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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1. memo	John G. Roberts ro Fred F. Fielding re Legislative Veto Meeting, 1p.	7/12/83	P5 12/14/00

RESTRICTION CODES

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

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

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 28, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Correspondence from Senator Goldwater on Chadha and War Powers Resolution

On July 13 Senator Goldwater wrote Ken Duberstein, enclosing a copy of his remarks from the Congressional Record of July 12. Those remarks questioned the constitutionality of the War Powers Resolution in light of the Chadha decision. The Senator's remarks did not focus on the legislative veto provision in the War Powers Resolution, but more generally suggested that the entire Resolution was invalid on the basis of the general thrust of Chadha, i.e., that each branch should keep to its own turf.

In his letter, Goldwater expressed his hope that his remarks would be directed to the President and to you. Duberstein sent Sherrie a copy for appropriate action; Sherrie referred it to me. I have drafted a response based primarily on Ken Dam's testimony concerning the effect of Chadha on the War Powers Resolution.

Attachment

THE WHITE HOUSE

WASHINGTON

July 28, 1983

Dear Senator Goldwater:

Ken Duberstein has shared your letter of July 13 with me. Along with that letter you provided a copy of your remarks, published in the Congressional Record of July 12, 1983, concerning the War Powers Resolution and the Supreme Court's decision in Immigration and Naturalization Service v. Chadha.

Needless to say, I read your remarks with considerable interest. In the executive branch, an inter-agency working group has been active since the announcement of the Chadha decision, reviewing the various statutes containing legislative vetoes. As you doubtless know, representatives from both the Department of State and the Department of Justice have already testified before Congress on the impact of the Chadha decision. Our main effort, beyond simply evaluating the legal effect of the decision, has been to assure Congress that we have no intention of "exploiting" the decision and will continue to consult closely with Congress concerning activities previously subject to the threat of legislative veto.

Much of the debate and discussion in the wake of the Chadha decision has, of course, concerned the War Powers Resolution. Deputy Secretary of State Kenneth W. Dam has testified before both the House Committee on Foreign Affairs and the Senate Committee on Foreign Relations concerning the effect of Chadha on the Resolution. As Mr. Dam testified, the legislative veto provision of the Resolution -- found at section 5(c) -- is clearly unconstitutional, and severable from the remainder of the statute.

Mr. Dam testified that section 5(b), which purports to require the President to withdraw troops in certain circumstances in the absence of Congressional authorization, does not fall within the scope of the Chadha decision. That section does not contain a legislative veto. As Mr. Dam noted, however, "the Executive Branch has traditionally had questions about this requirement of Congressional authorization for Presidential disposition of our armed forces, both in light of the President's Commander-in-Chief power and on practical grounds." Your suggestion that the broader implications of the analysis in Chadha -- as opposed to its specific treatment of legislative vetoes -- may have a bearing on the War Powers Resolution as a whole is certainly worthy of further consideration.

Thank you for sharing your views on this important subject with us. They will certainly be helpful as we continue to work with Congress in assessing and responding to the Chadha decision.

Sincerely,

Fred F. Fielding
Counsel to the President

The Honorable Barry Goldwater
United States Senate
Washington, D.C. 20510

FFF:JGR:aw 7/29/83

cc: FFFielding
JGRoberts
Subj.
Chron

bcc: Ken Duberstein

THE WHITE HOUSE

WASHINGTON

July 28, 1983

Dear Senator Goldwater:

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Needless to say, I read your remarks with considerable interest. In the executive branch, an inter-agency working group has been active since the announcement of the Chadha decision, reviewing the various statutes containing legislative vetoes. As you doubtless know, representatives from both the Department of State and the Department of Justice have already testified before Congress on the impact of the Chadha decision. Our main effort, beyond simply evaluating the legal effect of the decision, has been to assure Congress that we have no intention of "exploiting" the decision and will continue to consult closely with Congress concerning activities previously subject to the threat of legislative veto.

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Thank you for sharing your views on this important subject with us. They will certainly be helpful as we continue to work with Congress in assessing and responding to the Chadha decision.

Sincerely,

Orig. signed by FFF

Fred F. Fielding
Counsel to the President

The Honorable Barry Goldwater
United States Senate
Washington, D.C. 20510

FFF:JGR:aw 7/29/83

cc: FFFielding
JGRoberts
Subj.
Chron

bcc: Ken Duberstein

July 26, 1983

Dear Senator Goldwater:

Thank you for your note enclosing a copy of your recent remarks regarding the implications of the legislative veto decision for the War Powers Resolution.

I appreciate your contacting me to see that your comments are brought to the attention of the President and his advisers. Rest assured that your statement will be given close attention and review.

With best wishes,

Sincerely,

Kenneth M. Duberstein
Assistant to the President

The Honorable Barry Goldwater
United States Senate
Washington, D.C. 20510

KMD:CMP:dps

cc: w/copy of inc, Bob Kimmitt - FYI

cc: w/copy of inc, Sherrie Cooksey - for appropriate action

BARRY GOLDWATER
ARIZONA

United States Senate

WASHINGTON, D.C. 20510

COMMITTEES:
INTELLIGENCE, CHAIRMAN
ARMED SERVICES
TACTICAL WARFARE, CHAIRMAN
PREPAREDNESS
STRATEGIC AND THEATRE NUCLEAR FORCES
COMMERCE, SCIENCE, AND TRANSPORTAT
COMMUNICATIONS, CHAIRMAN
AVIATION
SCIENCE, TECHNOLOGY, AND SPACE
INDIAN AFFAIRS

July 13, 1983

Mr. Ken Duberstein
Assistant to the President
for Legislative Affairs
The White House
Washington, D.C. 20500

Dear Ken:

Yesterday I told the Senate that the War Powers Resolution is a dead letter under the rule applied by Chief Justice Burger to the legislative veto case. The basic prerogatives of the President are at stake in both subjects.

A copy of my remarks is enclosed and I hope you will bring it to the attention of the President and to the White House Counsel.

With best wishes,

Barry Goldwater

Enclosure

nority leader comports with what I think is the sense of our committee on this matter. That is that the advanced technology bomber funds be programed for these purposes and not for any other system. This is a priority system as far as our committee is concerned. Therefore, I think the amendment certainly comports with the spirit of the bill and the will of the committee as I understand it.

Mr. JACKSON. Mr. President, I concur in the comments of the distinguished chairman of the committee and the distinguished minority leader. The 18(b) program is one of our most important strategic programs. The distinguished minority leader is saying, in effect, that the funds here should be fenced off from any other use for that purpose. I strongly support the amendment and I hope that it will be unanimously approved. I commend the distinguished minority leader.

Mr. BYRD. Mr. President, I thank the distinguished manager of the bill (Mr. TOWER) and the distinguished ranking manager (Mr. JACKSON) for their comments and their support.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment (No. 1458) was agreed to.

Mr. TOWER. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. BYRD. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. TOWER. Mr. President, we have a number of amendments Senators have indicated they intend to offer. I think we have a total now of around 30. I expect that number to grow. The majority leader has already expressed his intention to work late hours, if necessary, and to work through the weekend, if necessary, to complete the bill this week. It is, I know, his intention to do that if at all possible. It is certainly, I think, the desire of the distinguished ranking minority leader (Mr. JACKSON) and myself to complete this bill with as much dispatch as possible. I hope that we shall not have to resort to a weekend session.

I understand that there will be a protracted debate on one or two issues. I expect that might come later in the proceedings, after we have disposed of a number of other matters.

In any case, Mr. President, we have our work cut out for us. I hope Senators will be forthcoming and come over and offer their amendments when they are asked to do so.

We are, of course, running into the usual problem of having a number of amendments, but also a number of Senators who say they are unprepared to offer them this afternoon. I hope we can break through that logjam and get those amendments over here and offered.

It is my intention to try to offer these amendments in a kind of sequence, if the proponents of these amendments would agree to that. Then we could deal with all amendments relating, for example, to technical aircraft procurement or all amendments relative to Army procurement, amendments relative to strategic systems, and deal with them on a categorical basis in an orderly way, so that interested Senators will know at about what point in time amendments in which they have an interest will come up and areas in which they have an interest will be dealt with.

I shall not attempt to do that now, but I hope that, at some point, we can organize our business in that fashion. In the meantime, if Senators are prepared to offer amendments, I shall be delighted to urge or recommend to the Chair that those Senators be recognized.

Seeing none at the moment, Mr. President, I think we can probably get on the telephone and suggest to some Senators that now would be a propitious time to offer them.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. GOLDWATER. Mr. President, I ask unanimous consent that the quorum call be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

WAR POWERS RESOLUTION VOIDED

Mr. GOLDWATER. Mr. President, I wish to take a moment to comment on the Supreme Court's decision, announced on June 23, which held that the so-called legislative veto by congressional resolution is a violation of the separation of powers doctrine of the U.S. Constitution. In particular, I want to address the Court's decision in the context of the war powers resolution which the Congress voted over the President's veto in 1973.

Mr. President, I believe the same reasoning and same constitutional analysis which the Supreme Court applied to the legislative veto will have the effect of invalidating the war powers resolution. That statute itself includes a legislative veto as the very heart of its purported method of enforcement and the resolution is clearly a dead letter to the extent of its reliance on the now-declared unconstitutional legislative veto.

But more than that, Mr. President, the strong six-Justice majority opinion written by Chief Justice Warren Burger indicates that the basic premise of the war powers resolution is unconstitutional. Congress attempts in the war powers resolution to assume unto itself the ultimate and controlling power over the use and deployment of U.S. military forces in defense of the lives, freedoms, and rights of U.S. citizens and our Nation.

This is an invalid action because Congress cannot encroach on a responsibility of the President. Just as the Supreme Court ruled in the legislative veto case that Congress overstepped its authority by invading the constitutional boundaries of the executive branch, so it would have to rule that the war powers resolution exceeds those boundaries if the Court decides to reach the constitutional question on the merits.

Congress cannot usurp the powers vested by the Constitution in the President even if the Chief Executive has assented to the particular piece of legislation which contains a provision contrary to the Constitution. This is the expressly stated ruling of the Court in the case announced last month by Chief Justice Burger, Immigration Service against Chadha.

Of course we know that the President never gave his assent to the war powers resolution. President Nixon vetoed it and Congress overrode his veto. But this strengthens the arguments against that statute. Where the President specifically objects to and denies the authority claimed by a piece of legislation, the validity of the challenged statute is on even weaker ground than it was in the legislative veto case.

This conclusion becomes evident when we examine what Chief Justice Burger wrote about the specific power Congress asserted in the legislative veto case, which was an effort by Congress to control decisions involving the deportation of certain aliens. In that case, Congress asserted plenary authority over aliens under a power which is specifically granted to it by article I, section 8, clause 4, of the Constitution. Even so, wrote Chief Justice Burger, the authority of Congress over the particular subject "is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power."

Applying this same analysis to the war powers resolution, we can see that a similar result would follow. It is true that Congress has concurrent authority in the field of military and defense matters. It is true that Congress must appropriate moneys for the Armed Services at least every 2 years, that Congress possesses the power to declare war, and that Congress may establish a military justice system.

The flaw in the war powers resolution, however, is that the Congress has attempted to exercise its power in a way which offends other constitutional restrictions. In the legislative veto case, the Supreme Court put its basic reliance upon the precise terms of section 1, article, I, of the Constitution, which provides:

> All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

If the Supreme Court should ever consider a case involving the war powers resolution, the Court would similarly rely on an equally explicit provision of the Constitution, which is the first section of article II. This section provides:

The executive power shall be vested in a President of the United States of America.

Also, the Supreme Court would rely on the first paragraph of section 2 of article II, which declares in precise terms:

The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States. . .

Just as the Court held that the provisions of article I are integral parts of the constitutional design for the separation of powers, the Court must find in a similar vein that the provisions of article II are woven into the fabric of the separation of powers concept.

The history of the 13 separate states prior to the Constitutional Convention of 1787, the evolution in the early State constitutions from weak executives to strong executives, the discredited interference by the Continental Congress with military actions of General Washington during the War of Independence, and the entire course of practice under the Constitution from the administration of President Washington to the current administration of President Reagan, all combine to demonstrate beyond any reasonable doubt that the fundamental and ultimate power to employ the existing forces of the United States in defense of citizens and the survival of our country, in reaction to foreign dangers, rests with the President.

Once the military forces are established, once an Air Force and a Navy and an Army and a Marine Corps are created, it is for the President to decide how to deploy and use those forces. That is an executive power. It is within the class of executive authorities that the Framers had in mind when they drafted section 1 of article II of the Constitution and conferred upon the President all the executive powers of the United States. And, these military defense powers are precisely what the Framers contemplated when they expressly provided that the President, not the Congress, but the President, is the Commander-in-Chief of the Armed Forces.

Thus, it is a violation of the separation of powers for Congress to attempt to claim for itself the supreme direction of the Armed Forces. Congress has attempted to do that in the War Powers Resolution and the action of Congress is in direct contradiction to other specific restrictions of the Constitution and of the separation of powers.

Congress cannot invade an executive function. Congress cannot set itself up as the Executive. Congress cannot concentrate unto itself all the powers of the Government which the Framers deliberately allotted among three separate branches.

That is the lesson of the Supreme Court's decision in the legislative veto case and I hope that my colleagues in Congress will reflect long and hard on that meaning of the case so that we may someday reach the point when we will openly repeal the unwise and unconstitutional War Powers Resolution.

Mr. President, in the event that some of my colleagues, who were not here at the time the Congress acted on the War Powers Resolution, may be aware of the conflict between that resolution and the Constitution and history of our country, I ask unanimous consent that an article discussing the subject, written by J. Terry Emerson, my staff counsel, may be printed in the RECORD.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From 2 Strategic Review 44, Winter 1974]

IMPERATIVES OF THE PRESIDENT'S WAR POWERS

(J. Terry Emerson)

"In every circle, and truly, at every table, there are people who lead armies into Macedonia; who know where the camp ought to be placed; what posts ought to be occupied by troops, when and through what pass that territory should be entered; where magazines should be formed; how provisions should be conveyed by land and sea; and when it is proper to engage the enemy, when to lie quiet . . . What then is my opinion? That commanders should be counseled, chiefly, by persons of known talent, by those who have made the art of war their particular study, and whose knowledge is derived from experience; from those who are present at the scene of action, who see the country, who see the enemy, who see the advantages that occasions offer, and who, like people embarked in the same ship, are sharers of the danger. If, therefore, anyone thinks himself qualified to give advice respecting the war which I am to conduct, which may prove advantageous to the public, let him not refuse his assistance to the state, but let him come with me into Macedonia. He shall be furnished with a ship, a horse, a tent; even his traveling charges shall be defrayed. But if he thinks this too much trouble, and prefers the repose of a city life to the toils of war, let him not, on land, assume the office of a pilot."—LUCIUS AEMILIUS PAULLUS, Roman General, 168 B.C.

On May 19, 1973, after nine years of direct United States involvement in Indochina, the House of Representatives cast its first vote in favor of ending military activities there. Though President Nixon vetoed this bill, which would have barred use of all funds to conduct American combat activity in Cambodia and Laos, Congress promptly passed a second appropriations bill with a broadened prohibition applicable to North and South Vietnam as well as Cambodia and Laos. This ban became effective on August 15.

On September 20, the Senate began work on the military weapons procurement bill. With the United States and the Soviet Union about to resume nuclear strategic arms talks in SALT II and with an October 30 date set for beginning negotiations between the opposing NATO and Warsaw Pact nations on the subject of mutual reduction of armed forces in Europe, the Senate approved an amendment to unilaterally cut overseas land-based troops by 110,000 by the end of 1975. Another amendment passed requiring a reduction in the numbers of United States troops in NATO countries. A renewed ban on the use of funds to finance the involvement of American military forces in hostilities in or over or from off the shores of North and South Vietnam, Laos, or Cambodia was accepted without debate.

Conferees later deleted the unilateral reduction of 110,000 troops overseas, but a provision requiring the withdrawal of NATO forces proportionate to the balance of payments deficit caused by stationing our troops in Europe and a prohibition aganist United States military actions in Indochina were both contained in the law signed by President Nixon on November 16.

Meanwhile, blunderbuss provisions shutting off all funds to the Department of State, USIA, and other foreign affairs agencies upon failure to supply information requested by certain Congressional Committees were attached by the Senate Foreign Relations Committee to the USIA, State Department and foreign economic aid bills. Congress eventually deleted the provision from the State Department and AID bills and sustained President Nixon's veto of the USIA bill.

A Senate attack on executive agreements also failed. Two amendments prohibiting the implementation of the 1971 Azores military base agreement between the United States and Portugal or any future base agreements with foreign countries, unless the agreements were submitted to the Senate for its advice and consent, were dropped in conference from the State Department bill.

THE WAR POWERS RESOLUTION

But the major battle of 1973 dealt with the heart of the war powers issue—the circumstances in which war or the threat of war can be used as an instrument of national policy. Here Congress emerged as the clear victor, at least for the moment. For the first time in history, legislative policy restrictions governing the waging of war became part of American law. This was no exercise of the power of the purse, tied to an appropriations measure. This proposal, House Joint Resolution 542, the War Powers Resolution, was a clear-cut declaration of Congressional superiority in the substantive, policy-making realm of the use and disposition of the Nation's Armed Forces.

On November 7, Congress put this unprecedented legislation into law over President Nixon's veto. Cast as an effort "to fulfill the intent of the framers of the Constitution and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities," the War Powers Resolution actually claims for Congress a position of dominance over the entire field of troop commitment and deployment.

The operative sections of the Resolution are triggered by the introduction of American forces, without a declaration of war, (1) into hostilities or imminent hostilities, (2) into the territory, airspace or waters of a foreign nation, while equipped for combat (except for supply, replacement, repair or training), or (3) in numbers which substantially enlarge United States forces equipped for combat already located in a foreign nation. When military forces are introduced in one of these situations, the President must report on it to Congress within forty-eight hours and periodically thereafter.

Unless Congress grants specific authority for such use of the Armed Forces to continue within sixty days after the report is required, the President shall end the oper-

ation. Only if he certifies that the safety of United States troops demands their continued use in the course of removal is the President allowed an additional thirty days. But, at any time during this sixty to ninety day period, should Congress approve a concurrent resolution ordering their withdrawal, the President must obey a Congressional directive to remove the forces.

Another major provision of the Resolution prescribes that no authority for the use of troops shall be inferred from any provision of law, including defense appropriations, unless the law spells out a specific intent to constitute authority within the meaning of the Resolution. Nor is any authority for troop commitment to be inferred from any existing or future treaty unless it is implemented by other legislation specifically conferring this authority.

What is happening is that Congress is asserting dominion over a host of unsettled Constitutional issues which until now the Supreme Court has been reluctant to arbitrate, but which the course of history has resolved generally in favor of the Chief Executive. Overturning a decision by the U.S. Second Court of Appeals determining that military appropriations throughout the war in Southeast Asia did contain an authorization for the making of war, Congress itself has mandated that authority cannot be inferred from war-implementing appropriations. Disregarding the expectation of our allies, Congress unilaterally has decided at this late time to spell out a hard and fast rule preventing the Executive Arm from enforcing an American commitment under the NATO Treaty without further Congressional authorization. Oblivious to the history of the Republic in which Presidents have engaged United States forces in hostilities abroad on hundreds of occasions without a declaration of war, Congress has taken it upon itself to suddenly and dramatically shift the interpretation which 184 years have put upon the Constitution. Contrary to the brutal realities of warfare, Congress now instructs any enemy wise enough to count that it may rely upon the inaction of the legislature to achieve for it within sixty to ninety days the withdrawal of American forces which no opposing foe could compel.

Who has the war powers? Who has the power of initially committing American forces to battle in defense of America's people—or America's freedoms—or our position in the world? Once United States units are involved, who controls day-by-day tactics and overall strategic planning? With war underway, who can dictate where and when to bomb and which borders to cross? In peace, who determines where American forces can be stationed around the globe, and in what numbers? What is the meaning of the Declaration of War Clause? What authority did the Framers vest in the Commander in Chief? Who enjoys primacy in the making of foreign policy?

FROM THE FOUNDING FATHERS

"I am now convinced, beyond a doubt that unless some great and capital change suddenly takes place in that line [Commissary Department], this Army must inevitably be reduced to one or other of these three things. Starve, dissolve or disperse.

"[B]ut what makes this matter still more extraordinary in my eye is, that these very Gentn. who were well apprized of the nakedness of the troops . . . should think a Winters Campaign and the covering these States from the Invasion of an Enemy so easy a business. I can assure those Gentlemen that it is a much easier and less distressing thing to draw remonstrances in a comfortable room by a good fire side than to occupy a cold bleak hill and sleep under frost and snow without cloathes or Blankets"—Letter of George Washington to the President of Congress, Valley Forge, December 23, 1777.

In August of 1777, the Continental Congress, then possessed of the joined powers of Legislative and Executive, had discarded the military Commissary General whom Washington had selected and itself assumed complete charge of the commissariat. Shortly after this change, the system suffered a total breakdown. As we know, the great want of clothing, food and blankets grew into tragedy as cold weather came on. A prominent military historian has written: "The amount of harm, caused by the unwise military control usurped by Congress, can only be measured in terms of the appalling sufferings of the American soldiers at Valley Forge, which Washington was powerless to prevent."[1]

But this is not the only disaster for which Congress must be held accountable. Required by his commission, "punctually to observe any such orders and directions" as he should receive from Congress, Washington was harassed, second-guessed and overruled throughout the War of Independence. It was the Continental Congress who ordered Washington's men, opposed by over four times their strength, to defend Manhattan and Long Island to the last, resulting in the useless surrender of over 3,000 American troops in the summer of 1776. It was Congress who passed over Washington's first choice as commander for the Southern Department, and instead appointed a general who had recently been exposed for plotting against Washington and who in his first battle proceeded to lose the entire American Army in the South. And it is Congress whose orders blocked the reinforcements which Washington needed in the fall of 1777, making it impossible for him to save the forts along the Delaware that had prevented the British from using the river for the supply of their armies.

These and other directives of Congress very nearly lost the War of Independence. And yet, it is exactly this system of government to which the War Powers Resolution would have us revert.

The Founding Fathers intended to prevent a recurrence of the interference Washington had experienced. They had witnessed at first hand the inefficiency of the legislature meddling with military operations. Of the fifty-five Framers who attended the Constitutional Convention, no less than thirty had performed military duty in the Revolution. At least six signers of the Constitution (in addition to Washington) were intimately familiar with Washington's problems. Thomas Mifflin had been quartermaster general of Washington's army, and Hamilton, McHenry and C.C. Pinckney had served on Washington's staff. Gouverneur Morris had defended the Commander in Chief in Congress and visited Valley Forge; and Robert Morris had financed Washington's campaigns. These men knew that Congress, clothed with powers of an Executive, had very nearly caused disaster during the Revolution. They planned that the new government which they formed would have at its head a Commander in Chief who possessed unbridled power over the direction and management of war.

This conclusion explains why the Founders designated the President as Commander in Chief. It explains the decision of the Constitutional Convention to reject a clause specifically giving Congress the power "to *make* war." It is consistent with the position of the Constitutional Convention when it voted down a proposal giving Congress the power to declare "peace"—to end a war once started—and with the remark made at the Convention that the conduct of war "was an Executive function."

From the historical setting in which these events occurred, it is clear the Framers meant to leave the basic powers of waging war with the President. They were influenced in this decision by the writings of Locke, Montesquieu and Blackstone, all of whom viewed the making of war as a prerogative of the Executive. These writers believed it to be among the fundamental laws of nature and government that the Executive should posses an unrestricted discretion to act when the safety of society was involved.

The danger of legislative deliberation in moments of distress is the focus of Madison and Hamilton in the Federalist 19. Here the two great architects of the Constitution agree that the Constitutional Convention had specifically rejected as a political model the Germanic Empire in which the Diet, or legislative body, was possessed of the power to make and commence war. "Military preparations must be preceded by so many tedious discussions . . . ," they wrote, "that before the Diet can settle the arrangements the enemy are in the field."

Thus, in creating a government in which the Executive power was removed from the Congress and vested in the single person of the Presidency, the Framers well understood the need for unity in the Executive Department and especially in making decisions related to emergencies. As Alexander Hamilton wrote in the Federalist 73, "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength form a usual and essential part in the definiton of executive authority." In other words, the direction of military affairs is to be managed by a single Commander in Chief, not by 535 different Members of Congress.

An analysis of history will shed additional proof that the Founding Fathers arranged the power to make war with the Executive Branch. For example, it is an oft-overlooked historical fact that the declaration of war had already fallen into disuse in the eighteenth century. In the period from 1700 to 1787, the year of the Constitutional Convention, thirty-eight wars were held in the Western World and thirty-seven of them began without any declaration. This development was remarked upon by Alexander Hamilton in the Federalist 25.

The idea that the only way nations can go to war is by a declaration was a myth at the time of the Constitutional Convention. Why, if the Constitutional Convention intended for the nation to go to war only when Congress had declared it, or otherwise authorized it, did the Founders use a method to vest this power which was so little used in their own time?

Another question which must be answered, if the Framers are supposed to have vested Congress with primary power over the making of war, is why they chose a word "declare" which meant in the custom of the time something far different? Samuel Johnson's Dictionary of the English Language, the standard dictionary used in America at the time of the Constitutional Convention, defines "declare" as meaning no more than "to make known" or "to proclaim." On the other hand, "to make," a power removed from Congress by the Constitutional Convention, was given a definition of substance.

[1] T. Frothingham, Washington, Commander in Chief, Houghton Mifflin Co., Boston, 1930, p. 234.

"Make" meant "to create" or "to bring into any state or condition." Thus, when the Constitutional Convention struck out "to make" from the draft of the Constitution and substituted "declare," it withheld from Congress the power to create war or to bring this country into the state of war and left with it instead a power to declare, or formally make known, that the United States is at war and that the whole forces of the nation will be employed in carrying on the war. Accordingly, each of the American declarations of war—the War of 1812, the Mexican War of 1846, the War against Spain in 1898, and World Wars I and II—were not initiated by Congress, but were called for by Presidents after hostile acts by foreign countries which had brought us into an existing state of war between sovereign powers.

Also, the declaration may have been conceived as the method by which the United States could enter into "offensive war," as distinguished from situations where the President has discretion to use force, on his own initiative, to react against dangers to the nation or its people. In circumstances where the President does not perceive aggression or a threat to our own security, the Founding Fathers may well have intended for the Executive and Congress jointly to collaborate by means of a formal declaration.

The problem is that the advocates of Congressional supremacy have confused the declaration power with a veto power which was never given to Congress over situations when the President may exercise his independent authority for defense. This claim is based upon assumptions that have no historial foundation. Even the correct premise that the Framers wished to avoid creating a despot who might lead them into ruinous wars of conquest, in the manner of the princes of Europe, misses the mark.

Of course, the Framers intended to check the President from engaging them in wars of aggression initiated by an inflamed passion for conquest. But they equally knew as a law of society that a nation ought to attend to the preservation of its own existence and that there must be some ultimate authority who could and would be able to defend the country and its enduring interests. They knew that the only practical agency to fulfill this expectation is not the legislature composed of numerous members but the unitary office of the President. Speed of decision, unity of decision, ability to execute the decision—all are qualities of the Executive.

The Framers also recognized that a nation which has a right to preserve itself, has, as a necessary consequence, a right to avoid and prevent everything which would threaten it with danger. Thus the President, in order to protect the public safety, must necessarily and practically meet foreign threats where they arise and not only when they are at our doorstep.

As Jay wrote in the Federalist 3: "Among the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their safety seems to be the first." This language hardly lends itself to an inference that shackles may be placed upon the President's ability of response to foreign threats.

Moreover, those who would dwell upon the concern of the Founders with a despot would do well to study the fear of our forefathers with an unregulated Congress. James Wilson instructed his law class in 1790 "[t]o control the power and conduct of the legislature by an overruling constitution, was an improvement in the science and practice of government reserved to the American States."[2] Madison more specifically indicates in the Federalist 38 that the Framers had intentionally withheld the direction of war from Congress because it is "particularly dangerous to give the keys of the Treasury and the command of the army into the same hands." Would the Framers have made the Executive the mere handmaiden of Congress if they thought this?

PRESIDENTIAL PRIMACY IN DEFENSE

"It was due largely to the erratic, occasionally irresponsible actions of the ancient Greek assemblies that the city-states' diplomacy was ineffective and defensive collaboration against the Eastern aggressors impossible. Despite growing recognition by Congress and the public of the purposes, methods and needs of an effective diplomacy, as long as the consistent pursuit of long-range interests and aspirations is periodically sacrificed to passing whims inspired by fleeting emotions in Washington, the danger persists of a twentieth-century repetition of the Greek débâcle."—CHARLES W. THAYER, Diplomat

The pertinent eighteenth century materials combine with living history to the end that the President, as Commander in Chief, occupies an entirely independent position, having powers of defense that are exclusively his, subject to no policy restriction or control by Congress. The President cannot conduct a war of aggression. He cannot intimidate another nation with military threats simply because we do not like its tariff rates or the way it governs its internal affairs. But the President may, in his discretion, act in defense of our country, its citizens and freedoms, whenever and wherever a danger exists, presently or imminently, which compels a response on our part.

There is a very little case law on point. In fact, no decision of the Supreme Court has ever ordered the President to halt an ongoing war or any ongoing military activity. When Supreme Court Justice William Douglas recently ordered a stop to the American bombing of Cambodia, the eight other members of the Court promptly overturned his decision.

A nearly unbroken chain of history supports the theme of Presidential responsibility for the national safety. Since Washington's Proclamation of Neutrality in 1793, despite our Treaty of Alliance with France, the authority to decide important matters of foreign relations bearing on questions of war or peace has been established in the Executive. This is true both of decisions when to terminate fighting or when to commence defensive measures.

Examples of Executive handling of matters of peace include Washington's Neutrality Proclamation; the agreement of 1817 with Great Britain limiting naval armaments on the Great Lakes; the Protocol of 1873 averting a war with Spain over the *Virginius* affair; the Protocol of 1898 suspending hostilities with Spain; the Protocol of 1901 ending the Boxer uprising in China; the surrender agreement ending the Philippine insurrection; the armistice conditions imposed upon Austria-Hungary and Germany in 1918; the cease-fire agreements ending hostilities after World War II and the Korean War; and the recent Vietnam peace agreement; each and every one a purely Executive agreement.

It may come as a surprise, but research by the author has revealed the occurrence of 199 separate foreign military hostilities commenced by Presidents in the absence of a declaration of war. Each of these operations involved actual landings on foreign soil or the evacuation of American citizens from foreign lands, or in a few instances, mobilizations into crisis areas where the risk of war was particularly grave, such as the Cuban Missile Crisis of 1962.[3] Over one hundred of these hostilities took place outside the Western Hemisphere. Many involved the employment of several thousands of troops. All involved the serious risk of war and at least eighty-two incurred actual fighting. Taken together, the incidents, large and small, amass a consistent practice by which American Presidents have responded to foreign threats with whatever force they believed was necessary and technologically available at the particular moment in history.

What is new in this regard is the failure of Presidents in recent history to bring the defensive use of military force to a prompt and successful conclusion. President Johnson acted decisively in the Dominican landings of 1965 and President Nixon's orders for the mining of ports and increased bombing in North Vietnam achieved at least the return of American prisoners of war and a chance for the South Vietnamese to develop the means of defending themselves; but President Truman in Korea and President Johnson in Vietnam entered prolonged and irresolute hostilities which they showed no capacity to terminate. Thus, the failure of the Commander in Chief to bring his military actions to a prompt and successful conclusion fostered the emergence of gratuitous advice respecting the conduct of war in the legislative chambers and new illusions of legislative competence to wage war.

In describing the President's authority to wage war, the Supreme Court has related it to his assumed duty to win:[4] "As Commander in Chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."

The number of historical precedents of executive agreements is also impressive. Executive agreements in every consequential respect equivalent to a treaty have been prevalent in every period of our history. The first known use of the international executive agreement, other than by a treaty, occurred in 1792. The most recent compilation of executive agreements indicates there are now 5,590 in effect.

There is nothing improper in this. Congress itself has authorized or ratified all but sixty-four of the current agreements, thereby lending its stamp of approval to the bypassing of the Senate's treaty power. As for the 1 percent of agreements concluded by the President on his own authority alone, the Congress may still determine whether or not it shall appropriate the moneys essential to implement these agreements. If the President lacked authority to enter into any foreign agreements at all, without a

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[2] *Wilson's Works, Vol. III*, Lorenzo Press, Phila., 1804, p. 292. See also Jefferson's portrayal, quoted in the Federalist 48, of Congressional government as the equivalent of "despotic government." What influenced the Framers in the allotment of war powers was not worry over the powers of Congress or the President, but rather an overriding purpose of providing effectively for the public safety. The Presidency was universally recognized as the office most capable of attending to the national safety.

[3] T. J. Emerson, "War Powers Legislation," 74 West Va. Law Review 53, 1972, p. 367. Though some of these 199 incidents may have been initiated by subordinate officers on the spot, all appear to have been undertaken on the President's directions, in implementation of well-known Presidential policies, or subsequently ratified by him.

[4] *Fleming v. Page*, 50 U.S. 603, 615 (1850). See also *United States v. Sweeny*, 157 U.S. 281, 284 (1895) in which the Court stated that the President is expected to wage a "successful war" once war has been commenced.

treaty, it could be disastrous to the national interest.

All we have to do is remember American preparations prior to our entry into World War II. In 1941, President Roosevelt occupied a number of military bases granted us on British soil along their possessions in the western Atlantic, and sent United States troops to Greenland, Iceland and Dutch Guiana, all before war was declared and all by executive agreements with the local authorities. A Congress which in August of 1941 had extended the draft by but a single vote could not have been counted upon to approve these base agreements at the time they were crucial.

Though the list of asserted uses of executive privilege is not so long, there are several examples of documents or testimony being refused to Congress on this ground. For example, Secretary Rogers and Dr. Kissinger declined to appear before the Senate Foreign Relations Committee on January 2, 1973, because of the ongoing negotiations with the North Vietnamese to end the Indochina War. Without the protection of executive privilege, the nation's delicate peace talks may have been disrupted.

In fact, without a minimum of independence for the Executive Department in withholding certain classes of information, our military security, our relations with other countries, pending law enforcement matters, government employee personal security files, and the confidentiality of internal decision-making processes could be impaired. For example, if Congress had enacted the information rider to the State Department Authorizations, any committee of Congress could demand all working documents accompanying an ongoing international conference. A Congressional Committee could demand information given to an Ambassador from foreign embassy sources, who may have turned over material having significant insight into a third country's position and who would be highly embarrassed if this fact became known.

All the above categories of information are areas where executive privilege is firmly rooted in historical precedence and in principle. This doctrine is implicit in the creation of our divided form of government, with the executive, legislative, and judicial responsibilities going to three great and separate branches. Congress cannot violate this division by legislating its own boundaries between the branches.

From this usage arises an impressive source of Constitutional interpretation which has been accepted by the Supreme Court before as being determinative of similar confrontations between Congress and the President. For Congress now, after almost 200 years of acquiescence in the interpretations of the President's foreign affairs and war powers, to reverse the construction which has become so settled runs contrary to the judicial doctrine of usage which the Supreme Court has on at least two occasions previously invoked as a basis for rejecting Congressional control over the Presidency.[5]

Though Congress holds great powers over military subjects, it cannot vary the exercise of the President's independent authorities. Congress controls the numerical size and the strength of the Armed Forces and the nature of equipment and arms with which the military can wage war.[6] Congress can pass or deny emergency powers bearing on foreign trade or reject treaties or area resolutions with defense implications. Congress can, as an ultimate recourse, initiate impeachment procedures, impeachment being meant as a viable safeguard against political offenses, such as an irresponsible abuse of a Constitutional discretion. Less severely, Congress can trust to a free press which is always at the ready to spread word among the public of Congressional positions running counter to the Presidency.

With time, public opinion will work its will upon the President or remove him from office. But once Congress has determined how many troops shall be enlisted, or what arms constructed, the President may, so long as he holds this high office, station those forces and send those arms to such parts of the world as he finds needed in the national defense. The Constitution authorizes the President to protect American rights and security abroad and no legislative power short of that of the people, acting on a Constitutional Amendment, can change his authority.

What was recognized by the Founding Fathers and what has been reflected throughout history is that war is a state in which nations are placed not alone by their own acts, but by the acts of other nations. As Thomas Jefferson wrote in 1815, in frank acknowledgment of his earlier error in thinking the United States could live in peace whatever the trend of events elsewhere, "experience has shown that continued peace depends not merely on our own justice and prudence, but on that of others also."

However much the Framers may have wished to live by a policy of avoiding foreign troubles, they knew from personal experience that the nation cannot be safe unless there is a single Commander in Chief with discretion to resist foreign dangers as they arise. The President does not "initiate" war in these instances; he reacts to foreign threats. Congress will persist in altering this insurance system only at grave risk to the public safety.

POTS AND KETTLES—COLOR BOTH BLACK

Mr. GOLDWATER. Mr. President, returning from the Far West as I did late Sunday evening and then coming downtown the next day, once again, I found out the great difference between living in the East and living in the West.

While out there, I hardly ever heard about former President Carter. I never heard anything about President Reagan being prompted by staff on the Carter papers and, if I had, I would have said what I said Monday morning: "Where were all these first amendment addicts, the press, when Lyndon Johnson was stealing my headquarters blind?"

As I have said on the floor, he not only knew what I was going to say before I said it, but the people representing him around the country also knew the contents of the speeches and they were answered before I even had a chance to read them. As I further related here in this body, he even had a woman spy on a campaign train of mine, and it was my unpleasant task to ask her to separate herself from my entourage.

Why is it that the Washington and New York papers seem to keep on forever and ever blasting the Government of the United States, be it Republican or Democrat; with the emphasis on the Republicans. Why, when so many things are going on around this world of such extreme importance, not just to the United States as a government entity but to the people who live here who love freedom, do we read this sort of thing? Why is it that the headlines are seemingly confined to the eastern seaboard, although I have to admit there are a few on the west coast that go the same route which occupy themselves with disclosing top secret information, berating the President of the United States, whoever he might be, downgrading our efforts around this world to preserve peace and never once thinking maybe there is a responsibility written into the Constitution, in that wonderful first amendment, which calls for the responsibility that should be practiced by everyone connected with the media, including television, radio, and newspapers.

I was flabergasted the other evening to watch a particularly well known and successful political talk show, in which the commentators, both conservative and liberal, just couldn't get over the terrible thing that George Will, one of the finest columnists in this country, had done during the campaign. As far as I can see, the crime committed by George Will was that he backed the successful candidate.

Now, are all of these columnists who suddenly have become so self righteous that it is difficult to discuss it saying that a man in the writing profession has no right to choose a candidate of his choice for President, mayor, Senator, or for anything else? Are they able to sit there and honestly say to the people of this country, never in my life as a writer, have I backed a particular man for President, or for any other office? Never in my writing life, have I discussed an issue publicly in a column? Mr. President, you and I know that that would be challenged so fast their heads would fall off.

Frankly, this whole uproar over the Carter papers is something that President Reagan summed up very well in his first remarks, something to the effect that it does not make much difference—and it does not. Those who read this in the CONGRESSIONAL RECORD have, at some time in their lives, tried to find out something that an adversary, an opponent, or a competitor was doing and, if they found it out, they would use it to their advan-

[5] *United States v. Midwest Oil Co.*, 236 U.S. 459, 472, 473 (1915); *Myers v. United States*, 272 U.S. 52, 175 (1926).

[6] Congress has exercised these powers with alacrity in recent years. It has limited U.S. troop strength to only 2.2 million in fiscal 1974, down from 3.6 million in 1968, and appropriated a defense budget which is down 40 percent from 1968 in terms of constant dollars. Human resource spending (47 per cent) now exceeds defense spending (29 per cent) as a share of the Federal budget. The fruit of Congress's shift in priority was exposed in the 1973 Mideast crisis when the Soviets moved ninety-eight ships into the Mediterranean against only sixty-five U.S. ships.

-83 DATE

The New York Times

E 4 PAGE

Administration Cautions Against 'Precipitous' Action to Tighten Power

Congress Digs In After Legislative Veto

By MARTIN TOLCHIN

WASHINGTON — Kenneth W. Dam, Deputy Secretary of State, assured Congress last week that the abolition of the so-called legislative veto need not alter the relationship between the Administration and Capitol Hill. If anything, he said, it would lead to greater consultation.

Last month's Supreme Court ruling that the veto is unconstitutional to the contrary notwithstanding, Mr. Dam said,, "the Department of State is committed to continue" taking Congress's "concerns into account in reaching decisions on issues of policy. I believe (the ruling) will make the departments and agencies of the Executive Branch more, not less, conscious that they are accountable for their actions."

Skeptics noted that the veto, by which the legislators reserved the right to override certain Presidential decisions, would not have been devised in the first place if Congress had felt adequately consulted. Indeed, Mr. Dam's view was a distinct contrast to the initial reaction to the decision on both ends of Pennsylvania Avenue.

As Mr. Dam pointed out in his testimony, more than a dozen foreign affairs and national security statutes dating back a decade or more have been affected, including the War Powers Resolution and arms export, nuclear nonproliferation and trade controls. They are among the 207 legislative veto provisions in 126 different laws affected by the High Court's ruling. Many of those laws involve the power of regulatory agencies. Mr. Dam was considerably more sanguine than some regulators, who believe that their powers may be irretrievably curtailed.

Michael Pertschuk, a member of the Federal Trade Commission and its former chairman, was jubilant the day the decision was announced. He had seen Congress veto a rule concerning used cars, and the threat of a veto had hung over the panel's deliberations on other issues. It did not take very long, however, for his joy to turn to gloom. Since Congress, which had given the regulatory agencies broad discretionary authority in exchange for the right to veto resulting regulations, had lost the ability to second-guess the regulators, it was threatening to rescind the authority. "It's the worst of all possible worlds," Mr. Pertschuk lamented.

In its first expression of Congress's new mood, the House voted overwhelmingly to curtail the regulatory powers of the Consumer Product Safety Commission, adopting a measure that would require Congress to enact legislation before a proposed rule would take effect. As if in overkill, the House bill also provided that before a new regulation took effect, Congress would have 90 days to enact a law — to be signed by the President — that would nullify the ruling.

That House action sent Administration officials to Capitol Hill — among them, Mr. Dam to the Senate Foreign Relations Committee last week — to urge Congress not to be precipitious. In fact, Congress is divided on its options.

"My own view, as an advocate for the House of Representatives, is that we wipe the slate clean, and repeal all delegations (of authority)," Stanley M. Brand, counsel to the House, said recently. "If the Administration wants to sell a single aircraft, let them come to Congress for permission." That, Mr. Brand observed, would be tantamount to a one-House veto of all arms sales. But Representative Clement J. Zablocki, the Wisconsin Democrat who is chairman of the Foreign Affairs committee, declared Mr. Brand's proposal unworkable. Congress, he said, lacked the resources and time to re-enact all affected legislation.

Another option would be to delete the veto provisions from laws that include severability clauses, while preserving the rest of the statute. Most laws contain such clauses, because Congress generally seeks to preserve measures in the event that the courts find sections of them unconstitutional. Mr. Brand summed up the objections to this approach. "It will permit courts to rewrite statutes," he said, "and because we have, in my view, against our interest but with Pavlovian regularity inserted severability clauses like legal boilerplate in contracts, the Congress will be left with nothing or very little, while a wholesale delegation (of authority) will remain intact."

The Power of the Purse

A third approach would be that of the House in the public service commission bill. It is that the two chambers of Congress adopt a joint resolution that must be signed by the President before any regulation would take effect. Congress also could delay new regulations' effective dates until it had the opportunity to enact legislation that would bar them. Such a method was also approved in the House version of the public service bill; a similar measure has been introduced in the Senate by Carl Levin of Michigan and David L. Boren of Oklahoma, both Democrats.

Of course, Congress could always use its power of the purse to prohibit the use of Federal funds to implement unwanted regulations or carry out unwanted activities, as the House moved to do last week in voting to cut off money for covert intelligence activities in Central America. The final recourse would be a constitutional amendment overturning the Supreme Court decision.

Representative Elliot Levitas, Democrat of Georgia and for years a leading advocate of the legislative veto, recently sent a letter to President Reagan. "So long as this uncertainty exists," he wrote, "I foresee the potential for years of wasteful and bitter confrontation and even chaos in our Government. As one first step, I urge the early convening of a Conference on Power Sharing to address this new situation and consider solutions." Mr. Levitas has discussed his proposal with Vice President Bush and David A. Stockman, director of the Office of Management and Budget. He has received no response from the President.

THE WHITE HOUSE

WASHINGTON

July 27, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Statement of the Honorable Kenneth W. Dam, Deputy Secretary of State, Before the Committee on Foreign Relations of the United States Senate, Thursday, July 28, 1983

OMB has asked for clearance of the above-referenced testimony on legislative veto by 2:00 p.m. I have reviewed the testimony and, in light of the short deadline and the fact that the testimony generally mimics Dam's previous testimony before the House Foreign Affairs Committee, I have advised OMB that, with one minor exception, we have no objection.

The exception concerns the last sentence on page 11, which begins: "In Section 4 of the [War Powers] Resolution, the President is required to make a formal report to Congress . . . ." Section 4(a) by its terms requires a formal, written report concerning the introduction of forces; section 4(c) simply requires the President to report periodically (at least every six months) to Congress concerning the continued involvement of forces. I recommended to Jim Murr of OMB that "Section 4" be changed "Section 4(a)" in Dam's testimony, to avoid any suggestion that formal reports were required under section 4(c).

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO John Cooney	Take necessary action	☐
John Roberts	Approval or signature	☐
Ed Strait	Comment	☐
Jim Nix	Prepare reply	☐
Bob Kimmitt	Discuss with me	☐
	For your information	☐
	See remarks below	☐
FROM Jim Murr, x4870	DATE Jul 27	

REMARKS

State Testimony - Legislative Veto

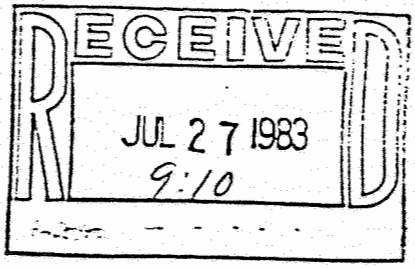
The attached testimony is scheduled for tomorrow morning, 7/28. It arrived at OMB this morning. Please let me have your comments by 2:00 p.m. today, 7/27, or sooner. Thanks.

(Ihave made copies of the testimony available to Justice, Defense, Commerce, and Treasury.)

State may also be preparing some Q&A's for the hearing. If so, I will obtain them for clearance as well.

OMB FORM 4
Rev Jul 82

As Prepared for Delivery



STATEMENT

OF

THE HONORABLE KENNETH W. DAM

DEPUTY SECRETARY OF STATE

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS

OF THE

UNITED STATES SENATE

THURSDAY, JULY 28, 1983

Mr. Chairman and members of the Committee,

I appreciate the opportunity to appear before the Committee this afternoon.

The Supreme Court's recent decision in the Chadha case, and two related decisions,* have declared the legislative veto to be unconstitutional. The Department of State and this Committee both recognize that the Court's historic decision affects a considerable body of legislation in the field of foreign affairs and national security. My principal theme here today is that our two branches of government have a common problem and a shared responsibility. We owe the American people a constructive and cooperative response to the legal problem we now face.

The Department of State is in the process of reviewing all the legislation with which we deal and which is affected by Chadha -- the language of the statutes, their legislative history, and the record of executive-legislative relations in working with these statutes.

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* Immigration and Naturalization Service v. Chadha, No. 80-1832 (U.S. June 23, 1983); Process Gas Consumers Group Consumers Energy Council of America, Nos. 81-2008 et al. (U.S. July 6, 1983), affirming Consumers Energy Council of America v. FERC, 673 F. 2d 425 (D.C. Cir. 1982), Consumers Union, Inc. v. FTC, 691 F. 2d 575 (D.C. Cir. 1982).

We have reached some tentative conclusions, which I am happy to share with the Committee. Our review is still continuing, however, and we will keep the Committee informed as we proceed toward firmer judgments.

In The Federalist No. 47, James Madison referred to the separation of powers as "this essential precaution in favor of liberty." The genius of our constitutional system is that a structure of dispersed powers and checks and balances, designed to limit government power and preserve our freedom, has also been able to produce coherent and effective national policy. This success is a tribute to the Founding Fathers who built the structure; it is also a tribute to the generations of leaders and statesmen since then who have put the nation's well-being first and foremost as they played their constitutional roles in the various branches of government. As Justice White acknowledged in his dissent in Chadha, "the history of the separation of powers doctrine is also a history of accommodation and practicality."

The Administration is prepared to work with the Congress in this spirit.

First, I would like to review with you the history of the legislative veto -- what it is, how it has worked -- and then the Chadha decision itself and its consequences.

Finally, I shall discuss the impact of that decision on some of the statutes that are of particular concern to the Department of State and to this Committee.

The Legislative Veto

"Legislative veto" is a term describing a variety of statutory devices that were meant to give the Congress legal control over actions of executive departments and agencies by means other than the enactment of laws. Legislative veto provisions have been included in statutes for more than 50 years. The procedure was first passed into law in the Act of June 30, 1932, which authorized President Hoover to reorganize the structure of the Federal Government subject to Congressional review. The device was added to various statutes during World War II, when the Congress delegated greater authority to the President in the area of foreign affairs and national security, subject to the legislative veto procedure. Enactment of the procedure became frequent again in the 1960's and 1970's, as Congress sought to strengthen its oversight over the expanding practice of rule-making by administrative agencies. Adoption of the legislative veto procedure reached its zenith in the early 1970s, in connection with some major controversies in the area of foreign affairs and national security.

Some of these statutes provide for Congressional disapproval of proposed administrative regulations. Some involve review of decisions of individual cases (Chadha, for example, involved the suspension of the deportation of a single person), or review of other executive actions under authority granted by statute. Other legislation, such as the War Powers Resolution, involves the allocation of broad constitutional powers.

The legislative vetoes in all these statutes fall into two general categories. First, there are those in which the full Congress, or one House or one committee, is purportedly given a right to "veto" an administrative action. A typical statute of this kind requires the President to report an action or rule to both Houses of Congress. The executive action may not be made or take effect until after a fixed period (60 days, for example). If Congress does not act during the period, the executive action can take effect, but if the Congress disapproves (or one House or committee, as the statute may provide), it does not take effect. Second, there are statutory schemes by which an administrative action purportedly becomes valid only when approved by Congress. The typical statute of this kind requires the President to report a proposed action and then provides for affirmative approval by one or two Houses of the Congress. Most legislative vetoes, like the one in Chadha, fall within the first category.

The Chadha Case and Its Implications

The case of INS v. Chadha involved a section of the Immigration and Nationality Act. That statute permitted the Attorney General to allow a deportable alien to remain in the United States, suspending an otherwise valid deportation order. This suspension authority, however, was subject to disapproval by a simple resolution of either House of Congress. The Attorney General suspended Chadha's deportation, but the House of Representatives disapproved. Chadha brought suit; the Supreme Court held the Congressional veto to be unconstitutional. The rationale of the Court's holding was that legislative actions, to be valid, must follow the course prescribed in the Constitution: approval by both Houses and "presentment" to the President. Thus the Court's decision in Chadha invalidates not only the "one-House veto" but the "two-House veto" and "committee veto" as well, a point confirmed by the Court's subsequent summary decisions of July 6. Those statutes which provide for Congressional action by joint resolution -- passed by both Houses and signed by the President -- would not seem to be affected by Chadha.

The legislative veto has long been controversial, ever since Woodrow Wilson first vetoed a bill incorporating a legislative veto in 1920.

Since then, most administrations have not been happy with the device, while the Congress has tended to favor it as another useful check on executive authority. This specific controversy is now settled. Yet paradoxically, the practice of executive-legislative relations is unlikely to undergo any radical change in the wake of Chadha, for several reasons.

For one thing, Chadha does not affect other statutory procedures by which the Congress is informed of or involved in actions by the Executive Branch. Specifically, Chadha does not affect statutory requirements for notifications, certifications, findings or reports to Congress, consultations with Congress, or waiting periods which give Congress an opportunity to act before executive actions take effect. In the foreign affairs field, moreover, the Executive Branch and the Congress have generally reconciled or disposed of controversies and differences without resort to the process of legislative veto. Therefore, we see no reason why the Court's decision need cause a fundamental change in our relationship.

The Administration is prepared to work closely with the Congress to resolve any questions or problems that may arise as a result of the decision. And we hope that Congress will act in the same spirit of cooperation.

Perhaps the key legal question raised by Chadha is that of "severability." The problem is an intriguing one: Since the legislative veto provision of a statute is unconstitutional, is any of the rest of the law tainted by that defect?

The Supreme Court has given us a basis for answering that question. The general principle is that the provision containing the legislative veto will be found to be severable, and the remainder of the statute will continue unaffected, unless it is evident that the Congress would not have enacted the remainder of the law without the legislative veto. That test establishes a strong presumption in favor of severability.

The Court has also given us some additional guidelines. There is a further presumption of severability, first of all, if the statute contains an express "severability clause." Several of the statutes with which we deal -- including the War Powers Resolution and the Atomic Energy Act, for example -- contain such severability clauses. Second, the legislative veto is also presumed to be severable if the legislative program in question is "fully operative as a law" without the veto provision. In the statutes with which we are dealing, this seems generally to be the case.

These statutes often establish a system under which the Executive Branch is empowered to make or implement a decision 30 or 60 days later unless the Congress chooses to intervene. In foreign affairs cases to date, in the absence of formal Congressional action, the executive determination has proceeded, although Congressional views have always been taken fully into account. This pattern clearly indicates that these statutes are capable of independent operation with no further Congressional action.

Specific Statutes

There are several dozen statutes in the foreign affairs and national security area that are affected by the Chadha decision. I would say that four statutes or groups of statutes are of particular importance. These are arms export controls, the War Powers Resolution, nuclear non-proliferation controls, and trade controls related to emigration. Let me discuss these in turn.

Arms Export Control. First, arms export controls. I know this subject is of pressing concern to this Committee. It is also of importance to the Administration, because of the importance of such transactions in contributing to the security of friendly countries and to our political relations with friendly countries.

We should be clear about what Chadha does and what Chadha does not do. It is apparent that under the Chadha decision the legislative vetoes in several sections of the Arms Export Control Act are not valid. But that result in no way impairs the elaborate structure of reporting, consultation, and collaboration that the Executive Branch and the Congress have worked out over recent years to ensure effective Congressional oversight. Under the Arms Export Control Act, for example, we have regularly reported to the Congress well in advance on prospective sales under the Foreign Military Sales program, as well as on actual proposed FMS sales and licenses of arms exports sold through commercial channels. Specifically, pursuant to the Javits Amendment, we provide an annual Arms Sales Proposal covering all sales and exports above certain thresholds which are considered eligible for approval during the current calendar year. We also provide, under Section 28 of the Arms Export Control Act, quarterly reports of each "price and availability" estimate provided to foreign governments, together with a list of requests received from such governments for letters of offer to sell defense articles and services.

As a matter of practice and accommodation with the Congress, we have agreed with the Congress to go beyond these and other statutory requirements.

For example, we have long engaged in a practice of informal pre-notification of proposed sales under the FMS program. While this is not required by law, it has given Congress the opportunity to review and comment upon proposed transactions informally and privately before the Executive Branch sends a formal public statement.

Congress has received and will continue to receive annual, quarterly, and case-by-case information, formal and informal, on upcoming potential arms sales. In the last three years we have sent up more than 240 formal reports of intended arms sales -- 110 in Fiscal Year 1981, 90 in FY 1982, and 41 in FY 1983 to date. Three informal notifications are currently before you. Of these 240-odd notifications, 156 are for non-NATO countries. In short you have, and will continue to have, a full plate. While Congress has never disapproved any proposed arms sale, the Administration has on occasion modified the terms of a proposal in light of Congressional concerns. We have done so even though the Executive Branch has long considered the legislative veto to be unconstitutional.

I think the record speaks for itself. The Executive Branch does not live in a vacuum, and we are acutely aware of the need for consultation and cooperation in this sensitive area.

Our foreign policy and national interest require that a President, any President, be able to use this important policy instrument effectively, flexibly, and, I might add, responsibly. We recognize the importance of Congressional oversight. As in any other important area of national policy, both Congress and the Executive have a responsibility to find an effective cooperative solution.

War Powers Resolution. Next, the War Powers Resolution. The War Powers Resolution contains four major operative parts. The first of these is a consultation requirement. In Section 3 of the Resolution, the President is required to consult with the Congress "in every possible instance" before United States armed forces are introduced into hostilities or into situations where imminent involvement in such hostilities is clearly indicated by the circumstances. And the President is to consult regularly while the forces remain in such situations.

The second operative part is a reporting requirement. In Section 4 of the Resolution, the President is required to make a formal report to Congress in any case in which United States armed forces are introduced--

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

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

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

The third operative part, Section 5(b), requires the President to withdraw U.S. troops not later than 60 days after a report of actual or imminent involvement in hostilities unless the Congress has affirmatively authorized their continued presence.

The fourth operative part is a legislative veto. According to Section 5(c), the President must withdraw U.S. troops introduced into hostilities even before the end of 60 days if the Congress so directs by concurrent resolution.

The first and second provisions of the War Powers Resolution, on consultation and reporting, are in our view unaffected by the Chadha decision. We do not intend to change our practice with respect to consultation and reporting.

The fourth provision, which asserted a right of Congress by concurrent resolution to order the President to remove troops engaged in hostilities, is clearly unconstitutional under the Supreme Court's holding in Chadha. It must be said, however, that this holding is unlikely to have a significant impact on the way national security policy is conducted. In the decade since the enactment of the War Powers Resolution, no U.S. forces have been committed to long-term hostilities. It is doubtful that Presidents have refrained from such commitments simply because of the legislative veto in the War Powers Resolution; it is equally doubtful that Presidents will now feel freer of restraints because of Chadha. The lesson of recent history is that a President cannot sustain a major military involvement without Congressional and public support.

The legislative veto provision of the War Powers Resolution is severable from the others, in our view, according to the Supreme Court's test and guidelines. The Resolution itself includes a severability clause, and the other operative portions of the Resolution need not be affected by the dropping of the veto provision.

The third operative part of the Resolution, requiring positive Congressional authorization after 60 days, does not fall within the scope of Chadha.

Its constitutionality is neither affirmed, denied, nor even considered in the Chadha decision. As you know, the Executive Branch has traditionally had questions about this requirement of Congressional authorization for Presidential disposition of our armed forces, both in light of the President's Commander-in-Chief power and on practical grounds. Congress, of course, has had a different view. I do not believe that any purpose would be served by debating these questions here, in the abstract. This provision is unlikely to be tested in the near future. Here, too, I want to reaffirm the Administration's strong commitment to the principles of consultation and reporting, confident that in a spirit of cooperation the Executive and the Congress can meet future challenges together in the national interest.

Nuclear Non-Proliferation. Nuclear non-proliferation is another important policy area in which legislative veto provisions have been evident. Various sections of the Atomic Energy Act, for example, have provided for a legislative veto of Presidential determinations to permit nuclear exports to foreign countries.

These statutory arrangements typically involve three elements. First, they establish very strict standards limiting the export of nuclear items. Second, they authorize the President to waive certain restrictions and permit exports if he makes certain findings.

Third, the Congress has been -- until Chadha -- empowered to veto the Presidential waiver. We consider that those standards and that waiver authority, as well as the statutory requirement of notification to Congress and the observance of a waiting period, continue to be valid. We will continue to wait through the period during which the Congress, in the past, deliberated over its veto; during that time, the Congress may use its constitutional authority to enact new legislation if it chooses. The only provision that is invalid is the third, which permitted a legislative veto by concurrent resolution.

The Administration shares Congress's concern about nuclear proliferation. We have been active diplomatically in this field, as this Committee well knows. We vigorously oppose the development of nuclear weapons capabilities by additional countries. Each Executive Branch agency is required to keep the Congress, including this Committee, fully informed of its activities in this field and of significant developments abroad. We have done so, and we are proud of our record of close consultation and collaboration with the Congress. We will continue that practice.

Jackson-Vanik Amendment and Trade-Related Issues. A fourth important statutory area involving a legislative veto is the procedure for granting most-favored-nation treatment (MFN) to certain non-market countries.

Under the Jackson-Vanik Amendment, nondiscriminatory tariff treatment may be granted to these countries only when they comply with certain conditions for the protection of human rights, including the right of emigration. These requirements may be waived on the basis of stated findings and determinations by the President.

The annual report required under that statute--for continuation of MFN for Hungary, Romania, and China--is now before the Congress. This report illustrates how we believe Congress and the Executive should continue to work together constructively.

We presented that report to the Congress before the Supreme Court decision was announced, but we would have done precisely the same thing if the Chadha decision had been handed down before the report was filed. We regard the report as fully effective to extend the waiver authority and to continue the waivers currently in force. At the same time, legislative oversight hearings serve the salutary purpose of scrutinizing the implementation of statutory requirements, of airing public concerns, and of making our nation's deep commitment to human rights known to other nations.

The spirit with which we expect to work with Congress in the future, in all statutory fields, is illustrated by another example. We are required by the Case-Zablocki Act to report executive agreements to the Congress, and we do so regularly. That procedure notifies the Congress of agreements already signed. There is also a procedure for enabling this Committee and the House Foreign Affairs Committee to consult with us as to the form of significant international agreements prior to their conclusion. This practice was arranged between the Department of State and the Chairmen of the two Committees in 1978. It is not required by law, but makes good sense. We will maintain it.

The Future

As I have emphasized, little of practical significance need in fact change as a result of the Supreme Court decision. The Department of State is committed to continue working closely with the members and committees of Congress and to take their concerns into account in reaching decisions on issues of policy. If anything, I believe Chadha will make the departments and agencies of the Executive Branch more, not less, conscious that they are accountable for their actions.

There are many basic questions about the separation of powers which the Supreme Court will probably never settle. In that realm our constitutional law is determined, in a sense, as in Britain--by constitutional practice, by political realities, by the fundamental good sense and public conscience of the American people and their representatives. This is how we have always settled these questions, and this is how we, the Executive and the Congress, must approach these problems in the aftermath of Chadha.

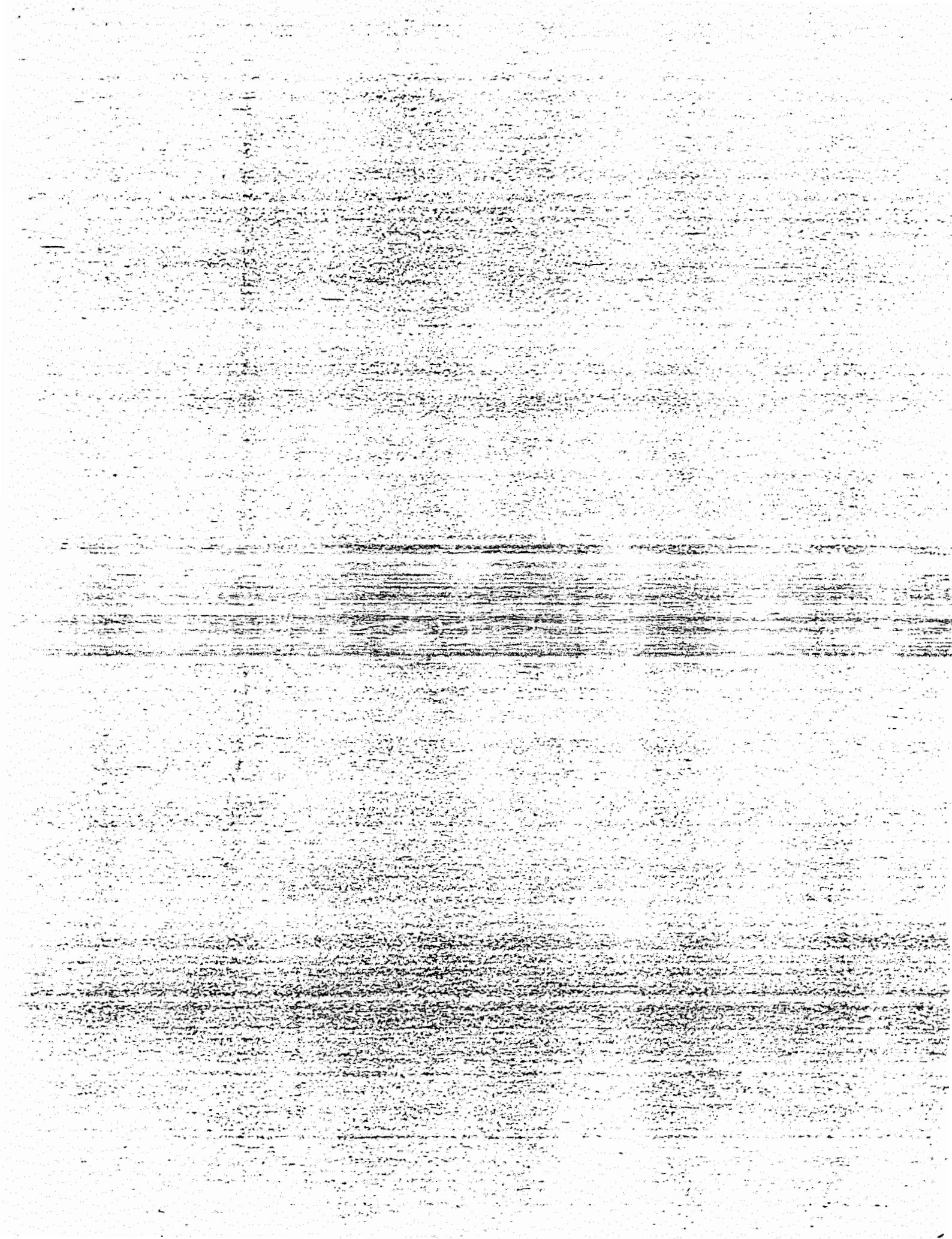
Our Constitution has proved to be a wise and enduring blueprint for free government. In this period of our history, our nation faces challenges that the drafters of that document could not have imagined. The federal government has the duty to conduct this nation's foreign policy and ensure its security in a nuclear age, in an era of instantaneous communications, in a complex modern world in which international politics has become truly global. America's responsibility as a world leader imposes on us a special obligation of coherence, vision, and constancy in the conduct of our foreign relations. For this there must be unity in our national government. The President and the Congress must work in harmony, or our people will not have the effective, strong, and purposeful foreign policy which they expect and deserve.

We have seen in the last 15 years that when Congress and the President are at loggerheads, the result can be stalemate and sometimes serious harm to our foreign policy.

We now have an opportunity, all of us, to put much of that past behind us, and to start afresh. We have a chance to shape a new era of harmony between the branches of our government--an era of constructive and fruitful policymaking, of creativity and statesmanship. That is President Reagan's goal and the goal of all of us in his Administration.

Thank you.

#5287L



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Thank you.

#5287L

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

DATE:

TO: John Roberts

FROM: John Cooney

Final state testimony on legislative vetoes.

OMB FORM 38
Rev Aug 73

S/S 8322203

United States Department of State

Washington, D.C. 20520

July 19, 1983

MEMORANDUM FOR MR. ALTON KEEL
OFFICE OF BUDGET AND MANAGEMENT

Per discussions earlier today with Mr. Cooney and Mr. Murr, attached is the final version of the Deputy Secretary's written testimony on the Legislative Veto Process, as it will be presented to the House Foreign Affairs Committee tomorrow morning.

Charles Hill
Executive Secretary

Attachment:

As stated.

As Prepared for Delivery

STATEMENT

OF

THE HONORABLE KENNETH W. DAM

DEPUTY SECRETARY OF STATE

BEFORE THE

COMMITTEE ON FOREIGN AFFAIRS

OF THE

HOUSE OF REPRESENTATIVES

Wednesday, July 20, 1983

EMBARGOED UNTIL DELIVERY, SCHEDULED FOR APPROXIMATELY 10:00 A.M., EDT, JULY 20, 1983. NOT TO BE PREVIOUSLY CITED, QUOTED FROM, OR USED IN ANY WAY

Mr. Chairman and members of the Committee,

The Supreme Court's decision of June 23 in INS v. Chadha,* as amplified by two summary decisions of July 6,** has declared the long-standing practice of the legislative veto to be unconstitutional. This historic decision touches upon a considerable body of legislation in the field of foreign affairs and national security. I welcome the opportunity to appear before this Committee to present the preliminary views of the Department of State on some of the important questions raised by the Chadha decision.

At the outset I must emphasize that the views stated here are preliminary. While the Department of State has reached some tentative conclusions, we are still in the process of thoroughly reviewing all the legislation with which we deal and which is affected by Chadha--the language of the statutes, their legislative history, and the record of executive-legislative relations in working with these statutes.

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* Immigration and Naturalization Service v. Chadha, No. 80-1832 (U.S. June 23, 1983)

** Process Gas Consumers Group v. Consumers Energy Council of America, Nos. 81-2008 et al. (U.S. July 6, 1983), affirming Consumers Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), and Consumers Union, Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982).

This review is a task that cannot be accomplished overnight, as I am sure the Committee will understand. We will keep the Committee informed as we proceed toward firmer judgments about the legal environment created by the Chadha decision.

James Madison in The Federalist No. 47 referred to the separation of powers as "this essential precaution in favor of liberty." The genius of our constitutional system is that a structure of dispersed powers and checks and balances, designed to preserve our freedom, has also been able to function effectively to produce coherent national policy. This success is a tribute not only to the Founding Fathers who built the structure, but also to the generations of leaders and statesmen since then who have put the nation's well-being first and foremost as they played their constitutional roles in the various branches of government. As Justice White acknowledged in his dissent in Chadha, "the history of the separation of powers doctrine is also a history of accommodation and practicality."

This is the spirit with which this Administration approaches the task ahead of us.

I should like to examine first the history of the legislative veto--what it is, how it has worked--and then the Chadha decision itself and its consequences. Finally, I shall discuss the impact of that decision on some of the statutes that are of particular concern to the Department of State.

THE LEGISLATIVE VETO

"Legislative veto" is a term used to describe a variety of legislative devices, designed to give Congress legal control over actions of executive departments and agencies by means other than the enactment of laws. The legislative veto has been included in statutes for more than 50 years. The procedure was first passed into law in the Act of June 30, 1932, which authorized President Hoover to reorganize the structure of the Federal Government subject to Congressional review. The device was added to various statutes during the Second World War, when the Congress delegated greater authority to the President in the area of foreign affairs and national security, subject to the legislative veto procedure. Enactment of the procedure, became frequent again in the 1960's and 1970's, as Congress sought to strengthen its oversight over the expanding practice of rule-making by administrative agencies.

Adoption of the legislative veto procedure reached its zenith in the early 1970s, as a result or part of some major controversies in the area of foreign affairs and national security.

The statutes span a broad range. Many of them provide for Congressional disapproval of proposed administrative regulations. Some involve review of decisions of individual cases (Chadha, for example, involved the suspension of the deportation of a single person), or review of other executive actions under authority delegated by statute. Other legislation, such as the War Powers Resolution, involves the allocation of broad constitutional powers.

The legislative vetoes in all these statutes fall into two general categories. First, there are those in which the full Congress, or one House or one committee, is purportedly given a right to "veto" an administrative action. The typical statute of this kind requires the President to report an action or rule to both Houses of Congress. The executive action may not be made or take effect until after a fixed period (60 days, for example). If Congress does not act during the period, the executive action can take effect, but if the Congress disapproves (or one House or committee, as the statute may provide), it does not.

Second, there are statutory schemes by which an administrative action purportedly becomes valid only when approved by Congress. The typical statute of this kind requires the President to report a proposed action and then provides for affirmative approval by one or two Houses of the Congress. Most legislative vetoes, like the one in Chadha, fall within the first category.

THE CHADHA CASE AND ITS IMPLICATIONS

At issue in INS v. Chadha was a section of the Immigration and Nationality Act. That statute permitted the Attorney General to allow a deportable alien to remain in the United States, suspending an otherwise valid deportation order. This suspension authority, however, was subject to disapproval by a simple resolution of either House of Congress. The Attorney General suspended Chadha's deportation, but the House of Representatives disapproved. Chadha sued; the Supreme Court held the legislative veto to be unconstitutional. This holding was based on the rationale that legislative actions which do not follow the constitutionally prescribed course of approval by both Houses and "presentment" to the President cannot have legal effect. Thus the decision invalidates not only the "one-House veto" but the "two-House veto" and "committee veto" as well, a point confirmed by the Court's subsequent summary decisions of July 6.

Those statutes which provide for Congressional action by joint resolution--passed by both Houses and signed by the President--would not seem to be affected by Chadha.

The Chadha decision is consistent with the position of this Administration, and with the position taken by most administrations going back to that of Woodrow Wilson, who vetoed a bill incorporating a legislative veto in 1920. Congress's view has always been different. Nevertheless, the practice of executive-legislative relations need not undergo any immediate or radical change in the wake of the Chadha decision, for several reasons.

For one thing, Chadha does not affect other statutory procedures by which Congress is informed of or involved in actions by the Executive Branch. Specifically, Chadha does not affect statutory requirements for notifications, certifications, findings or reports to Congress, consultations with Congress, or waiting periods which give Congress an opportunity to act before executive actions take effect. Moreover, in the foreign affairs field, the Executive Branch and the Congress have generally reconciled or disposed of controversies and differences without resort to the process of legislative veto. Therefore, we see no reason why the Court's decision should cause a fundamental change in our relationship.

We are prepared to work closely with the Congress to resolve any questions or problems that may arise as a result of the decision. And we hope that Congress will act in the same spirit of cooperation.

Perhaps the key legal question raised by Chadha is that of "severability." The problem is an intriguing one: Since the legislative veto provision of a statute is unconstitutional, is any of the rest of the law tainted by that defect?

The Supreme Court has given us a basis for determining the answer to that question. The general principle is that the provision containing the legislative veto will be found to be severable, and the remainder of the statute will continue unaffected, unless it is evident that the legislature would not have enacted the remainder of the law without the legislative veto. That test establishes a strong presumption in favor of severability.

The Supreme Court has also given us some additional guidelines. There is a further presumption of severability, first of all, if the statute contains an express "severability clause." Several of the statutes with which we deal--including the War Powers Resolution and the Atomic Energy Act, for example--contain such severability clauses.

Second, the legislative veto is also presumed to be severable if the legislative program in question is "fully operative as a law" without the veto provision. In the statutes with which we are dealing, this seems generally to be the case. These statutes often establish a system under which the Executive Branch is empowered to make or implement a decision 30 or 60 days later unless the Congress chooses to intervene. In foreign affairs cases to date, given the absence of formal Congressional action, the executive determination has proceeded, although Congressional views have always been taken fully into account. This pattern clearly indicates that these statutes are capable of independent operation with no further Congressional action.

SPECIFIC CASES

I would like to turn now to some of the most important statutes with which we deal in the foreign affairs area and to our probable response in light of the Chadha decision. One of the first that comes to mind is the War Powers Resolution.

War Powers Resolution. The War Powers Resolution contains four major operative parts. The first of these is a consultation requirement.

In Section 3 of the Resolution, the President is required to consult with the Congress "in every possible instance" before United States armed forces are introduced into hostilities or into situations where imminent involvement in such hostilities is clearly indicated by the circumstances. And the President is to consult regularly while the forces remain in such situations.

The second operative part is a reporting requirement. In Section 4, the President is required to make a formal report to Congress in any case in which United States armed forces are introduced--

> "(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
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>
> "(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation...."

The third operative part, Section 5(b), requires the President to withdraw U.S. troops not later than 60 days after a report of actual or imminent involvement in hostilities unless the Congress has affirmatively authorized their continued presence.

The fourth operative part is a legislative veto. According to Section 5(c), the President must withdraw U.S. troops introduced into hostilities even before the end of 60 days if the Congress so directs by concurrent resolution.

The first and second provisions of the War Powers Resolution, on consultation and reporting, are in our view unaffected by the Chadha decision. We do not intend to change our practice under them.

The fourth provision, which asserted a right of Congress by concurrent resolution to order the President to remove troops engaged in hostilities, is clearly unconstitutional under the Supreme Court's holding in Chadha. It seems to me unlikely, however, that this will have a significant impact on the conduct of national security policy. In the decade since the enactment of the War Powers Resolution, no U.S. forces have been committed to long-term hostilities. It is doubtful that Presidents have refrained from such commitments because of the legislative veto in the War Powers Resolution.

It would be equally doubtful that Presidents will now feel freer of restraints because of Chadha. The lesson of recent history is that a President cannot sustain a major military involvement without Congressional and public support.

We believe the legislative veto provision of the War Powers Resolution is severable from the others according to the Court's test and guidelines. The Resolution itself includes a severability clause, and the other operative portions of the Resolution need not be affected by the dropping of the veto provision.

The third operative part of the Resolution, requiring positive Congressional authorization after 60 days, does not fall within the scope of Chadha. Its constitutionality is neither affirmed, denied, nor even considered in the Chadha decision. As you know, the Executive Branch has traditionally had questions about this requirement of Congressional authorization for Presidential disposition of our armed forces, both in light of the President's Commander-in-Chief power and on practical grounds. Congress, of course, has had a different view. I do not believe that any purpose would be served by debating these questions here, in the abstract. This provision is unlikely to be tested in the near future.

And I am authorized here and now to reaffirm the Administration's strong commitment to the principles of consultation and reporting, confident that in a spirit of cooperation the Executive and the Congress can meet future challenges together in the national interest.

Arms Export Control. We come next to the field of arms transfers. Under such statutes as the Arms Export Control Act, we have regularly reported to the Congress certain proposed foreign military sales. We have also reported the proposed licensing of arms exports to foreign countries sold through commercial channels.

Indeed, as a matter of practice and accommodation with the Congress, we have agreed with the Congress to go far beyond the statutory requirements. In addition to the statutory notification procedures, for example, we have long engaged in a practice of informal pre-notification of proposed sales under the Foreign Military Sales program. While this is not required by law, it has given Congress the opportunity to review and comment upon proposed transactions informally and privately before the Executive sends a formal public statement. This practice shows how much the Executive Branch has been aware of and responsive to the legitimate concerns of the Congress.

Even though we have long considered the legislative veto to be unconstitutional, we have always taken Congressional concerns into account in formulating and carrying out the arms sales proposals.

While it seems clear that the legislative vetoes contained in several sections of the Arms Export Control Act are not valid, that result will in no way impair our continued reporting to Congress either under the express statutory provisions or under the informal pre-notification and consultation that we have traditionally maintained. In the last year alone, we have sent up more than 60 reports of intended arms sales and more than 30 pre-notifications for non-NATO countries. While Congress has never disapproved any proposed arms sale, the Administration has on occasion modified the terms of a proposal in light of Congressional concerns.

I think that record speaks for itself. The Executive Branch does not live in a vacuum, and we are acutely aware of the need for consultation and cooperation in this sensitive area. The Chadha decision will make clearer the legal and political responsibility for these decisions, but it will not significantly affect the practice.

Nuclear Non-Proliferation. Another field in which statutes have contained many legislative veto provisions is that of international commerce in nuclear energy. Various sections of the Atomic Energy Act, for example, have provided for a legislative veto of Presidential determinations to permit nuclear exports to foreign countries.

There are three elements in many of the provisions. One of them is the establishment of very strict standards limiting the export of nuclear items. The second is an exceptional waiver authority, vested in the President, who may permit exports if he makes certain findings. The third is a Congressional veto. We consider that those standards and that waiver authority, as well as the statutory requirement of notification to Congress and the observance of a waiting period, continue to be valid. We will continue to wait through the period during which the Congress, in the past, deliberated over its veto; during that time, the Congress may use its constitutional authority to enact new legislation if it chooses. The only provision that is invalid is the third, calling for a veto by concurrent resolution.

The Administration shares Congress's concern about nuclear proliferation. We have been active diplomatically in this field, as this Committee knows.

We vigorously oppose the development of nuclear weapons capabilities by additional countries. Each Executive Branch agency is required to keep the Congress, including this Committee, fully informed of its activities in this field and of significant developments abroad. We have done so, and we are proud of our record of close consultation and collaboration with the Congress. We will continue that practice.

Jackson-Vanik Amendment and Trade-Related Issues. A fourth important statutory area involving a legislative veto is the procedure for granting most-favored-nation treatment (MFN) to certain non-market countries. Under the Jackson-Vanik Amendment, nondiscriminatory tariff treatment may be granted to these countries only when they comply with certain conditions for the protection of human rights, including the right of emigration. These requirements may be waived on the basis of stated findings and determinations by the President.

The annual report required under that statute--for continuation of MFN for Hungary, Romania, and China--is now before the Ways and Means Committee. It can serve as an illustration of how we believe Congress and the Executive should continue to work together constructively.

We presented that report to the Congress before the Supreme Court decision was announced.

However, we would have done precisely the same thing if the Chadha decision had been handed down before the report was filed. We regard the report as fully effective to extend the waiver authority and to continue the waivers currently in force. At the same time, legislative oversight hearings serve the salutary purpose of scrutinizing the implementation of statutory requirements, of airing public concerns, and of making our nation's deep commitment to human rights known to other nations.

The spirit with which we expect to work with Congress in the future, in all statutory fields, is illustrated by another example. We are required by the Case-Zablocki Act to report executive agreements to the Congress, and we do so regularly. That procedure notifies the Congress of agreements already signed. There is also a procedure for enabling this Committee and the Senate Foreign Relations Committee to consult with us as to the form of significant international agreements prior to their conclusion. This practice was arranged between the Department of State and the Chairmen of the two Committees in 1978. It is not required by law, but makes good sense. We will maintain it.

WHERE DO WE GO FROM HERE?

As I emphasized at the beginning, little of practical significance need in fact change as a result of the Supreme Court decision. The Department of State will continue to work closely with the members and committees of Congress and to take their concerns into account in reaching decisions on issues of policy. If anything, I believe Chadha will make the departments and agencies of the Executive Branch more, not less, conscious that they are accountable for their actions.

There are many basic questions about the separation of powers, particularly in the foreign affairs and national security field, which the Supreme Court will probably never settle. In that realm our constitutional law is determined, in a sense, as in Britain--by constitutional practice, by political realities, by the fundamental good sense and public conscience of the American people and their representatives. This is how we have always settled these questions, and this is how we, the Executive and the Congress, must approach these problems in the aftermath of Chadha.

Our Constitution is a wise and enduring blueprint for free government. In this period of our history, our nation faces challenges that the drafters of that document could not have imagined.

One of the most profound responsibilities of the federal government is to conduct this nation's foreign policy and ensure its security in a nuclear age, in an era of instantaneous communications, in a complex modern world in which international politics has become truly global. America's responsibility as a world leader imposes on us an obligation of coherence, vision, and constancy in the conduct of our foreign relations. For this there must be unity in our national government. The President and the Congress must work in harmony, or our people will not have the effective, strong, and purposeful foreign policy which they expect and deserve. We have seen in the last 15 years that when Congress and the President are at loggerheads, the result can be stalemate and sometimes serious harm to our foreign policy.

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Thank you.

THE WHITE HOUSE

WASHINGTON

July 12, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Legislative Veto Meeting

Mr. Meese began the meeting by announcing its purpose, which was to expand the legal analysis of the effect of the legislative veto decision to include broader policy considerations. The Attorney General then stated his view that legislative veto questions should be addressed on a case-by-case basis as they arose, rather than in any broad or general fashion. He also noted that any testimony should be postponed until after the August recess, if possible, to let the situation cool down some more. Ken Duberstein opined that he did not think Congress was inclined to act precipitously or in an across-the-board manner, but was still surveying the damage.

David Stockman agreed with the case-by-case approach only for the interim, noting that a vacuum now existed that Congress would fill with some other device. In particular he was concerned about a rise in appropriations riders, and seemed to be suggesting some accomodation with Congress to avoid this. The Deputy Attorney General disagreed, noting that Congress could still act as prescribed in the Constitution, so no "vacuum" existed. Ed Harper seemed to agree with Schmults; Mike Horowitz with Stockman.

Mr. Meese concluded the meeting by setting out the following course of action:

1. Do not alarm Congress; comply with report and wait provisions.

2. Address legislative veto issues as they arise on a case-by-case basis.

3. Begin "brainstorming" on long-term effects, through a working group of the Cabinet Council on Legal Policy.

4. The activities of this working group will be coordinated with the existing review group which has been meeting at Justice.

JGR

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 13, 1983

FOR: RICHARD A. HAUSER

FROM: PETER J. RUSTHOVEN

SUBJECT: Memoranda from Ed Harper's Office re: Legislative Vetos

As we discussed, attached for your review and signature is a revised memorandum for Ed Harper, with copy to Wendell Gunn, on the above-referenced issue.

The memorandum has been changed to reflect the discussions at the meeting on legislative veto issues earlier this week attended by John Roberts. John and I think you should still send the memorandum, notwithstanding Harper's attendance at that meeting, as additional insurance against the possibility that Administration statements or other action on legislative veto provisions fail to be coordinated through the Justice "Working Group" and the Cabinet Council on Legal Policy.

Attachment

cc: Fred F. Fielding
John G. Roberts, Jr. ←

THE WHITE HOUSE

WASHINGTON

July 13, 1983

MEMORANDUM FOR EDWIN L. HARPER
ASSISTANT TO THE PRESIDENT
FOR POLICY DEVELOPMENT

FROM: RICHARD A. HAUSER
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: Legislative Veto Provisions

This will respond to the question noted on Wendell Gunn's June 23 memorandum for you about the impact of the Supreme Court's decision in INS. v. Chadha on the legislative veto provision of section 203 of the Trade Act of 1974, 19 U.S.C. § 2253, with specific reference to the recent specialty steel case.

Prior to the President's decision in that case, we were advised by the Office of Legal Counsel at the Department of Justice that it had reviewed this issue, and believed that the Chadha decision invalidated this legislative veto provision. OLC was also of the view, however, that the President retained his statutory authority to review United States International Trade Commission recommendations, and that he should continue to report to the Congress his decisions with respect to such recommendations. Our office reiterated this OLC advice in our comment memorandum on the specialty steel case.

Our office was copied on your more general memorandum to Assistant Directors of the Office of Policy Development, asking them to compile lists of statutes with legislative veto provisions involving their respective areas of substantive responsibility. As you know, the Cabinet Council on Legal Policy and the Department of Justice "Working Group" are conducting an overall survey of legislative veto provisions that may have been affected by the Supreme Court's decision. Accordingly, the results of the OPD survey should probably be forwarded to the Justice Working Group, which we can handle if you wish.

Let me know if you have any questions; thank you.

cc: Wendell W. Gunn

STRONG MEMO TO
HARPER — OLC, GTL
COORDINATING RESPONSE
(WE TOLD THEM BEFORE)
+ YES, OF COURSE,
PREZ SHOULD EXERCISE
HIS POWER

Legislative Veto
file: CHADHA

THE WHITE HOUSE
WASHINGTON

Date 7.8.83

Suspense Date _____

MEMORANDUM FOR: Peter
John ←

FROM: **DIANNA G. HOLLAND**

ACTION

_____ Approved

_____ Please handle/review

__X__ For your information

_____ For your recommendation

_____ For the files

_____ Please see me

_____ Please prepare response for _____ signature

_____ As we discussed

_____ Return to me for filing

COMMENT

_____

_____

_____

_____

TO PR

JUL - 1 1983

DOCUMENT NO. 140627 PD

OFFICE OF POLICY DEVELOPMENT

STAFFING MEMORANDUM

DATE: 7/1/83 ACTION/CONCURRENCE/COMMENT DUE BY: July 8, 1983

SUBJECT: IMPACT OF COURT'S LEGISLATIVE VETO DECISION

	ACTION	FYI
HARPER	☐	☒
PORTER	☐	
BARR	☐	☐
BLEDSOE	☒	☐
BOGGS		☐
BRADLEY		☐
CARLESON		☐
DENEND		☐
GALEBACH	☐	☐
GARFINKEL	☐	☐
GUNN	☒	☐
B. LEONARD	☐	☐
LI	☐	☐
McALLISTER	☐	☐
MONTOYA	☐	☐
ROPER	☐	☐
SMITH	☐	☐
SWEET	☐	☐
UHLMANN	☒	☐
ADMINISTRATION	☐	☐

	ACTION	FYI
DRUG POLICY	☐	☐
TURNER	☐	☐
D. LEONARD	☐	☐
OFFICE OF POLICY INFORMATION		
HOPKINS	☐	☐
PROPERTY REVIEW BOARD	☐	☐
OTHER		
Ed Meese	☐	☒
Fred Fielding	☐	
	☐	☐
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REMARKS:

Please return this tracking sheet with your response

Edwin L. Harper
Assistant to the President
for Policy Development

THE WHITE HOUSE

WASHINGTON

June 30, 1983

MEMORANDUM FOR ASSISTANT DIRECTORS

FROM: EDWIN L. HARPER

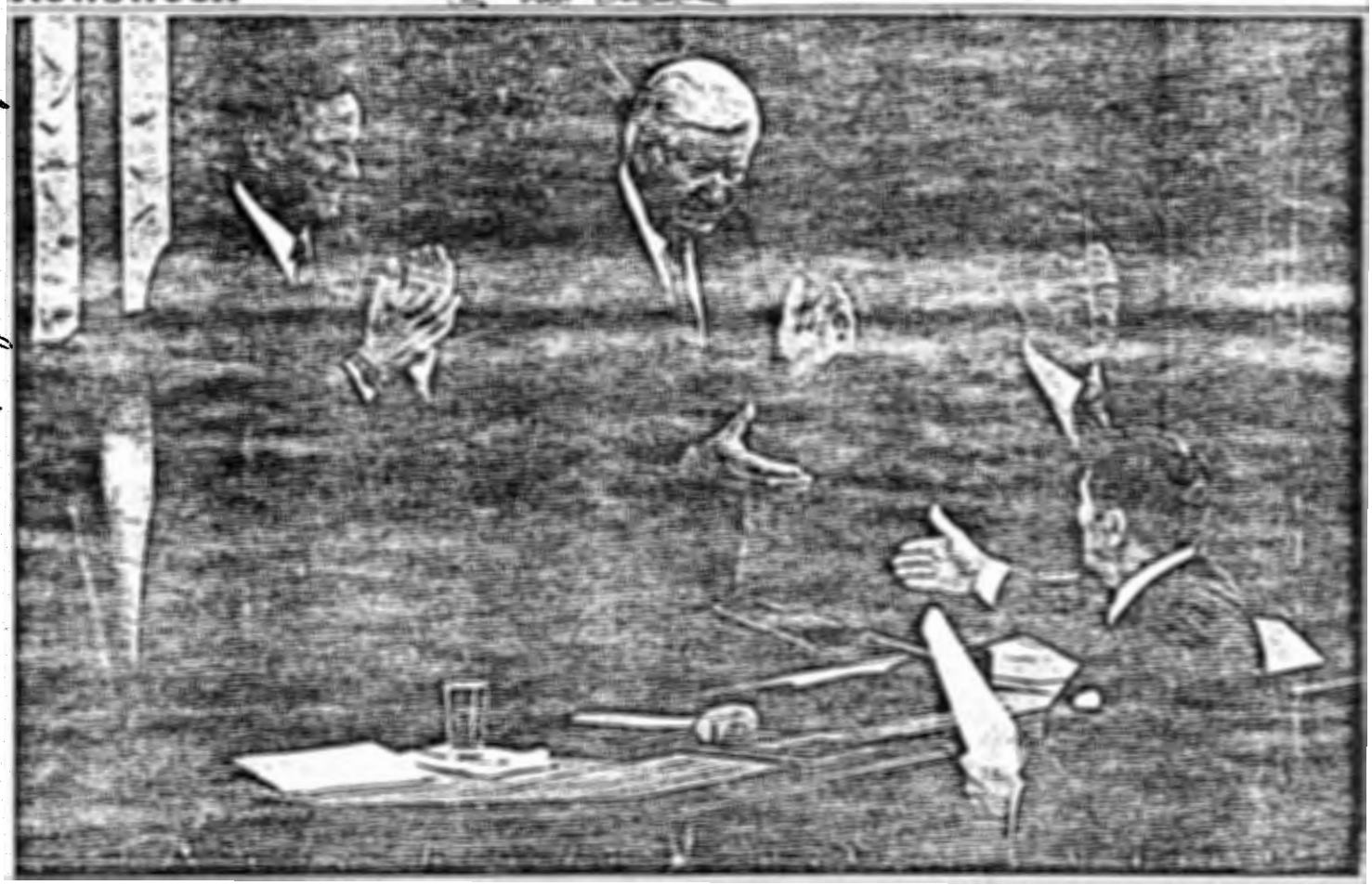
SUBJECT: Impact of Court's Legislative Veto Decision

Attached is a copy of the article from Newsweek magazine of July 14th discussing the background of the Court's decision overturning the legislative veto.

Would you please identify the significant applications of the legislative veto concept in your area of responsibility and comment on whether it is likely and/or desireable that the President's new-found freedom from the threat of legislative veto be exercised.

cc: Edwin Meese III
Fred Fielding

Attachment



Jean Louis Atlan—Sygma

Checks and balances: The legislative branch (House Speaker Tip O'Neill) greets the executive (State of the Union Message, 1982)

The Court Vetoes the Veto

In a historic ruling, the executive branch regains power at the expense of Congress.

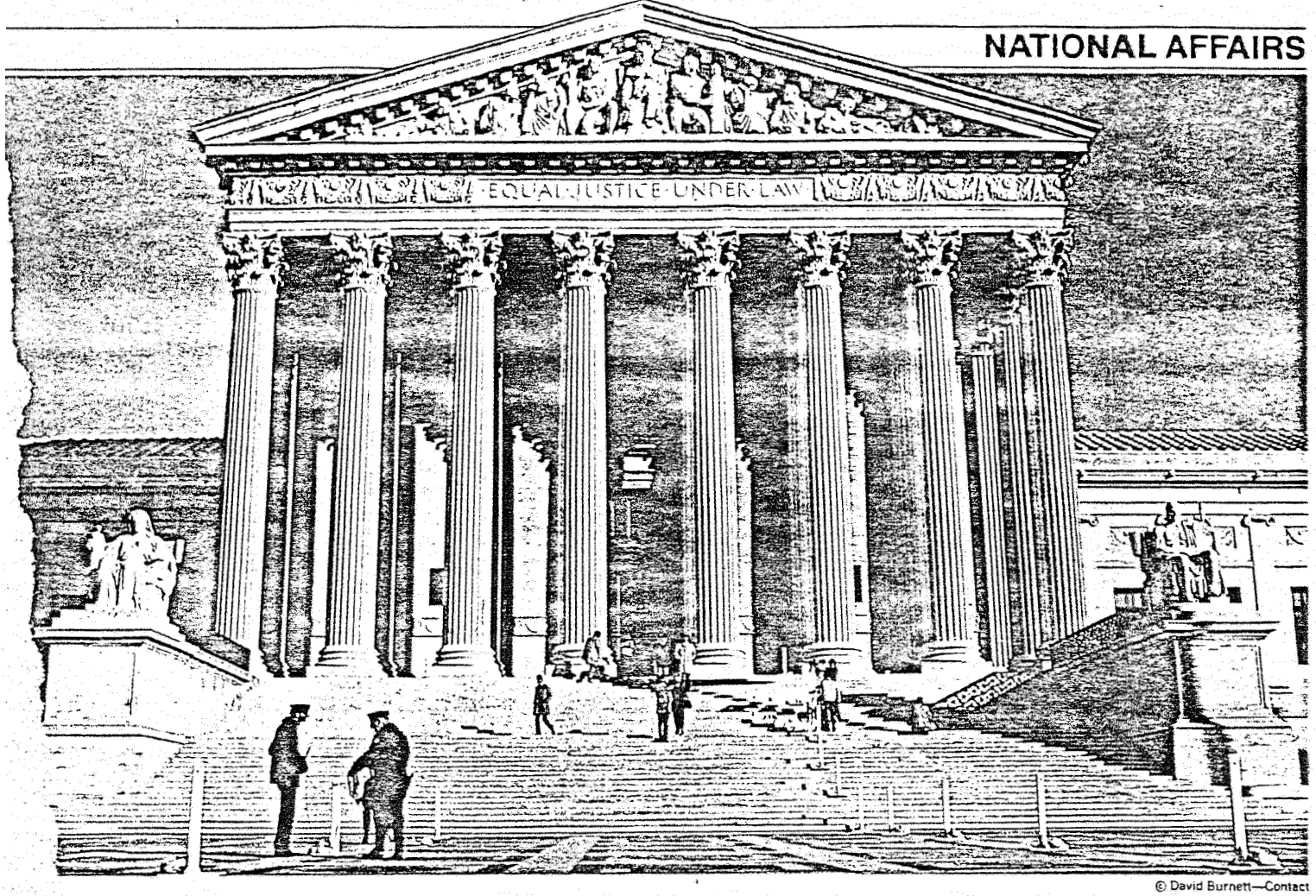
Justice Byron White usually does not say much on days when the U.S. Supreme Court announces its decisions, but last week he couldn't contain himself. "I have not spoken orally in dissent in many years," White began, "but this is no ordinary case. It is probably the most important case that the court has handed down in many years." Then for five minutes in a silent U.S. Supreme Court chamber White sharply criticized his colleagues for, as he put it, "in one fell swoop" readjusting the constitutional calculus between the president and Congress by striking down a device most Americans never heard of: the legislative veto.

In Washington, at least, White's criticism seemed understated. The ruling appeared to invalidate veto provisions tucked into nearly 200 laws—including major legislation giving Congress a measure of control over American troops involved in hostile actions abroad and allowing the House and Senate to make sure the president actually spends money they have appropriated (box, page 18). In so doing, the court struck down in one day more federal statutes than it has overturned in its history—and stripped Congress of an extremely powerful tool. Although it will be years before all the effects of the ruling are clear, it will change the way Washington does business and, in the short run, force Congress to write much stricter laws.

Shortcut: Invented as a simple way to keep an eye on the last gasps of Herbert Hoover's administration, the legislative veto has become Congress's desperate—and sometimes lazy—way of trying to check both an imperial presidency and a set of low-profile regulatory agencies with a taste for running amok. While it takes many forms, the veto typically works like this: Congress authorizes the White House to do something such as sell arms abroad, while reserving for itself the power to overrule any sale it doesn't like. By a 7-2 vote, the high court said that if Congress wants to thwart the president or a federal agency, it must pass another law. "The veto ... doubtless has been in many respects a convenient shortcut," wrote Chief Justice Warren Burger for the majority. "But it is crystal clear ... that the framers [of the Constitution] ranked other values higher than efficiency."

Congress responded with wounded cries. "It's a disaster," said Rep. Elliott Levitas of Georgia, sponsor of a bill to give Congress a veto over every new administrative-agency regulation. Both the House and Senate foreign-policy committees created task forces to explore the extent of the damage. And Sen. Charles E. Grassley of Iowa pledged to find new ways to curb presidents. The ruling was particularly stinging because it struck at the fruits of Congress's post-Watergate, post-Vietnam frenzy. Furious at presidents who either lied to or ignored them, a reassertive Congress has spent the past decade giving itself authority to, among other things, recall U.S. troops from hostile actions.

For the most part, the veto was useful simply as a bluff. While Congress approved 41 new provisions in 1980 alone, over the



© David Burnett—Contact

ıpreme Court Building: 'A fairly monumental change in the way the government does business'

st five years it actually vetoed only 31 ıtters—and most of them were minor. In ıctice, the veto's existence helped stimu- :e compromise between legislative and ex- utive branches unwilling to play a game of ɔnstitutional chicken. "The justices don't ıderstand what it's like here," says Stanley ırand, counsel to the House of Represent- ıtives. "This is a fairly monumental change in the way the government does business." But, insists Brand, Congress may have the last laugh; without a veto the lawmakers may be less willing to dole out new authority to the executive branch: "Every time the president wants something he's going to have to come up here, hat in hand."

Excesses: A generation of White House staffers say they are willing to take their chances. Virtually every modern president has opposed the legislative veto; Jimmy Carter even asked his staff to find a test case that would challenge it. Candidate Ronald Reagan endorsed it as a way to check the excesses of the federal bureaucracy, but once in the White House he found the threat of congressional veto just as annoying as his predecessors had. Indeed, the bruising 1981 Senate battle over the sale of AWACS reconnaissance planes to Saudi Arabia was essentially a fight over the legislative veto; under the Arms Control Act of 1976, Congress could block the export of most military arms and equipment within 30 days after the president announced his plans. In fact, Congress never passed an arms-deal veto.

Like many other great cases, last week's landmark began as just another obscure dispute. At issue was whether one Jagdish Rai Chadha, an East Indian native of Kenya who came to the United States as a student, could be deported. Chadha overstayed his visa but argued he shouldn't be returned to Kenya because of that country's racial turmoil. Applying federal law, an immigration judge found that Chadha could stay in this country and suspended his deportation. However, 18 months later, for still unexplained reasons, the House of Representatives invoked its legislative veto power on immigration decisions and ordered Chadha and five others to leave. Chadha went to court, challenging the House action, and, in the process, the veto's very existence.

Burger: Striking down nearly 200 laws

'Presentment': Last week's decision was surprising only for its great breadth. According to Burger's opinion, the Constitution requires that all valid acts of legislation must not only pass both houses of Congress, but also must be "presented" to the president for approval. The problem with the legislative veto, he concluded, was the absence of that "presentment" procedure.

For White the court's decision was simply too formalistic. In his view, the veto is entirely consistent with the separation-of-powers plan created by the Constitution. "Only within the last half-century has the complexity and size of the federal government's responsibilities grown so that the Congress must rely on the veto to ensure its

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 1, 1983

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS JGR

SUBJECT: INS v. Chadha

Craig Fuller has asked for our analysis of the legislative veto opinion "as soon as possible." We did, of course, provide such an analysis to the Senior Staff the morning after the decision was announced.

I recommend sending Fuller a copy, with a cover memorandum reviewing events subsequent to preparation of the analysis, specifically the convening of the Justice Department working group and the recommendation of our office that Legislative Affairs became involved to calm the fears of Congress.

Attachment

THE WHITE HOUSE

WASHINGTON

July 1, 1983

MEMORANDUM FOR CRAIG L. FULLER

FROM: RICHARD A. HAUSER

SUBJECT: INS v. Chadha

You have asked for our analysis of the Supreme Court's legislative veto opinion "as soon as possible." We provided such an analysis to the Senior Staff the morning after announcement of the decision. A copy of that analysis is attached.

Since that time a working group chaired by Assistant Attorney General Olson has been convened to assess the impact of the decision. Our office, OMB, and Legislative Affairs are represented on the working group, in addition to the pertinent offices and divisions of the Justice Department and several other departments. The group is monitoring transmissions to Congress to ensure consistency with the Court's decision and to provide advance warning of any potential disputes concerning the effect of the decision.

It was the general consensus of the group that an immediate effort should be made to prevent Congressional overreaction to the Chadha decision. Our office has recommended that Legislative Affairs meet with appropriate legislators and perform a calming function, advising them that we would comply with existing "report" provisions and would work closely with Congress in assessing the long-term effect of Chadha. Establishment of such a low-key approach and cooperative tone will do much to dissipate Congressional fears and prevent Congressional overreaction.

RAH:JGR:aw 7/1/83

cc: RAHauser
JGRoberts
Subj.
Chron

Immigration and Naturalization Service v. Chadha
(U.S. Supreme Court, June 23, 1983)

The Supreme Court yesterday issued a historic ruling on the respective powers of the Executive and Legislative branches. In Immigration and Naturalization Service v. Chadha, the Court agreed with the Administration's legal arguments and struck down a "legislative veto" provision in terms that strongly suggest that all legislative veto provisions are unconstitutional. Under the Immigration and Nationality Act, the Attorney General has the authority to suspend deportation of an alien. He did so in Chadha's case, but the House of Representatives, acting pursuant to a legislative veto provision, "vetoed" the Attorney General's decision. In an opinion written by the Chief Justice, joined by Justices Brennan, Marshall, Blackmun, Stevens, and O'Connor, the Court ruled that the exercise of such a veto power by the House was unconstitutional.

The opinion of the Court stresses that a proper exercise of legislative power under the Constitution requires action by both Houses of Congress and presentment of the question to the President for veto or approval. The opinion contains numerous passages emphasizing the importance placed by the Framers on the President having an opportunity to review legislative actions before they could become effective. The legislative veto device is unconstitutional precisely because it purports to give effect to Congressional action while totally avoiding presentment of the question to the Chief Executive. While Chadha involved a one-house legislative veto, its reasoning strongly suggests that a two-house legislative veto -- by concurrent resolution -- is also unconstitutional. As the Chief Justice's opinion concluded: "To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President."

Justice Powell concurred separately, not reaching the legislative veto question. He thought the House's action unconstitutional as an exercise of judicial power, determining the specific rights of one individual under the law. Justice White dissented. He considered the legislative veto a useful device for Congress to reserve control over executive agency actions. Justice Rehnquist also dissented on a technical point, with which White agreed. Rehnquist argued that this particular legislative veto provision was not severable from the provision giving the Attorney General

the power to suspend deportations. Thus, if Congress could not veto the suspension order, the Attorney General lacked the power to order suspension in the first place.

This is a historic ruling in favor of the Executive Branch. It means that Congress can no longer interfere with executive actions short of passing a bill through both Houses and presenting it to the President for his approval. There are nearly 200 statutory provisions containing legislative vetoes, and the Court's opinion, as noted by Justice Powell, "apparently will invalidate every use of the legislative veto." Some prominent examples of acts with legislative veto provisions include the War Powers Act, the Department of Defense Appropriation Authorization Act, and the Federal Trade Commission Improvements Act. Provisions in these and other acts purporting to allow Congress to disapprove executive decisions by a one-house veto or concurrent resolution are presumably invalid under Chadha.

Some argue that Congress has lost a valuable tool permitting it to police the executive agencies and making the bureaucracy more responsible to the elected representatives of the people. In fact, the Chadha decision will promote better government by forcing Congress to draft statutes more clearly and narrowly. Congress will not be able to delegate vast power to agencies with the assurance that it can step in later if it disagrees with what an agency is doing. As the Attorney General stated yesterday, "[t]he long term effect of this decision will be a better and more effective Congress as well as a more effective presidency."

Severability problems may arise in connection with some legislative veto provisions, a concern highlighted by Justice Rehnquist's dissent. If a legislative veto provision is not severable -- if a court rules Congress would not have given the executive the authority in question if Congress could not "veto" its exercise in any particular case -- then the grant of authority to the executive may be struck down, along with the legislative veto. While most legislative veto provisions, like the one in Chadha, should be found to be severable, the question can only be decided on a case-by-case basis, after examination of each statute and its legislative history.

ID # 073455 CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Craig L. Fuller

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: Legislative Veto Opinion

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
W Holland	ORIGINATOR	831061 30			1 1
	Referral Note:				
CWAT 18	D	83 10 6 30		S	83 10 7 05
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ACTION

DISPOSITION

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

THE WHITE HOUSE
WASHINGTON

CABINET AFFAIRS STAFFING MEMORANDUM

DATE: June 29, 1983 NUMBER: 07345ICA DUE BY: 5 pm, July 6

SUBJECT: Legislative Veto Opinion

	ACTION	FYI
ALL CABINET MEMBERS	☐	☐
Vice President	☐	☐
State	☐	☐
Treasury	☐	☐
Defense	☐	☐
Attorney General	☑	☐
Interior	☐	☐
Agriculture	☐	☐
Commerce	☐	☐
Labor	☐	☐
HHS	☐	☐
HUD	☐	☐
Transportation	☐	☐
Energy	☐	☐
Education	☐	☐
Counsellor	☐	☑
OMB	☐	☐
CIA	☐	☐
UN	☐	☐
USTR	☐	☐
CEA	☐	☐
CEQ	☐	☐
OSTP	☐	☐
_____	☐	☐
_____	☐	☐

	ACTION	FYI
Baker	☐	☐
Deaver	☐	☐
Clark	☐	☐
Darman *(For WH Staffing)*	☐	☐
Harper	☐	☑
Jenkins	☐	☐
FIELDING	☐	☑
_____	☐	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐
CCCT/Gunn	☐	☐
CCEA/Porter	☐	☐
CCFA/Boggs	☐	☐
CCHR/Carleson	☐	☐
CCLP/Uhlmann	☐	☐
CCMA/Bledsoe	☐	☐
CCNRE/Boggs	☐	☐

REMARKS:

We would appreciate receiving your analysis of the Supreme Court's legislative veto opinion as soon as possible. For your information I have attached a paper developed by OMB.

RETURN TO:

☑ Craig L. Fuller
Assistant to the President
for Cabinet Affairs
456-2823

☐ Becky Norton Dunlop
Director, Office of
Cabinet Affairs
456-2800

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

June 24, 1983

MEMORANDUM TO: Dave Stockman
Joe Wright
Don Moran
Fred Khedouri
Al Keel
John Cogan
Connie Horner
Chris DeMuth
Hal Steinberg
Pete Modlin

FROM: Mike Horowitz MH

SUBJECT: Unconstitutionality of Legislative Veto

1. Introduction

Yesterday, in INS v. Chadha, the Supreme Court in a sweeping opinion declared the legislative veto unconstitutional. As stated by Justice Powell in his concerning opinion, "the Court's decision . . . apparently will invalidate every use of the legislative veto."

Chadha involved section 244(c)(2) of the Immigration and Nationality Act. The section permits the Attorney General to suspend the deportation of an alien found deportable by an immigration judge. The section also permitted Congress to veto the Attorney General's suspension of deportation if either House passed a resolution to that effect. In Chadha, the House of Representatives passed such a resolution, thereby effectively requiring Chadha's deportation. Chadha sued the INS, and as one of his grounds asserted that Congress' exercise of the veto was unconstitutional.

The Supreme Court's decision dealt with a variety of issues, including several questions involving standing and jurisdiction. The substantive issues of critical importance, however, were the constitutionality of the legislative veto and the severability of the provision.

2. Legislative Veto

The Court, in extremely sweeping language, found the provision unconstitutional on the grounds that it violates both the Presentment Clauses1/ and the bicameralism requirement2/ of the Constitution. Only Justice White dissented from the holding that the legislative veto was unconstitutional; Justice Powell concurred in the judgment, but on the narrower and novel ground that the particular legislative veto provision was an unconstitutional assumption of judicial power.

3. Severability

In real terms, this may be the most critical question, and the Chadha opinion only suggests the future shape of the law.

The Immigration and Nationality Act, at issue in Chadha, contained a standard severability clause. The Court held that that provision gave rise to a clear presumption in favor of severability. The Court, however, also engaged in a lengthy review of the Act's legislative history to determine whether Congress really intended the legislative veto provision to be severable. In addition, the Court applied a second test -- whether what remains after the severance "is fully operative as a law." The Supreme Court concluded that both tests -- legislative intent and the "fully operative" standard -- supported a finding of severability.

It is possible that the Court will provide more detailed guidance on severability in the next few weeks in another legislative veto case still pending before the Court involving a FERC rule vetoed by Congress. There, the D.C. Circuit held the legislative veto unconstitutional, and also found the provision severable from the Natural Gas Policy Act even though it did not contain a

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1/ The Presentment Clauses require Congress to present passed legislation to the President for his signature or veto.

2/ The bicameralism requirement requires that a bill pass both Houses before it is presented to the President. Although the bicameralism requirement is not an issue for two-House legislative vetos, the Court's decision is not predicated on bicameralism, and is applicable to any type of legislative veto.

severability clause. The D.C. Circuit analyzed the severability issue wholly in the context of legislative intent. It found the legislative veto provision severable because the legislative history indicated that the provision was not "essential" to the implementation of the statutory policy of the Act. If the Supreme Court affirms the decision of the D.C. Circuit in the FERC case, it will be a strong precedent in favor of the general severability of legislative veto provisions. Because the Supreme Court expressly declined to hold oral argument on the FERC case, Justice believes the case will be summarily affirmed.

Whatever the disposition of the FERC case, however, it is likely that the severability of legislative veto provisions will continue to be litigated extensively, and a source of considerable uncertainty, perhaps for a substantial period.

4. Retroactivity

A second major issue raised by Chadha is retroactivity. The Supreme Court has in the past made some of its constitutional holdings prospective in application only. In Chadha, the Court was silent on the retroactivity issue because, in the context of the case, the issue did not arise. (Mr. Chadha's deportation had been stayed during the pendency of the case.) Thus, it is entirely possible that Executive Brach actions vetoed by Congres may now be in force. It is likely that such "unvetoed" Executive Branch actions will quickly be tied up in litigation as adversely affected parties seek judicial resolution of the retroactivity issue. We are looking into a variety of areas that may be affected if Chadha applies retroactively, including Pay Act legislative vetos and the veto of the FTC's used car regulations.

5. "Report and Wait" Provisions

The Supreme Court in Chadha expressly approved the "report and wait" provisions contained in some statutes. These provisions require agencies to report regulations to Congress, and not to implement them for a specified period pending Congressional action. The Court made clear that such provisions are not legislative vetos, and are appropriate mechanisms to provide Congress with time to enact legislation barring the reported actions.

6. Impoundment Control Act

The most immediate problem presented by Chadha for OMB is the Impoundment Control Act. The rescission authority does not

appear implicated, in that an affirmative endorsement of both Houses is required.3/

The legislative veto contained in the deferral authority, however, is clearly unconstitutional and was identified in Justice White's dissenting opinion as one of the key Executive Branch powers affected by the Court's decision.4/

Justice believes, as do I, is that the legislative veto provision is severable from the deferral authority. A basis for this conclusion is that deferrals, unlike rescissions, largely ensure the orderly obligation of funds, so that Congress arguably would have given the President this type of limited power without an attached legislative veto.5/ But it is too early to know definitively whether this reasoning is supported by the legislative history, and whether the courts will hold the deferral authority severable from the one-house veto. Because the Impoundment Control Act does not contain a severability provision, the Supreme Court's disposition of the FERC case may be crucial on this issue.

3/ The Impoundment Control Act does not, by its terms, require Presidential signature of rescissions. Thus, possible questions regarding some rescissions may arise under the Presentment Clauses rationale discussed at note 1. It is my understanding that most if not all rescissions are packaged in appropriations bills, which are of course signed by the President. If this is the case, Chadha may not present problems for the rescission authority. In any event, we may wish to propose or endorse Impoundment Control Act amendments expressly requiring rescissions to be in the form of regular bills.

4/ White noted that 65 budget deferrals have been vetoed by Congress.

5/ It is not clear whether the Impoundment Control Act creates the deferral authority, or simply regulates its use. It can be argued that the deferral authority exists without the Act, in which case the legislative veto provision would be clearly severable. Although we have not yet researched all of them, it appears that the pre-Impoundment Control Act cases -- which were decided adversely to the President -- dealt with attempted lapsings of budget authority, i.e. rescissions.

For the present, and generally, we will need to exercise care in using deferrals in such a way that they cannot be interpreted as rescissions, since one result of Chadha is that the Comptroller General probably will be much more aggressive in policing deferrals.6/

7. Conclusion

It is too early to know the full fall-out of Chadha. There are some immediate issues that will have to be considered, including budget deferrals, offshore leasing, federal pay, acts of the D.C. government, sales of public lands, civil service reform, and a variety of regulatory regimes that involve legislative vetos. In this regard, I am attaching an Appendix to Justice White's dissenting opinion listing 56 major statutes affected by the Court's decision.

Some predictions can be made as to what we can expect from Congress in the immediate future. For instance, we are likely to see many more of the "report and wait" provisions that the Court approved in its decision -- dangerous provisions if Congress seeks to examine and delay publication of NPRM's or final rules, and not merely suspend their effective dates. We also are likely to see a sharp increase in the number of appropriation bill riders. This is likely to bring with it an increase in the shutdown "brinksmanship" budget politics we have experienced in recent years.

Attachment

6/ The Comptroller General is empowered to sue to ensure that a deferral is not used to achieve a rescission. It is likely that the invalidation of the legislative veto on deferrals will reduce the threshold for such a lawsuit.