

# 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<sup>1</sup> attracted headlines and public commentary rarely experienced by the Court. Written following what was evidently a difficult internal process,<sup>2</sup> the Chief Justice's majority opinion in the principal case, *Immigration and Naturalization Service v. Chadha*,<sup>3</sup> 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,<sup>4</sup> as well as by

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\*\* 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*.<sup>5</sup> The immediate and pained response of Congress<sup>6</sup> 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.<sup>7</sup> 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

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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.<sup>8</sup>

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

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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<sup>9</sup>—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.<sup>10</sup> That section defines the factors that must be present to support such a

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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. ROSENFELD, *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

finding, but under that section the immigration judge's conclusion that they are present does not end matters.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

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.

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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,<sup>14</sup> 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.<sup>15</sup> 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,"<sup>16</sup> 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."<sup>17</sup> 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

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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)).

branch;”<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> Where stat-

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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,<sup>21</sup> or to cooperate with an investigation by congressional functionaries,<sup>22</sup> 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,"<sup>23</sup> is insufficient.<sup>24</sup> 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<sup>25</sup>—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.<sup>26</sup> 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. 1, § 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.<sup>27</sup> Although, “to be sure, . . . rulemaking . . . may resemble ‘lawmaking,’ ”<sup>28</sup>—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*<sup>29</sup>: “The President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”<sup>30</sup> 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.<sup>31</sup> 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-

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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.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup>

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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 retroac-

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.<sup>37</sup> 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.<sup>38</sup> 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 attainer 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.<sup>39</sup> 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,<sup>40</sup> 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.<sup>41</sup> But the Court did not for that reason find it to be legislative.<sup>42</sup>

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tively established; significant procedural protections are required, however, in administrative process for deciding whether an individual is in the described group).

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.<sup>43</sup> 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."<sup>44</sup> 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*,<sup>45</sup> 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.<sup>46</sup> 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

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§§ 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.<sup>47</sup> 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.<sup>48</sup>

### 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,"<sup>49</sup> in reaching the con-

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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,<sup>50</sup> 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;<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup>

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."<sup>54</sup> It is the denying character-

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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;<sup>55</sup> and the deportation context, rightly or wrongly, has long been viewed as involving regulation rather than punishment.<sup>56</sup> 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,"<sup>57</sup> 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.<sup>58</sup> 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

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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.<sup>59</sup> 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,<sup>60</sup> 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<sup>61</sup> 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.<sup>62</sup>

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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 cataloging 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*

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.<sup>63</sup>

For Justice White, the legislative veto "has become a central means by which Congress secures the accountability of executive and independent agencies"<sup>64</sup>—"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."<sup>65</sup> In light of the relatively limited use of the device to date, one wonders if he does not overstate the case.<sup>66</sup> 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."<sup>67</sup> Withdrawals of federal lands,<sup>68</sup> international agreements and tariffs, pay adjustments, war powers, national emergency legislation, and the impoundment issue

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*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.").

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"<sup>69</sup>) 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*<sup>70</sup> that the power of government is at its peak when the President and Congress work supportively of each other's authority.<sup>71</sup> 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.<sup>72</sup>

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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,"<sup>73</sup> 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,"<sup>74</sup> 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.<sup>75</sup>

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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.<sup>76</sup> 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 lawmaker 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;<sup>77</sup> it then serves the same function as the President does respecting the legislation Congress *does* en-

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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;<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup> The latter involves the assertion of a right to act without finality in a manner likely

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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."<sup>81</sup> 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.<sup>82</sup> 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.<sup>83</sup> 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.<sup>84</sup> The threat of their exercise may also en-

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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

hance 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"<sup>85</sup> against the Imperial Presidency.<sup>86</sup> 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.<sup>87</sup>

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.<sup>88</sup> 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

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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,<sup>89</sup> 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.<sup>90</sup> 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.<sup>91</sup> 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*,<sup>92</sup> 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

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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.”<sup>93</sup> 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<sup>94</sup> 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<sup>95</sup>—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 congress-

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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."<sup>96</sup> 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,<sup>97</sup> 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.<sup>98</sup> 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 pro-

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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.

cess,<sup>99</sup> 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,<sup>100</sup> 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.<sup>101</sup> 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.

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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,<sup>102</sup> 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

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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.<sup>103</sup>

## 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,

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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.<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup> 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.<sup>107</sup> Thus, future judicial opportunities to examine these issues seem likely to be infrequent at best.

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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.