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MM-98-143

United States Senate
COMMITTEE ON FOREIGN RELATIONS
WASHINGTON, D.C. 20510

July 25, 1983

MEMORANDUM

TO: All Members

THROUGH: Ed Sanders and Jerry Christianson

FROM: Fred Tipson

SUBJECT: Supreme Court Decision on the Legislative Veto

This memorandum is an impact assessment of the Supreme Court's June 23 decision on the legislative veto issue: Immigration and Naturalization Service vs. Chadha et al. It is intended as background to a series of hearings on the impact of the decision in three key areas of Committee jurisdiction: war powers, arms sales and nuclear non-proliferation. The following points are made:

--The Court clearly intended to strike down all forms of the legislative veto and used broad reasoning to do so;

--While there might be some long-term possibility of salvaging the veto mechanism for such areas as war powers, the prospects are not encouraging;

--The decision offers little practical guidance as to what remains of the statutes containing concurrent resolution veto provisions (the so-called "severability issue") and its suggested criteria of "Congressional intent" and "workability" are difficult to apply; the consequence is likely to be that all affected statutes will stand, minus only the narrowest excising of the veto provisions;

--The principal statutes affected under Foreign Relations Committee jurisdiction are the following (with the number of veto provisions indicated):

War Powers Resolution (1)
Arms Export Control Act (4)
Foreign Assistance Act (4)
Nuclear Non-Proliferation (6)

--The veto provisions in each of these four statutes would appear to be "severable", although in some cases it is arguable that the Presidential waiver provisions involved should be severed along with the Congressional vetoes;

--No simple legislative "fix" is available to remedy the situation, and the range of remedial alternatives should be considered in light of the objectives sought by each of the statutes in question;

--The prospects for enactment of remedial proposals in the short term are not good, given the difficulty in developing Congressional consensus and the probable need to override Presidential vetoes.

Scope of the Decision

The Supreme Court majority deliberately reached out from the particular facts of the Chadha case to strike down the legislative veto mechanism in general. The reasoning of the six Justice majority was broad and emphatic. The fact that the Court singled out a case which, from Congress' point of view, was clearly a "worst case" example of the veto procedure, only confirms the determination of the justices to resolve this question in its broadest dimension. (Many of the Court's most historic decisions have been taken on fact situations which exaggerate the evils which the Court seeks to correct.)

On July 6, the Court gave additional confirmation of the breadth of the Chadha decision, citing it to justify its affirmance of two lower court decisions, one of which invalidated a concurrent resolution (two-House) veto provision. Both cases were provisions for legislative vetoes of agency rulemaking, a one-House veto of natural gas pricing regulations by the Federal Energy Regulatory Commission and a two-House veto of Federal Trade Commision rules on used cars.

In the long run, the Supreme Court might conceivably be brought to reconsider the sweeping breadth of its decision. In particular, the Court did not address arguments that the constitutional as well as practical justifications for a concurrent resolution veto procedure are different in foreign affairs. In the War Powers area, for example, the question is not one of Congressional delegation of authority to the President, but rather of joint decision-making by the two branches, both of which possess constitutionally-recognized, but overlapping authorities. Despite the Court's sweeping decision, Congress might wish to preserve the argument that the Chadha reasoning does not entirely cover the war powers area. (Further discussion of this point appears below.)

Nevertheless, for all practical purposes in the foreseeable future, the vitality has been removed from any provision which purports to give legal significance to an action by Congress other than by statute or joint resolution.

Severability Problem

The decision leaves in its wake some serious questions regarding the statutes which presently contain the now-invalidated veto provisions. What is left of a statute whose legislative veto has been removed? Are there sections of the statute which survive, or is the veto provision so integral to the statutory framework that the entire scheme falls with it? (Justice Rehnquist argued in vain in his dissenting opinion that the veto in Chadha was not severable from the authority being granted.)

Some statutes -- the War Powers Resolution, for example -- contain so-called "severability" or "separability" clauses which state the intent of Congress that the remainder of a statute should survive the elimination of any particular part of it. Such provisions do not necessarily resolve the question of severability, because the issue is often as much a matter of workability as of intent. Conversely, the absence of a severability clause is not conclusive either. The Supreme Court has stated on several occasions that statutes should be construed, if at all possible, to preserve the remaining provisions when one provision is declared unconstitutional -- whether or not a severability clause is included.

It is, therefore, necessary in considering the severability question to consider two aspects: the practical consequences of excising the veto clause (whether, in the Court's words, it would be "fully operative" and "workable") and the legislative history of the statute to determine whether Congress intended the provision to operate as an inseparable part of the underlying statute. Anyone who has confronted the difficulties in determining "Congressional intent" will understand the problems involved. The determination is really a choice between viewing the underlying statute as a delegation or a prohibition. Did Congress mean to say "yes, you may do it, but we also want a chance to take away your authority in particular cases", or did it mean to say "no, you may not do it unless we confirm that your authority exists in particular cases?"

If the veto provision is not severable and the entire statute falls with it, what is the situation with respect to Presidential authority to conduct the activity in question? Does he have inherent or pre-existing authority to conduct it anyway? For example, if arms sales or nuclear exports were carried forward prior to the enactment of the particular statutes containing the legislative veto provisions, can't the President continue to do so if those statutes are removed from the scene? Such judgments involve constitutional, statutory and historical determinations which go well beyond the simple language of the statutes concerned.

Statutes Affected

The following is a chart summarizing the statutes within the Committee's jurisdiction which contain legislative veto provisions. None of these vetoes, of course, has ever been carried through. The two closest cases were the 1980 vote on nuclear fuel shipments to India's Turapur reactor under the Nuclear Non-Proliferation Act and the 1981 vote on AWACS aircraft to Saudi Arabia under the Arms Export Control Act.

SUMMARY OF FOREIGN RELATIONS STATUTES
AFFECTED BY CHADHA DECISION

TITLE (and Number of Veto Provisions)	Section Number	NATURE OF PROVISION	Waiting Period	Volume and Page Number from Legislation on Foreign Relations
WAR POWERS RESOLUTION (1) (Separability Clause - Section 9)	5(c)	Termination of U.S. Military Involvement in Hostile Situations	None	II-633
ARMS EXPORT CONTROL ACT (4)	3(d)(2)	Prohibition of Arms Transfers by Third Countries		I-193
		NATO et al countries	15	
		Other countries	30	
	36(b)	Letters of Offer for (Government-to-Government) Arms Sales		I-218
		NATO et al countries	15	
		Other countries	30	
	38(c)	Licenses for (Commercial) Arms Exports	30	I-219
	63(a)	Prohibition on Leases or Loans of Arms to Non-NATO et al countries	30	I-231

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TITLE (and Number of Veto Provisions)	Section Number	NATURE OF PROVISION	Waiting Period	Volume and Page Number from Legislation on Foreign Relations
FOREIGN ASSISTANCE ACT (4)	116(b)	Termination of Security Assistance for Human Rights Violations	None	I-31
	617	Termination of Foreign Assistance in General	None	I-134
	669(b)	Prohibition of Assistance to Countries for Unacceptable Nuclear Enrichment Transfers (Symington Amendment)	30	I-182
	670(a)	Prohibition of Assistance to Countries for Unacceptable Nuclear Reprocessing Transfers (Glenn Amendment)	30	I-183
NUCLEAR NON-PROLIFERATION ACT (6)	123(d)	Disapproval of Agreements for Nuclear Cooperation	60	II-471
	126(b)	Export License for Nuclear Materials (Presidential override of NRC)	60	II-476
	128(b)	Export License for Nuclear Materials (Presidential Waiver of Safeguard Requirements) (contains three separate veto opportunities)	60	II-479
	129	Nuclear Export Cutoffs to Nuclear Outlaws (Presidential Waiver)	60	II-480

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TITLE (and Number of Veto Provisions)	Section Number	NATURE OF PROVISION	Waiting Period	Volume and Page Number from Legislation on Foreign Relations
	131 (a)(3)	Exports of Reprocessed Material	60	II-484
	131(f)	Transfers of Reprocessed Materials (two types of veto opportunities)	60	II-486
NATIONAL EMERGENCIES ACT (1)	202	Termination of National Emergencies	None	II-637
SINAI EARLY-WARNING SYSTEM (1)	1	Removal of U.S. Civilians	None	II-650
MIDDLE EAST RESOLUTION OF 1957	6	Termination of Resolution	None	II-642

The principal statutes affected are the first four on the list.

War Powers Resolution

The concurrent resolution veto provision in Section 5(c) of the Resolution is available to be exercised at any time U.S. forces are engaged in hostilities. The legislative history of the resolution leaves little doubt, however, that this feature was meant to be distinct from the other three key provisions of the legislation: the obligations to consult in advance (Section 3), to report (Section 4), and to obtain specific authorization within 60 days (Section 5(b)), for military operations in hostile environments. In fact, the record would indicate that the severability clause (Section 9) was included in anticipation of a possible Supreme Court determination such as the Chadha decision. The remainder of the resolution, in other words, seems clearly to survive the invalidating of the veto provision.

Arguments have been made against this view of severability by some of the original critics of the Resolution. Senator Goldwater, for example, has argued that the effect of Chadha is to strike down the entire resolution, since the principal remaining portion of the statute, the 60-day limitation, is

itself an unconstitutional intrusion on Presidential authority. On the other hand, some of those who originally voted against the resolution as conceding too much authority to the President, such as Senator Eagleton and Congressman Eckardt, have argued that the concurrent resolution veto provision was the only salvation of an otherwise unconstitutional delegation of Congressional prerogatives. They would also argue that the entire resolution falls with the veto.

Finally, there are those, such as former Senator Jacob Javits, who argue that the rationale in the Chadha case does not apply to the war powers area. Elaborating on what I understand to be Javits' basic point, the Chadha decision struck down legislative vetoes where they are used to qualify statutory delegations and inject Congress into decisions which are inherently executive in character. "Delegating with a rubber band" is a phrase which might describe such violations of the separation of powers.

On the other hand, in the area of war powers the issue of delegation is not present. Unlike domestic situations, both the Congress and the President possess clear constitutional powers -- the Congress to declare war and the President as Commander-in-Chief -- neither of which can be delegated or otherwise surrendered to the other. In this situation, the concurrent resolution mechanism is not a violation of the separation of powers but a means for the exercise of overlapping authorities. This argument might be elaborated to apply to other areas of foreign relations as well -- and might even be applied in an area such as impoundment control -- but it is clearest in the case of the war power. (Declarations of war are different creatures from statutes, for example.)

Of course, the practical difficulties in sustaining this argument or of obtaining a narrowing of the opinion by the Supreme Court in the near term are probably insurmountable. With such a sweeping opinion by the Court, confidence in the viability of any procedure employing the concurrent resolution has been completely undercut. Nevertheless, the long-term possibility may justify some efforts to preserve this argument in principle.

Arms Export Control Act

The statutory authority for the President to make arms sales or approve commercial export licenses predated the introduction of the basic 36(b) and 38(c) concurrent resolution veto procedures. The Nelson-Bingham amendment in 1974 established the original concurrent resolution veto procedure. It was subsequently incorporated in a comprehensive revision of the arms export control laws in 1976, which was passed over President Ford's veto that year. But the basic authority of the President to make such sales was recognized in earlier statutes. Therefore, even if it is argued that the lack of a severability clause in the arms export control statutes results in a nullification of the larger statutes themselves, the President would arguably be left with authority to make such

sales. A more likely assessment of "Congressional intent" would preserve the notice and waiting requirements of the revised statutes even if the veto clause does not survive. In short, it would be difficult to overcome what the Supreme Court seemed to indicate is a "presumption" in favor of the severability of such provisions. The other two provisions, relating to third country transfers and to leasing or loans are essentially derivative and would also appear to be severable. (A more detailed discussion of this statute will be presented in the memo for the forthcoming hearing on this issue.)

Foreign Assistance Act

Two of the four provisions for concurrent resolution vetoes added to the Foreign Assistance legislation over the years also appear to be clearly severable: the general provision for terminating assistance by concurrent resolution (Section 617) and the provision for Congressional termination of security assistance on human rights grounds (Section 116(b)).

The remaining two provisions, the so-called Symington and Glenn amendments are in a form similar to that contained in several places in the Nuclear Non-Proliferation Act. That is, they relate to legislative vetoes of Presidential waivers. As in the NNPA, it might be argued that the waiver authority itself was intended to be dependent on the availability of a legislative veto.

Nuclear Non-Proliferation Act

The NNPA is a procedurally complicated overlay on the original framework of the Atomic Energy Act of 1954, as amended over the years. This consolidated legislation contains six to nine legislative veto provisions (depending upon how they are counted since two of them are multi-part provisions.) One of these predated the passage of the NNPA in 1978.

The Atomic Energy Act itself contains a severability clause. However, three of the veto provisions involved (Sections 126, 128 and 129) refer to available Congressional vetoes of possible Presidential waivers. As noted above on the Symington and Glenn amendments to the Foreign Assistance Act, it might be argued that the waiver authority itself would not have been granted without the available controls of a Congressional veto. In severing the veto, therefore, the waiver should also be severed, leaving intact the original prohibitions contained in the law. Needless to say, the Administration's position is that the waiver authority is preserved.

Specific Remedial Alternatives

There is no "quick fix" mechanism appropriate to all the statutes affected by the Chadha decision. In considering possible amendments (or completely new statutes), it seems essential to consider each affected statute on its own terms, keeping in mind the policies behind the legislation and the degree of Congressional control appropriate to each area.

The available options would seem to fall into several broad categories.

1. Do Nothing. This approach would accept whatever reductions in Congressional control result from the removal of a particular veto provision. In most cases, the statutes would still maintain reporting requirements and waiting periods, thereby allowing Congress an opportunity to consider legislative action to overrule or modify proposed actions. Since none of the veto provisions contained in the above statutes has ever been exercised, the existence of the veto provisions was arguably more important symbolically than practically in any event.

In a few cases, such as the legislative vetoes provided to override Presidential waivers of an underlying prohibition, the consequence of severing and invalidating the veto may actually be a tightening of Congressional control.

2. Repeal All Statutes Containing Legislative Vetoes. This approach was suggested by the Clerk of the House of Representatives, Stanley Brand, in his July 19 testimony before the House Foreign Affairs Committee. Brand's basic point is that Congress should not leave behind the authorities provided in statutes containing such provisions now that the control mechanism of the legislative veto is invalidated. His point was apparently as much tactical as substantive -- to encourage a willingness in the Executive branch to accommodate new arrangements for Congressional control.

However, this approach to "restoring the status quo ante," as Brand put it, might actually be counterproductive in the area of foreign affairs. Repealing the statutes concerned might actually leave the President with greater rather than lesser authority because of statutes which predated the ones being repealed, as well as arguments which the President might develop regarding his inherent authority under the Constitution.

3. Substitute a Joint Resolution for the Concurrent Resolution Veto. Such a substitution would be particularly simple to propose and would maintain the basic framework of the original statutes. Where reporting requirements, waiting periods, preclusion of amendments and expedited procedures are already prescribed, the outcome would still be substantially better than relying on the initiation of a legislative override from scratch. Various joint resolution vetoes already exist in the statutes dealing with foreign relations.

Obviously, however, the need to override probable Presidential vetoes of such joint resolutions would result in significantly less control by the Congress of the activity in question.

4. Prohibit the Activity in Question Unless Specifically Authorized. The irony of the Chadha decision is that Congress can generally exercise even greater control than the legislative veto asserts. In most cases, Congress would have the authority to completely prohibit the activities involved and require that departures from such a general prohibition be affirmatively authorized. Reporting requirements, waiting periods and expedited procedures can also be built in to such a framework. Senator Glenn developed such a procedure for the termination of assistance to countries detonating nuclear explosions. Senator Byrd has proposed a similar framework for the arms sales process with regard to very large sales.

5. "Fence in" the Activity with Restrictions on Time, Money, or Geography. Rather than an outright prohibition, Congress can channel the President's authority by legislating restrictive boundaries. The remaining framework of the War Powers Resolution illustrates such an approach, limiting the President's ability to maintain U.S. troops in hostile situations to an initial 60 days, after which specific authorization is required. Arms sales above a certain level might also be prohibited as might nuclear exports to specific countries or regions. So-called "country lists" might be legislated to designate either the countries to whom sales would require authorization or those which would not.

6. Prescribe Affirmative Criteria for Presidential Decision. This approach would provide substantive standards for the President to follow in conducting particular activities.

Critics of the legislative veto have sometimes argued that it provided an excuse for Congress to avoid or postpone decisions as to the underlying policies which should govern a particular foreign policy activity.

The problem with this approach, of course, is the difficulty in drafting it so that the criteria not only make sense, but also are precise enough to be "enforceable" on the executive branch. The difficulties with the El Salvador certification requirement illustrate the problems involved. A longer-standing example is the statutory prohibition on arms sales or assistance to countries who use U.S.-supplied military equipment in other than self-defense.

7. Create or Isolate an Independent Decision-Maker or Agency to Distinguish Certain Kinds of Actions Which Would Require Authorization. This approach would designate an official in the executive branch who would be assigned the function of determining which actions exceed some prescribed threshold or series of thresholds (such as, proliferation dangers, technological sensitivity, regional balances). Actions which exceed such thresholds would then be required to have specific authorization.

There are two difficulties with this approach. The first would be to achieve agreement on the threshold criteria themselves. The second would be the potential constitutional problems in

seeking to insulate an executive branch official from Presidential direction. Such insulation is possible in areas of domestic administration, both in the sense of protecting him from dismissal and of assuring that his determinations are not overruled. However, this has never been done in foreign affairs.

Of course, it would be possible to require the President himself (or one of his "uninsulated" subordinates) to make such determinations, but the confidence of Congress in his objectivity might be low.

Prospects for Enactment

Other than the first option, which requires no Presidential cooperation except a willingness to follow the remaining notice and waiting procedures, it is by no means clear whether any of the options outlined, if applied to reconstruct a particular statute, could be enacted without a Presidential veto. Given the traditional resistance of Presidents to accept major Congressional initiatives in these matters -- evidenced by President Nixon's veto of the War Powers Resolution in 1973, and President Ford's veto of the Arms Export Control Act in 1976 -- it is not clear whether the votes exist to sustain any particular course of action.