A Political Context for Legislative Vetoes

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After debating for the past decade the merits of the war power, executive privilege, impoundment, and other struggles between Congress and the president, along comes another topic of constitutional interest: the "legislative veto." Several hundred statutory provisions currently require the president and executive officials to report administration proposals to Congress, on the understanding that Congress (within a specified number of days) may disapprove the intended action. Another variation is to place upon the administration the burden of obtaining congressional *approval* within the time allowed by statute. Depending on the statute, congressional action may be taken by one or both houses. But whatever the procedure, these legislative actions are not presented to the president for his signature or veto.

The great danger at the present time is the temptation to join one of two rival camps. One choice: the legislative veto is an essential means of controlling the bureaucracy and maintaining representative government. Alternatively: the legislative veto violates the separation of powers doctrine and evades the president's veto power. My contention is that the issue, presented in this manner, is wrongly framed. The legislative veto is not a simple substance, to be disposed of one way or the other. No single constitutional theory can either exonerate it or invalidate it. We confront not an element but many different compounds, some easier to justify legally and politically than others.

Although proponents and opponents of the legislative veto are urging the courts to settle the issue, we cannot expect a neat resolution in this area any more than we could with the war power, executive privilege, or

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impoundment. With good reason, the courts are approaching the controversy over the legislative veto with great circumspection. The U.S. Court of Claims, in upholding a one-house veto incorporated in a federal salary act, remarked:

> We are not to consider, and do not consider, the general question of whether a one-House veto is valid as an abstract proposition, in all instances, across-the-board, or even in most cases. . . . Our consideration must center, then, on this specific mechanism in this specific statute—how it works, what it involves, what values and interests are implicated—not on an overarching attempt to cover the entire problem of the so-called legislative veto, or even a large segment of it.[1]

The same cautious attitude appears in a ruling by an appellate court, after deciding that a one-house veto in a federal elections act was not ripe for judicial consideration:

> Clearly, the question of legislative review of Executive and administrative agency actions is a sweeping subject to be treated in a gingerly fashion by the courts. Review of various legislative review mechanisms ought at an absolute minimum be informed by experience and not depend solely on abstract analysis or speculation.[2]

This essay divides into four sections. The first section discusses legislative vetoes that are attached to delegated authority. Congress consents to the delegation only on the condition that it retains control by a legislative veto. The second section covers the use of legislative vetoes in contested areas, where a power is not exclusively legislative in nature and therefore not subject to delegation. Instead, the legislative veto becomes a procedural device for accommodating the interests of Congress and the president. The last two sections concern legislative vetoes that reach deeply into administrative and adjudicative details, raising serious questions about congressional participation.

Quid Pro Quo for Delegated Authority

The constitutional challenge to the legislative veto draws much of its force from textual interpretations of the Constitution, especially the Presentation Clause. As provided by Article I, Section 7, every order, resolution, or vote "to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment)" must be presented to the president for his signature or veto. A second exception to the Presentation Clause is allowed by Article V, covering amendments to the Constitution. Congress can adopt amendments in the form of resolutions and refer them directly to the states for ratification, without submitting them first to the president for his signature.[3]

[1] *Atkins* v. *United States*, 556 F.2d 1028, 1059 (Ct. Cl. 1977). The Supreme Court denied certiorari on January 9, 1978; 46 U.S.L.W. 3431.

[2] *Clark* v. *Valeo*, 559 F.2d 642, 650 (n. 10) (D.C. Cir. 1977), affirmed by the Supreme Court on June 6, 1977, *sub. nom. Clark* v. *Kimmitt*, 45 U.S.L.W. 3785.

[3] *Hollingsworth* v. *Virginia*, 3 Dall. 378 (1798).

Throughout the nineteenth century, Congress deviated from a strict reading of the Presentation Clause by passing simple resolutions (adopted by either house) and concurrent resolutions (adopted by both houses). Those legislative measures were not presented to the president for his signature or veto. Congress withheld them because they were housekeeping in nature, pertaining to internal congressional operations, and not "legislative in effect." As a Senate report in 1897 observed, if a resolution contained matter "legislative in its character and effect," it had to be presented to the president.[4]

But the legislative effect of such resolutions could be profoundly altered if a public law sanctioned their use. Enabling legislation, signed by the president, elevated the status of these resolutions. Attorney General Cushing stated in 1854 that a simple resolution could not coerce a department head "unless in some particular in which a law, duly enacted, has subjected him to the direct action of each; and in such case it is to be intended, that, by approving the law, the President has consented to the exercise of such coerciveness on the part of either House."[5] This logic applied even to vetoes exercised by individual committees. In 1867, for example, Congress included the following restriction in an appropriation for public buildings and grounds: "To pay for completing the repairs and furnishing the executive mansion, thirty-five thousand dollars: *Provided*, That no further payments shall be made on any accounts for repairs and furnishing the executive mansion until such accounts shall have been submitted to a joint committee of Congress, and approved by such committee."[6]

The committee veto has been the target of repeated criticism by presidents. Yet it is instructive to recall that when constitutional misgivings were first expressed, they were directed not so much to the committee veto but to a particular dollar amount. In 1933 Attorney General Mitchell singled out as unconstitutional a bill that authorized the Joint Committee on Internal Revenue Taxation to make the final decision on any tax refund that exceeded $20,000.[7] Previous legislation, however, had allowed the Joint Committee to decide tax refunds in excess of $75,000. Apparently executive officials had lived with that procedure without objection. It took a dollar threshold to transform an acceptable procedure into unconstitutional "meddling" with executive detail.[8] At what point on the continuum between $75,000 and $20,000 did the constitutional objection emerge? Clearly there is room for judgment here on what Congress can add, in the form of conditional restrictions, to delegated authority.

This mix of constitutional theory and practical judgment is seen most clearly in the dispute over reorganization authority. Franklin D. Roosevelt initially asked for authority to reorganize the executive branch, allowing Congress to

[4] S. Rept. No. 1335, 54th Cong., 2d Sess. 8 (1897).
[5] 6 Ops. Att'y Gen. 680, 683 (1854).
[6] 14 Stat. 569 (1867).
[7] 37 Ops. Att'y Gen. 56 (1933).
[8] See 76 Cong. Rec. 2448 (1933). The Joint Committee now reviews all refunds in excess of $200,000.

disapprove by *joint* resolution (which must be presented to the president for his signature). If Roosevelt had decided to exercise his veto power, members of Congress would have had to find a two-thirds majority in each house to override him. In effect they would have delegated authority by majority vote but could recapture it only with a two-thirds majority. Partly because of that concern, Congress did not enact a reorganization bill in 1938.[9]

The impasse was broken the following year when members of Congress decided to make reorganization plans subject to disapproval by concurrent resolution. They believed that the procedure could be justified by placing the understanding in a public law. To Congressman Edward Cox the concurrent resolution was merely a condition attached to authority delegated to the president. If he objected he could invoke his veto power. Otherwise, by signing the bill, he would express a willingness to abide by the condition.

This reasoning found support in *Currin* v. *Wallace* (1939), which upheld a delegation of authority to the secretary of agriculture to designate tobacco markets. No market could be designated unless two-thirds of the growers, voting in a referendum, favored it.[10] To the House Select Committee on Government Organization it seemed absurd to argue that "the effectiveness of action legislative in character may be conditioned upon a vote of farmers but may not be conditioned on a vote of the two legislative bodies of the Congress."[11] Critics of the legislative veto point out that participation by farmers does not pose the same threat to the separation of powers doctrine as involvement by Congress, but the Reorganization Act of 1939 adopted the concurrent resolution approach, and by 1949 Congress had settled on simple resolutions as the preferred means of disapproving reorganization plans.

Attorney General Bell regards the legislative veto in the Reorganization Act as a permissible exception, and the only exception, to the regular procedure of having Congress pass legislation and present it to the president. All other legislative vetoes, according to his analysis, unconstitutionally trench upon the president's own veto power. Bell justified this single exception because the decision to initiate a reorganization plan remains with the president. The freedom to present a plan is treated as an equivalent to the presidential veto; in each case the decision to exercise power is one for the president alone.[12] The argument seems a bit strained, suggesting that the Justice Department is capable of marshaling whatever evidence is needed to obtain for the president the desired reorganization authority. Congress delegates the authority only on certain conditions; the executive branch accedes to the arrangement. Harvey C.

[9] 83 Cong. Rec. 4487 (1938). See Doyle W. Buckwalter, "The Congressional Concurrent Resolution: A Search for Foreign Policy Influence," 14 *Midwest J. Pol. Sci.* 434, 438–440 (1970), and Donald G. Morgan, *Congress and the Constitution* 189 (1966).

[10] 306 U.S. 1.

[11] H. Rept. No. 120, 76th Cong., 1st Sess. 6 (1939). See 84 Cong. Rec. 2477 (1939).

[12] H. Rept. No. 105, 95th Cong., 1st Sess. 11 (1977).

Mansfield cut through the constitutional bramble by making this astute observation: "There the question has rested, 'no tickee, no washee.' "[13]

The same compromise appears in FDR's willingness to accept a legislative veto in the Lend Lease Act of 1941, despite serious constitutional objections. The political situation, however, did not permit him to voice his criticism. Long-standing enemies in Congress had already opposed the concurrent resolution feature as unconstitutional. To announce his position would associate the president with the wrong group. His Attorney General, Robert H. Jackson, later explained: "To make public his views at that time would confirm and delight his opposition and let down his friends. It might seriously alienate some of his congressional support at a time when he would need to call on it frequently."[14]

The Nixon administration readily accepted a one-house veto as part of the price of obtaining new impoundment authority in 1974. Presidents may now report to Congress on "deferrals" (delays in the spending of funds), subject to disapproval by either house. No constitutional complaint has emerged from the White House. Presidents who want authority delegated to them have to take the conditions that are attached.

A Compromise for Powers in Dispute

Reorganization authority is recognized as essentially a legislative power, to be delegated or withheld as Congress decides. Also, as the U.S. Court of Claims said in *Atkins*, the pay-setting function is basically legislative in character and does not invade administrative responsibilities.[15] The use of the legislative veto in other areas can intrude impermissibly into the president's constitutional responsibilities. The Senate Foreign Relations Committee conceded in 1976 that the legislative veto could not be used to invade areas of "plenary presidential prerogative, such as the pardon power (article II, section 2, clause 1) or the recognition power (article II, section 3). It could not be employed to oversee the finest details of the day-to-day administration of the Federal Government."[16]

In many situations the power in question does not belong exclusively to Congress or the president. Here the legislative veto may serve as an acceptable bridge between different claims of constitutional power advanced by the two branches. The use of a legislative veto is not a condition attached to delegated authority, since the executive branch denies that anything had been delegated, but a legislative veto can provide a procedural link between two rival interpretations.

The difficulty of distinguishing between executive and legislative was painfully

[13] "Reorganizing the Federal Executive Branch: The Limits of Institutionalization," 35 *Law & Contemp. Prob.* 461, 464 (1970).

[14] "A Presidential Legal Opinion," 66 *Harv. L. Rev.* 1353, 1356–1357 (1953).

[15] 556 F.2d 1028, 1068 (Ct. C1. 1977).

[16] S. Rept. No. 605, 94th Cong., 2d Sess. 14 (1976).

evident to the framers. In Federalist 37 James Madison observed that just as naturalists had difficulty in defining the exact line between vegetable life and the animal world, so was it an even greater task to draw the boundary between the departments of government, or "even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science." After the constitutional convention, Madison confided to Jefferson that the boundaries between the executive, legislative, and judicial powers, "though in general so strongly marked in themselves, consist in many instances of mere shades of difference."[17]

Place these doubts in a more contemporary setting. Consider, for example, whether the impoundment power is "administrative" or "legislative." If routine in nature, Congress need not intervene. On the other hand, when programs are being curtailed or abolished, as they were during the Nixon administration, congressional prerogatives are vitally affected. The Senate gave serious consideration to distinguishing between routine and policy types of impoundment, but the Impoundment Control Act of 1974 contains no such distinction. The two types of impoundment are lumped together in the reports submitted by the president. Some impoundments are disposed of by the rescision process (requiring affirmative action by both houses within 45 days), while others follow the deferral process (allowing either house to disapprove).[18]

In the area of the war power, Congress tried to spell out by statute the constitutionally permissible actions of a president. The Senate believed that a distinction could be made between executive and legislative prerogatives; the House felt that any effort to codify the commander in chief powers would be futile and impracticable. Section 2(c) of the War Powers Resolution of 1973 appears to limit the president's exercise of his powers to three situations, but upon closer examination it is evident that the statute does not define his emergency powers. The two houses could not agree on the president's responsibilities under Article II of the Constitution. As a result, Congress fell back on procedural controls, placing great reliance on the passage of a concurrent resolution to force a president to disengage from military operations.

Nixon vetoed the War Powers Resolution, in part because he believed that the concurrent resolution violated the powers granted him under the Constitution. He also concluded that a concurrent resolution, since it evades the president's veto power, does not have the force of law. Depending upon circumstances, the exercise of the legislative veto may indeed encroach upon the president's constitutional powers. The Legal Adviser to the State Department told a House committee in 1975 that if the president has the power to put men into combat "that power could not be taken away by concurrent resolution because the

[17] *Writings of Madison* (Hunt ed.), V, 26.

[18] For one effort to categorize impoundments, see Louis Fisher, *Presidential Spending Power* 147–174 (1975).

power is constitutional in nature."[19] Surely it is too broad a proposition to claim that the president has an unrestricted power to put men into combat, but a strong case can be made for the president's responsibility to defend his armed forces and to protect American lives abroad.

On balance, the legislative veto in the War Powers Resolution is justified. Without it, Congress's own constitutional powers could be gravely impaired. Recall that in 1973 a majority in both houses wanted to bring the war in Southeast Asia to a halt. Each legislative action was countered by a veto. A federal court argued that the failure of Congress to override the vetoes should not be taken as legislative authority to continue the war. Said Judge Judd: "It cannot be the rule that the President needs a vote of only one-third plus one of either House in order to conduct a war, but this would be the consequence of holding that Congress must override a Presidential veto in order to terminate hostilities which it has not authorized."[20] To insist that every legislative action must be presented to the president, and made subject to his veto power, would allow a president to conduct a war with minority backing. No such intention should be read into the Constitution.

Closely related is the use of legislative vetoes for arms sales, such as President Carter's proposal this year to supply military weapons to Egypt, Saudi Arabia, and Israel. The president is required to notify Congress in the case of a "letter of offer" to sell any defense articles or services for $25 million or more. If within 30 days Congress passes a concurrent resolution, objecting to the proposed sale, the letter of offer cannot be issued unless the president certifies the existence of an emergency which would require the sale for U.S. national security interests.[21]

President Ford objected to this type of feature on the ground that it would "seriously obstruct the exercise of the President's constitutional responsibilities for the conduct of foreign affairs."[22] But Congress also has a legitimate role in arms sales. With sales above $10 billion a year, the power of the purse is profoundly affected. Moreover, the drawdown of military supplies has a direct impact on combat readiness and effectiveness, while the infusion of arms into a particular region, such as the Middle East, can tilt the balance of power to the point of war and American involvement. Apparently the Carter administration recognizes that the interest of Congress in arms sales is so intense and fundamental that it is best to work cooperatively with legislators rather than contest the constitutionality of the legislative veto procedure.

Regarding executive agreements, it is difficult to reach a consensus on what a

[19] *War Powers: A Test of Compliance*, hearings before the House Committee on International Relations, 94th Cong., 1st Sess. 91 (1975).

[20] *Holtzman* v. *Schlesinger*, 361 F.Supp. 555, 565 (E.D. N.Y. 1973), reversed by *Holtzman* v. *Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), after stays by the Supreme Court, 414 U.S. 1304, 1321 (1973).

[21] P.L. 94-329, 90 Stat. 740-743.

[22] *Wkly Comp. Pres. Doc.*, XII, 828 (May 7, 1976). See also his statement of July 1, 1976, while signing H.R. 13680; *id.* at XII, 1104.

president may do pursuant to constitutional powers. Even the settlement of claims, endorsed by the *Belmont* and *Pink* cases, is subject to disagreement today among scholars.[23] A bill introduced in the House of Representatives in 1975 did not try to codify presidential powers to enter into executive agreements. Instead, the bill focused generally on national commitments regarding the introduction, basing, or deployment of armed forces on foreign territory, as well as any military training, equipment, or financial or material resources provided to a foreign country. Such commitments would be subject to a 60-day waiting period, during which time Congress could disapprove the commitments by passing a concurrent resolution.[24]

The approach in these areas has been to leave the arena for presidential operation somewhat nebulous, because of conceptual and philosophical disagreements, while subjecting executive actions to congressional disapproval. This solution narrows, but does not eliminate, the opportunity for conflict between the two branches. Even though a legislative veto has the backing of public law, an administration may conclude, in a particular instance, that Congress has reached too far into the executive domain. In such confrontations it may not be possible for Congress to curb the president simply by passing a one-house or two-house veto. A lengthy and acrimonious political battle may result, in some cases requiring judicial intervention. An outcome of this magnitude would not discredit the legislative veto. It would merely clarify, or at least highlight, the parts of the terrain that remain in sharp dispute. In the majority of cases the legislative veto can serve as an acceptable compromise for both branches.

Integrity of the Administrative Process

Bills are currently under consideration to make all departmental regulations subject to legislative veto. While it could be argued that the authority to issue rules is delegated by Congress (and therefore vulnerable to whatever conditions Congress attaches), and that rule-making is a mix of legislative and executive qualities, the use of this type of legislative veto involves members too deeply in administrative matters. The problems are of both a constitutional and policy nature.

The framers established a separate executive branch in large part for reasons of administrative efficiency. For a decade the framers had watched the Continental Congress struggle fitfully with its legislative duties while at the same time tending to administrative and adjudicatory matters. Several years prior to the Philadelphia Convention, before the creation of three separate branches, the national government had already begun to establish separate executive and judicial bodies. The

[23] *United States* v. *Belmont*, 301 U.S. 324 (1937) and *United States* v. *Pink*, 315 U.S. 203 (1942). See Louis Fisher, *The Constitution Between Friends: Congress, the President, and the Law* 204–213 (1978).

[24] H.R. 4438; 121 Cong. Rec. H1451–1452 (daily ed. March 6, 1975).

experiment with single executives in 1781 laid the foundation for the executive departments established in 1789.

This quest for administrative efficiency need not lead to the strict partitioning of functions advocated by Woodrow Wilson. In one of his veto messages he counseled: "The Congress and the Executive should function within their respective spheres. Otherwise, efficient and responsible management will be impossible and progress impeded by wasteful forces of disorganization and obstruction." While he admitted that Congress had the power to grant or deny an appropriation, or to enact or refuse to enact a law, "once an appropriation is made or a law is passed the appropriation should be administered or the law executed by the executive branch of the Government."[25] This remark came from the days when students of government tried, unsuccessfully, to separate administration from politics.

Congress has the right to oversee the laws that are passed and the regulations that are promulgated. The rapid growth of administrative legislation prompted Congress, in the Legislative Reorganization Act of 1946, to make its celebrated plea that each standing committee exercise "continuous watchfulness" over the execution of laws. We may forget some of the concern that gave rise to that phrase. Senator Robert LaFollette told his colleagues that when Congress "yields up that rulemaking power and delegates it to an executive agency, it is part of the responsibility of Congress to keep informed as to whether the power is being exercised as it intended it should be."[26]

In the same year that Congress rededicated itself to legislative oversight, it passed the Administrative Procedure Act. The purpose was to create an administrative process that would best guarantee, to the degree possible in a political world, the availability of full information and facts needed for fair and intelligent rule-making. Major requirements include adequate notice to the parties concerned, an opportunity for interested persons to participate in rule-making by submitting material, publication of the rule not less than 30 days prior to its effective date, and a right to review by the courts. Because of the complexity of modern legislation, it may take agencies years to develop a suitable hearing record before issuing a regulation. The Federal Trade Commission estimated that one of its rules was the subject of four years of study and produced a public record of some 30,000 pages.[27] Some records run 100,000 pages and more.[28]

How will this process be affected by subjecting the thousands of regulations promulgated each year to legislative veto? Congress does not have the staff, expertise, time, or interest to review all of the rules and regulations. More is involved than simply reading a regulation, in itself a demanding assignment.

[25] James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents*, XVII, 8846 (1925).

[26] 92 Cong. Rec. 6446 (1946).

[27] *Congressional Review of Administrative Rulemaking*, hearings before the House Committee on the Judiciary, 94th Cong., 1st Sess. 465 (1975).

[28] *Oversight—Rulemaking Activities of the Federal Trade Commission*, hearings before the House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess. 57 (1977).

To judge the fairness and reasonableness of a regulation, members and their staffs would have to study the entire hearing record that supports the regulation. There is no evidence that Congress is prepared to do that. Congressman Walter Flowers has told his colleagues that there would not be a "rerun or a rehash of all of the intricate rule-making hearings and consideration that we have in the agencies. Congress is clearly not set up to do that; have no fear of that."[29] But if Congress does not examine the hearing record, and does not intend to conduct an independent study, on what would it base a decision to disapprove a regulation—on hunches and political pressures? The door would be wide open for lobbying by special interests. Information is already available to suggest the pattern: agency-subcommittee negotiation in private, with heavy influence by staffs.[30]

By disapproving a regulation Congress might add substantively to the legislative history of an act. Statements on the floor or in committee reports, as part of the process of overturning a regulation, would supplement everything that had preceded the public law. In this way Congress could selectively "amend" an act without allowing the president to participate. The temptation to express new intent, in light of public responses to agency regulations, will be strong.

Part of the criticism directed at the rules promulgated by the Environmental Protection Agency reflects a shift in public and congressional attitudes. While EPA has been trying to carry out legislation enacted at the height of the environmental movement, the commitment to environmental protection has lost ground to competing social and economic concerns (yet to be incorporated into law). Members of Congress will be hard-pressed to isolate a rule from the political values operating at the moment. Antonin Scalia, former Assistant Attorney General, has stated the case vividly: "What is likely, I fear, is that we will be forced to cross the ever-shifting sands of a congressional intent defined by separate and successive Houses of Congress as they see fit. It will be a confusing and never ending process of retouching legislative history."[31]

The use of legislative vetoes to second-guess regulations will most likely encourage Congress to legislate with even fewer guidelines. Defenders of vague delegations can always argue that Congress will be in a position at some later date to review regulations and see that they square with congressional intent. Yet if a statute is vague, and if the legislative history supplies inadequate or conflicting directives, who can say when an agency departs from the legislative purpose? The climate would be ripe for arbitrary, piecemeal, covert, and uninformed implementation of a statute. If Congress believes that agencies are violating legislative intent, it ought to draft statutes in more explicit language or adopt clarifying amendments.

[29] 122 Cong. Rec. H10673 (daily ed. Sept. 21, 1976).

[30] Harold H. Bruff and Ernest Gellhorn, "Congressional Control of Administrative Regulation: A Study of Legislative Vetoes," 90 *Harv. L. Rev.* 1369 (1977).

[31] *Congressional Review of Administrative Rulemaking*, hearings before the House Committee on the Judiciary, 94th Cong., 1st Sess. 375 (1975).

There are situations in which the legislative veto can be applied selectively to agencies that cry out for special attention. The General Services Administration provides an instructive case. In 1974, when it appeared that GSA might improperly dispose of President Nixon's tape recordings and other materials, Congress passed legislation to subject regulations issued by the Administrator of General Services to a one-house veto. In 1977 the Supreme Court offered this judgment on the legality of the statute: "Whatever are the future possibilities for constitutional conflict in the promulgation of regulations respecting public access to particular documents, nothing in the Act renders it unduly disruptive of the Executive Branch and, therefore, unconstitutional on its face."[32] The Court concluded that Nixon, who complained of being singled out for special treatment, constituted "a legitimate class of one" in view of his resignation, his acceptance of a pardon for offenses committed while in office, and the judgment of Congress that he was an unreliable custodian of his papers.[33] The extraordinary circumstances justified the use of a legislative veto to monitor GSA regulations.

In other situations, Congress can resort to the regular legislative process. Members of Congress have demonstrated that they can act rapidly to disapprove an agency regulation. On May 9, 1977 the Department of Housing and Urban Development released a regulation that created an uproar in Congress. The purpose of the regulation was to define the family groups eligible for public housing. HUD defined "stable family relationships" broadly to include unmarried couples, but because of ambiguities the definition could also cover homosexual couples—a result HUD did not intend. On June 15, 1977, the House voted to nullify the regulation. Shortly thereafter the House amendment became law.[34] Also, through an informal process, agencies will withdraw and revise regulations that have been criticized by review committees.

Congress as Adjudicator: Deportation Cases

When the Court of Claims upheld the use of a legislative veto for federal salaries, it noted that the pay-setting function "embodies no substantial element of, or incursion into, the administration, enforcement, or execution of the laws."[35] Quite different is the role that Congress has carved out for itself in the handling of deportation cases.

Section 244 of the Immigration and Nationality Act of 1952 authorizes the attorney general to suspend deportation of aliens and to adjust their status to that of an alien lawfully admitted for permanent residence. Congress may disapprove a suspension by a one-house veto. During the session of the Congress

[32] *Nixon* v. *Administrator of General Services*, 45 U.S.L.W. 4917, 4922 (June 28, 1977).

[33] *Id.* at 4930.

[34] 123 Cong. Rec. H5931–5932 (daily ed. June 15, 1977); P.L. 95–119, 91 Stat. 1089, sec. 408 (1977).

[35] 556 F.2d 1028, 1068 (Ct. Cl. 1977).

at which a case is reported, or prior to the close of the following session, either house may pass a resolution stating that it does not favor the suspension of a deportation. The attorney general shall then deport the alien or authorize the alien's voluntary departure at the alien's expense. Since 1952 Congress has exercised this one-house veto on at least thirteen occasions. Sometimes a resolution of disapproval includes one or two names; the number has been as large as seventy.

The constitutionality of this procedure is now in the courts. The specific issue involves Jagdish Rai Chadha, born and raised in Kenya but of East Indian race. Admitted to the United States as a student in 1966, he received a B.S. in business administration in 1970 and a master's degree in political science and economics a year later. At that point he discovered that neither Kenya nor the United Kingdom would admit him as a permanent resident because of immigration restrictions in those countries on persons of his race.[36]

When Chadha's visa expired in 1972, he requested a suspension of deportation. On the basis of documents and affidavits he supplied to the Immigration and Naturalization Service, and findings of fact that indicated "extreme hardship" for him were he deported, an immigration judge in 1974 granted the application for suspension. The attorney general transmitted to Congress the name of Chadha, along with others, complete with a detailed explanation justifying suspension.

The contrast between executive and legislative procedures, in this matter, could hardly be more pronounced. The INS established an adversary hearing procedure, with an opportunity for cross-examination. The attorney general is required by statute to report to Congress a complete and detailed statement of the facts and pertinent provision of law in suspension cases, giving the reasons for each suspension. Executive officials are expected to satisfy the requirements of due process.

Not so with Congress. On December 16, 1975 the House of Representatives passed a resolution disapproving six suspensions, including that of Jagdish Rai Chadha. Since the Judiciary Committee had been discharged from further consideration of the resolution, no report accompanied the resolution to explain the need for legislative action. The House agreed to the resolution without a recorded vote. The sole justification in support of the resolution was a statement that the Judiciary Committee, after a review of 340 deportation cases, decided that six individuals did not meet the statutory requirements, "particularly as it relates to hardship."[37] The record for other House and Senate actions on suspension cases is the same. Reasons are provided neither in the committee report nor during floor consideration.

The one-house veto for deportation cases bears a superficial resemblance to

[36] Details of this case appear in briefs filed in *Chadha* v. *Immigration and Naturalization Service*, No. 77-1702, U.S. Court of Appeals for the Ninth Circuit.

[37] 121 Cong. Rec. H12609 (daily ed. Dec. 16, 1975).

private immigration bills. Certainly Congress has, over the years, reserved for itself a special right of "dispensation" in these matters, but there the similarity ends. Private bills follow the regular legislative course. The initial burden is on Congress to build a record to justify the legislation. Members of Congress call upon the INS and the State Department to review private immigration bills. If the committee report accompanying a bill shows that an executive agency advises against it, that may be enough cause for any two representatives (including the "official objectors" appointed to review these bills) to send the bill back to committee. More important, private bills are presented to the president for a possible veto.

Conclusions

In adopting political reforms, Jefferson advised that the patch should be commensurate with the hole. The use of legislative vetoes to control all departmental regulations is not a good fit. Members of Congress, testifying in support of this legislation, emphasize how strongly their constituents resent government involvement in their daily lives. Constituents object to "redtape" and "overregulation." If that is the complaint, if such sentiments lie behind the drive for rule-making reform, relief will not come from legislative vetoes. The appropriate response would be smaller government, fewer statutes, and less regulation, but there is little indication that members of Congress (or their constituents) want to move in that direction.

For other objects, however, the legislative veto can serve a useful purpose. There are some who fear that Congress cannot use this oversight tool selectively, that in time the legislative veto will be used indiscriminately across the entire range of government activity. But legislators, like the rest of us, are limited by a 24-hour day and will circumscribe their activities. We did not think it responsible a few years ago to argue that the president's power to impound funds, withhold information, enter into executive agreements, and engage in other activities should be totally abolished, for otherwise he would use those prerogatives in unlimited fashion. Both Congress and the president have tried to reconcile the needs of administrative flexibility with legislative control. The legislative veto, kept within bounds, is one of a number of instruments available for that purpose.

Looking back on our handling of some central executive-legislative conflicts of the past decade, we can see how fashionable it was to stake out a position on the periphery. By occupying ground on the fringe area, and polarizing each issue, protagonists ignored a vast tract of fertile land in the middle. The questions were extravagant and impractical. Does the war power belong to Congress or to the president? Is executive privilege an inherent power, absolute in its application, or a "myth"? Can presidents impound funds at will or may Congress dictate how funds are to be spent? What factors ushered in "presidential government"? What augurs now for "Congressional government"?

Rarely does an issue between Congress and the president present itself in such stark fashion. After much compromise and accommodation, the political process gives ground to deliver novel solutions for sharing power and responsibility. We can expect the same kind of pragmatic approach to the legislative veto.*

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