether the conditions have been satisfied, similarly, seems important for some contexts but unexceptionable in the world of continuing executive-legislative interaction that characterizes the budget process. In such a continuing relationship, limiting one participant to episodic, formal, even clumsy acts is likely to produce rigidity and a covetousness about power that will hamper the effective conduct of government and may weaken the presidency far more than the alternative. The same is true for reorganization acts; in a government premised on the selection of a single executive as its head, it is internally sensible and externally non-threatening for the President to be the prime shaper of the internal structures of government, subject to congressional disapproval.

Obviously, there could be disagreements about particular measures, but the general utility of the New Jersey court's approach seems evident. One wishes the Court had limited itself to the particular measures before it, or that it or Justice White had shown some sensitivity in addressing the variety of settings in which legislative vetoes might be employed. In the three cases it had to decide, the Court reached a sound result: Congress has no business determining that the individual circumstances of a particular alien warrant his deportation; and in the regulatory rulemaking context, especially as it concerns the independent regulatory commissions, the legislative veto does seem to exclude the President rather than mediate a continuing dialogue between the

102. *See supra* notes 78-87 and accompanying text.

President and the Congress. Yet for the cases it did not have to decide, but seemed to Justice White's premises seem stronger than the majority's.[103]

VI. Conclusion

The argument that a legislative veto can be the functional equivalent of "normal" constitutional processes—or, perhaps more properly, works no threatening rearrangement of initiative and authority—is persuasive for the settings in which the device was earliest and most commonly used:

— where the President himself takes or directs the action subject to the legislative veto;

— where the subject matter principally concerns the internal arrangements of government rather than rules of conduct applicable to the public, and judicial consideration at any stage is unlikely;

— where both the President and Congress have an important interest in the subject matter of the action to be taken, and congressional participation through the veto may prompt less grudging recognition of the President's participation and/or a sense of moral commitment to provide fiscal or other support for the resulting arrangements.

The argument is far less persuasive, however, in the regulatory setting, where, on the other hand:

— the President ordinarily is not a direct participant, and may even be excluded from direct participation;

— judgments affecting individual interests or obligations are to be made, and judicial review of agency action is readily available;

— permitting use of the legislative veto may tempt Congress to believe that it can easily correct the excesses of a careless formula governing the obligations of the public, and correct them without the need to articulate a fresh or limiting principle; and

— the justification offered for use of the veto is framed not in terms of political accommodation between a Congress and President,

103. It is disappointing that, while Justice White deplores the majority's failure to find a middle ground and makes several intriguing suggestions for future development, he himself takes an apparently uncompromising position. Perhaps Justice White's most intriguing suggestion is for a statutory direction to courts to regard legislative resolutions of disapproval as relevant legislative history. *Chadha*, 103 S. Ct. at 2796 n.11. The new Model State Administrative Procedure Act embodies a provision of this character as a substitute for legislative veto; adoption of the legislative resolution deprives the agency action of any presumption of validity, requiring the agency affirmatively to demonstrate its authority for the measure adopted. *See* Model State Administrative Procedure Act §§ 3-203, 3-204 and Commissioner's Comments, 14 U.L.A. 97-101 (Supp. 1983).

both interested in the premises, but only in terms of Congress' performance of its own legislative function.

Neither the majority opinion nor Justice White's dissent seem to leave much room for accommodations of this character. Perhaps the Court's opinion will, over the years, be confined to its facts. In the late 1920's, the Court heard argument and then reargument in a much publicized dispute over the President's right to fire a postmaster without senatorial approval. A divided Court, in lengthy and seemingly categorical opinions, upheld the President's authority on sharply stated separation of powers grounds.[104] Many sensible arrangements of government, most notably, the fixed term of office given some officers, such as regulatory commissioners, seemed to have been called into question. Ten years had not passed before a unanimous Court easily found its way to the conclusion that, that decision notwithstanding, Congress *could* provide protected terms of office for regulatory commissioners.[105] One may hope for a similar outcome here.

Looking back at the majority opinion to see how that might be achieved, one must begin with some pessimism as to whether the opportunity will soon arise. As the popular press reported, and Justices Powell and White decried, the majority seems bent on eliminating the legislative veto device in all its forms. The formal approach the majority took does not readily yield to the functional distinctions here suggested.[106] The strength of the Court's language will discourage challenges. Perhaps more important, the political settings for which use of the legislative veto seems most justified seem also to be the least likely to produce sustainable litigation.[107] Thus, future judicial opportunities to examine these issues seem likely to be infrequent at best.

104. Myers v. United States, 272 U.S. 52 (1926).

105. Humphrey's Ex'r v. United States, 295 U.S. 602, 626-30 (1935). *Humphrey's Ex'r* employed a highly formalistic analysis, highly misleading in my view and since displaced by the reasoning in *Buckley*, 424 U.S. 1, 118-43 (1976). The result, however, was plainly the right one.

106. Those distinctions do not, in my view, deny meaning to the requirements of bicameralism and presentment for the enactment of laws. The problem, again, is whether to regard the exercise of a legislative veto as the enactment of law. The burden of the preceding discussion is that, first, there is no necessary reason to do so and, second, that there is good reason not to do so. Some vetoes adequately preserve the President's role while also serving proper congressional interests and, most importantly, equally serving citizens' interests in enjoying a government of adequate strength and flexibility which yet tends to be held in check by the natural and continuing competition for political authority among its parts.

107. Reorganization, the exercise of authorities subject to the War Powers Resolution, 87 Stat. 555, 556-57 (1973) (codified at 50 U.S.C. § 1544 (1976)), impoundment, *see, e.g.*, Congressional Budget and Impoundment Control Act of 1974, 88 Stat. 297, 334-35 (1974) (codified at 31 U.S.C. § 1403 (1976)), and the like will not, in my judgment, often produce justiciable controversies between parties with standing to seek their resolution. *Cf.* American Fed'n of Gov't Employees v. Pierce, 697 F.2d 303, 305 (D.C. Cir. 1982) (Congressman did not have standing as legislator, but did have standing as member of House Appropriations Committee).

If opportunities for reconsideration do occur, perhaps the most likely verbal hook for the accomplishment of modification is to be found in the majority's stress on "altering legal rights" as the test for determining whether challenged action is "legislative" or not. For the reasons already suggested, that inquiry does not make much sense as a means of determining "legislative" character. If it could be understood in slightly different terms, however, it could provide the basis for a distinction like that suggested above. As framed ("altering the legal rights, duties and relations of persons . . . outside the legislative branch") it seems to extend to the political, largely infra-governmental uses of the legislative veto as well as to those that directly affect citizens. The President is a person, as are the other actors in cabinet departments and government agencies whose "legal rights, duties and relations" might be affected by legislative veto of a proposed reorganization or impoundment. It would take rather little readjustment in language, however, and perhaps none in meaning, to read the test as forbidding legislative vetoes only of those sorts of government action that have as their principal purpose and effect "altering the legal rights, duties and relations of persons" *outside government*. The altered test still could not be viewed as a measure of what is or is not "legislative"; but that is not the issue. The results of such an approach, overall, would be a far more satisfactory rendering of the conjoined purposes of governmental flexibility, role dispersal, and citizen protection that characterize our Constitution.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 28, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Draft State Department Q & A's on Legislative Veto

OMB is in the process of clearing State Department Q & A's on legislative veto, and has asked for the views of Justice, Defense, and NSC by noon August 1. The Q & A's review all of the major statutes in the area of foreign affairs containing legislative vetoes (War Powers Resolution, Foreign Assistance Act, Arms Export Control Act, Nuclear Non-Proliferation Act, Atomic Energy Act, Jackson-Vanik Amendment) and concludes with respect to each that the legislative veto is unconstitutional and severable. The President's powers and the report and wait provisions thus survive. The draft answers stress the executive branch's commitment to close consultation with Congress in developing and implementing a bipartisan foreign policy. The answers also oppose the various proposals that have been advanced to bar executive actions in the absence of affirmative Congressional authorizations as a substitute for legislative vetoes.

The Q & A's on sections 669 and 670 of the Foreign Assistance Act note that prior to the 1981 amendments, the statute provided for a joint resolution veto of Presidential waivers. The 1981 amendments substituted concurrent resolution vetoes. The draft answer states: "Since the 1981 change is not valid, it is my view that the joint resolution veto provision is reinstated."

This is absurd. The judicial invalidation of amendments by no means operates to resurrect those provisions repealed by the amendments. If the law specifies A, Congress repeals A and substitutes B, and B is declared unconstitutional, A is not suddenly the law once again. It has been repealed and can only become law by re-enactment.

Congress can overturn a Presidential waiver under section 669 or 670 by a joint resolution, but recognition of that fact is far different from saying that the pre-1981 "joint resolution veto provision is reinstated." I would strike the last sentence of these draft answers and substitute the following: "If Congress strongly disagrees with a Presidential waiver it can always attempt to overturn it through a joint resolution."

THE WHITE HOUSE

WASHINGTON

July 28, 1983

MEMORANDUM FOR RONALD PETERSON
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Clearance of Department of State Draft
Q & A's Concerning Legislative Veto

Counsel's Office has reviewed the proposed State Department Q & A's on legislative vetoes, and objects to the draft answers to questions on sections 669 and 670 of the Foreign Assistance Act. The draft answers note that prior to 1981, these sections provided for a joint resolution veto of Presidential waivers. The 1981 amendments substituted concurrent resolution vetoes invalid under Chadha. The last sentence of both draft answers states: "Since the 1981 change is not valid, it is my view that the joint resolution veto provision is reinstated."

There is no legal support for the proposition that the judicial invalidation of an enacted amendment operates to resurrect the provision repealed by the amendment. In no sense are the joint resolution veto provisions of sections 669 and 670 "reinstated" by the invalidation of the concurrent resolution veto provisions substituted for them in 1981. We recommend striking the last sentence of both of these answers and substituting the following, or something like it: "If Congress strongly disagrees with a Presidential waiver it can always attempt to overturn it through a joint resolution."

cc: Theodore B. Olson

FFF:JGR:aw 7/28/83

cc: FFFielding
JGRoberts
Subj.
Chron