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EXECUTIVE OFFICE OF THE PRESIDENT

BUREAU OF THE BUDGET

file Chalker. I advised John Carey to change 4 to 4(a) or to delete "make a formal" at page 8, line 3.

~~May be declassified when International Affairs (Tab A - second page) is removed.~~

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DEPARTMENT OF STATE

Washington, D.C. 20520

DECLASSIFIED
White House Guidelines, August 28, 1997
By Greg Cumming NARA, Date June 2, 1998

July 14, 1983

~~CONFIDENTIAL~~

TO: NSC - Mr. Robert Kimmitt
Commerce - Mrs. Helen Robbins
Defense - Col. John Stanford
Justice - Mr. F. Henry Habicht
OMB - Mr. Alton Keel
Treasury - Mr. David Pickford
USTR - Mr. Dennis Whitfield

SUBJECT: Deputy Secretary Dam's Testimony on the Legislative Veto before the HFAC

Attached is a draft of Deputy Secretary Dam's testimony on the Legislative Veto scheduled to be delivered to the House Foreign Affairs Committee on July 20, 1983.

Comments and clearances should be telephoned directly to Peter Rodman (632-1494) no later than COB, Friday, July 15, 1983.

Covey

Charles Hill
Executive Secretary

Attachment:

As stated.

~~CONFIDENTIAL~~
DECLAS: OADR

DRAFT TESTIMONY FOR MR. DAM

HOUSE FOREIGN AFFAIRS COMMITTEE

July 20, 1983

Mr. Chairman and members of the Committee,

The recent Supreme Court decision in INS v. Chadha, which held the legislative veto to be unconstitutional, touches upon a considerable body of legislation in the foreign affairs area. I appreciate 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 proceeding with a thorough review of all the many statutes with which we deal and which are affected by the Chadha decision -- the language of the statutes, that legislative history, and the record of executive-legislative relations in working with these statutes.

This review is a task that cannot be accomplished overnight. We would welcome the considered views of the members of this Committee as we proceed toward firmer judgments about the legal environment we have been thrust into by the Chadha decision.

I should like first to examine 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 four specific statutes that are of concern to the Department of State.

"Legislative veto" is a term used to describe a variety of legislative devices designed to give Congress legal control over actions of the executive branch by means other than the enactment of laws. The legislative veto has been used for more than 50 years. Its first use was in the Act of June 30, 1932, which authorized President Hoover to reorganize the structure of the federal government subject to Congressional approval. Use of the device accelerated 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 legislative veto. Its use was frequent again in the 1960's and 1970's, as Congress sought to strengthen its oversight over the growing practice of substantive rule-making by administrative regulation.

The legislative veto reached its zenith in some of the major controversies of the early 1970's again 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 waiver of the deportation of a single person), or review of other executive actions administering statutes already enacted. Other statutes attempt to specify the allocation of broad constitutional powers, such as the War Powers Resolution or the Congressional Budget and Impoundment Control Act.

The legislative vetoes in these statutes fall into two broad categories. First, there are those in which Congress, or one house or committee, is purportedly given a right to "veto" an administrative action. Second, there are those in which an administrative action purportedly becomes valid only when approved by Congress. The bulk of legislative vetoes fall within the first category. The typical statute of the first type requires the President to report a proposed action or rule to both Houses of Congress. The executive action may not take effect for a fixed period (60 days, for example). If Congress does not act, the executive action takes effect, but if the Congress disapproves (or one House, as the statute may provide) it does not.

In other cases, such as Chadha, the action takes effect provisionally, subject to the veto.

THE CHADHA CASE AND ITS IMPLICATIONS

At issue in INS v. Chadha was the Immigration and Nationality Act. That statute permitted the Attorney General to allow a deportable alien to remain in the United States, waiving an otherwise valid deportation order. This waiver authority was, however, subject to disapproval by a simple resolution of either House of Congress. The Attorney General waived Chadha's deportation, but the House of Representatives disapproved that action. Chadha appealed; the Supreme Court held the legislative veto to be unconstitutional. This holding was based upon the Court's view 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. As a result, the decision invalidates the "two_house veto," "one-House veto," and "committee veto" as well, a point confirmed by the two subsequent per curiam decisions.

The Chadha decision is consistent with the position of this Administration, and with the position of every previous Administration going back to that of Franklin D. Roosevelt, which have questioned the propriety of the legislative veto, particularly in the area of foreign affairs and national security. While Congress' view has been different, the next result in the wake of the Chadha decision is that the practice of executive-legislative relations need not suffer any immediate radical change. The decision does not affect most of the statutory procedures by which Congress is informed of or involved in actions by the executive branch. Specifically, Chadha does not appear to 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 affect. Moreover, in the foreign affairs field, legislative veto provisions have not, on the whole, played a major part in the resolution of specific issues between the executive branch and Congress. We have generally reconciled or disposed of our concerns and differences through other means. Therefore, we see no reason why the Court's decision should cause any fundamental change in our relationship. We hope to work closely with the Congress to resolve any questions or problems that may be imposed by the decision. And we trust, in the meantime, that Congress will not act precipitously.

Perhaps the key question raised by Chadha that we must resolve is that of "severability." The problem is an intriguing one: When the legislative veto provision of a statute is declared unconstitutional, what is the impact on the remaining provisions?

The Supreme Court has set forth a rule of decision and two important guidelines for dealing with that question. The rule is that the provision containing the legislative veto will be found to be severable, and the remainder of the statute will continue to be valid, 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 two guidelines to help apply the test. One guideline is straightforward: Does the statute contain 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 a severability clause. The second guideline is whether the legislative program in question can be made fully operational without the further participation of Congress. In the statutes with which we are dealing, this seems generally to be the case.

These statutes often establish the system under which the executive branch is empowered to make or implement a decision 30 or 60 days later unless -- as has never happened -- Congress chooses to influence. Thus in all of the foreign affairs cases to date, given the absence of formal Congressional action, the executive determination has simply taken effect. This pattern clearly indicates that the statutes are capable of independent operation with no Congressional action. There may be situations, however, in which this is not the case.

SPECIFIC CASES

I understand that you would like me to focus on a few specific statutes and on our probable response in light of the Chadha decision. One of the first of those mentioned was 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 are there. 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;
>
> "(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 within 60 days unless the Congress has affirmatively authorized their continued presence in the situation of danger as defined earlier.

The fourth operative provision is a legislative veto. According to Section 5(c)1, the President must withdraw United States troops from the area of danger before the end of 60 days if the Congress passes a concurrent resolution demanding such withdrawal.

The first and second provisions of the War Powers Resolution, on consulation and reporting, are in our view still valid and applicable. We do not intend to change our practice under them.

The fourth provision, which permitted Congress by concurrent resolution to order the President to remove troops, falls -- in both senses of the word -- under the Chadha decision. We believe that that procedure is not constitutional under the Supreme Court's holding. It seems to me unlikely that this is a significant loss for the Congress. In the decade since the enactment of the War Powers Resolution, no such concurrent resolution has been passed. We believe this provision is severable from the others according to the Court's rule and guidelines, since the Resolution itself includes a severability clause and the other portions of the Resolution need not be effected by the dropping of the veto provision.

The third provision, requiring positive Congressional authorization after 60 days, does not fall within the scope of the Chadha decision at all. Its constitutionality is neither affirmed, denied, or 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 has, of course, had a different view. I do not believe that any purpose is served by debating these 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. Let me turn next to the field of arms transfers. Under such statutes as the Arms Export Control Act and the Foreign Military Sales Act, we have regularly reported to the Congress certain proposed military sales transactions and export licenses. 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 gone far beyond the statutory requirements.

In addition to the statutory notification procedures, for example, we have long engaged in a practice of pre-notification of proposed sales under the Foreign Military Sales program--not required by law--which has given Congress an opportunity to review and comment upon proposed transactions before the Executive sends a formal statement. I emphasize that practice because it indicates the extent to which the Executive branch has been aware of and concerned about the legitimate concerns of Congress in this area. Even though we have always considered the legislative veto to be unconstitutional, we have also frequently taken your considerations and concerns into account in formulating the arms sale transactions that have been then formally reported to your committees.

While it seems clear that the legislative veto contained in several sections of the Arms Export Control Act is not valid, that result should in no way impair our continued reporting to Congress either under the express statutory provisions or under the kind of informal pre-notification and consultation that we have traditionally maintained.

In the last year we have sent up more than ____ reports of arms sales transactions. While Congress has never disapproved any proposed arms sale transaction, the Administration has on occasion modified the terms of some of them in light of Congressional concerns.

Thus, for example, out of the ___ pre-notifications sent last year, at least ____ of them were subject to some modification of terms or conditions after consultation with members of Congress.

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 comity and collaboration. The Chadha decision will make clearer the legal and political responsibility for these export decisions, but it will not necessarily affect the practice.

Nuclear Export Controls. Another field in which statutes have contained many legislative veto provisions is that of nuclear regulation. Several provisions of the Atomic Energy Act, for example, permit the legislative veto of Presidential determinations to permit shipment of nuclear-related material 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 material. The second is an exceptional waiver authority, vested in the President, who may take certain additional actions if he makes significant findings.

We consider that those standards and that waiver authority, including 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. The only provision that is invalid is the third, that calling for a veto by concurrent resolution.

The Administration shares the concern of Congress about nuclear proliferation. We have been quite active diplomatically in this field, as you know. We would certainly not wish to do anything to promote or assist in the development of nuclear weapons by additional countries. Each executive branch agency is required to keep the Congress, including this Committee, fully and currently 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 area in which statutes have contained a legislative veto--although it has never been invoked--is the procedure for granting most-favored-nation treatment to certain east-bloc countries.

We have been willing to grant nondiscriminatory tariff treatment to Eastern European countries only when they comply with certain conditions for the protection of human rights, including the right of emigration. You know of our willingness to take an active stance--and to incur some sacrifices--to further those goals.

One of the reports required under that statute is now pending before another Committee. Perhaps it can serve as an illustration of how we believe Congress and the Executive can usefully interact.

We laid that report before Congress before the Supreme Court decision was issued. We believe, however, that we would have done precisely the same thing if the Chadha decision had been issued two months earlier. Legislative oversight hearings serve the salutory purpose of bringing about a review of the implementation of statutory requirements, of airing public concerns and of making our nation's commitment on these issues known to other nations.

The spirit in 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 Act to report executive agreements to the Congress. We do so regularly.

That procedure notifies you of agreements already signed. To enable you to consult with us before negotiations take place, we have adopted a procedure of supplying your staff with our Circular 175 actions, the documents which authorize negotiations. That is not required by law, but makes good sense.

WHERE DO WE GO FROM HERE?

As I emphasized at the beginning, I believe that very little of practical significance need in fact have changed as a result of the Supreme Court decision. The Department of State will continue to strive to work closely with members of Congress and to take their concerns into account in reaching decisions on issues of policy. If anything, the Chadha decision will simply make the executive officers of our government and agencies more accountable for their actions.

In light of that assessment, I would urge Congress not to act in hasty response to these constitutional decisions. Your own studies show that we have been responsive to your concerns. Let us show that we can have the same spirit of cooperation in the future without the discarded notion of the legislative veto.

Part of the genius of our government has been its pragmatic response to problems, not theoretical superstructures which have little relation to reality. If you observe our response in the future, I believe that you will find it differs little from our response before June 23. You should find it unnecessary to enact new legislation or adopt new approaches, because you will find that the old approaches are still functioning well. I would encourage you to tread warily in this field as matters sort themselves out, because I believe that too hasty action might not only be ill-conceived but could also cripple both the Congress and the Executive in reaching the proper kinds of solutions to intricate foreign relations problems.

Our Constitution is a wise and enduring blueprint for free government. In this period of our history, our nation faces challenges which 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 global communications, in a complex world of over 150 nations. 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 they are entitled to expect. When Congress and the President are at loggerheads, the result is stalemate and sometimes tragedy. We have seen too many examples of this in the last decade.

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

Thank you.

Drafted:L:FLMorrison/S/P:PWRodman

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Subject: Legislative Veto Working Group

ROUTE TO: ACTION DISPOSITION

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CU Holland	ORIGINATOR	83/07/12			/ /
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- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
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5/81

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

JUL 8 1983

MEMORANDUM TO THE ATTORNEY GENERAL

Re: Legislative Veto Working Group

The second meeting of the legislative veto working group took place on Thursday, July 7, 1983 from 11:00 a.m. to 12:00 p.m. The same offices represented at the first meeting were represented at this meeting. We discussed the following subjects and came to the following conclusions and/or recommendations:

1. Pending or Anticipated Litigation.

(a) The FERC and FTC decisions (which, because of the Supreme Court's caption, will hereinafter collectively be referred to as Process Gas Consumers Group v. Consumers Energy Council of America [Process Gas]), were announced by the Supreme Court on July 6. The decisions of the District of Columbia Circuit Court were in each case summarily affirmed. Justice White dissented. The decision relative to the FERC veto is particularly significant because the question of severability had been raised in the Circuit Court and, notwithstanding a relatively strong case to be made against severability, the Circuit Court had decided that the unconstitutional legislative veto provision was severable from FERC's substantive authority.

The Process Gas decisions were significant also because, while Chadha involved a one-House veto, the FTC veto was a two-House veto. Both cases involved "independent" agencies rather than Executive Branch agencies. Thus, potential arguments regarding the remaining vitality of legislative vetoes in a two-House context (overcoming the bicameralism argument), or involving "independent" agencies (where the "interference with presidential power" argument is weaker) are no longer viable. Process Gas therefore makes it very clear (although Chadha left very little room to argue) that all legislative vetoes are unconstitutional.

Justice White, who dissented from the two decisions, was particularly disturbed about the decisions as they relate to independent agencies. In this regard, he quoted his earlier comments in Buckley v. Valeo, 424 U.S. 1, 284-85 & n.30 (1976). In Process Gas he stated further:

> Congress, with the President's consent, characteristically empowers the agencies to issue regulations. These regulations have the force of law without the President's concurrence; nor can he veto them if he disagrees with the law that they make. The President's authority to control independent agency law-making, which on a day-to-day basis is non-existent, could not be affected by the existence or exercise of the legislative veto. To invalidate the device, which allows Congress to maintain some control over the law-making process, merely guarantees that the independent agencies, once created, for all practical purposes are a fourth branch of the government not subject to the direct control of either Congress or the executive branch. I cannot believe that the Constitution commands such a result.

Of course, the Constitution does not command the result which bothers Justice White the most. Congress need not create "independent" agencies, and it may be the time for the three Branches of government to reconsider whether the "independent" agency concept is either wise or constitutionally defensible.

(b) The Federal Pay Comparability Act of 1970. Litigation is pending, under the supervision of the Civil Division, regarding the Federal Pay Comparability Act of 1970. This Act involves recommendations for pay raises for federal employees to make their pay "comparable" to private sector wages. The President's pay agent, as well as the Advisory Committee on Federal Pay, make recommendations to the President. The President may accept the recommendations or submit an alternative plan to Congress adopting a different percentage pay increase. Congress has a legislative veto over the alternative plan. The litigants have taken the position with respect to back pay that the President's power to alter the pay agent's recommendation is not severable from the legislative veto and, consequently, that existing wages must be revised upward to reflect the recommendation of the pay agents, rather than the lower wage increases contained in alternative plans submitted by two different Presidents. An answer to the complaint is not due until September, but because under the usual timetable the pay agent's and Advisory Committee's recommendations are submitted and the President's decision is made by the first of September, the plaintiffs may seek provisional injunctive relief prior to the deadline to answer, which would might require earlier official Administration action in the case.

The pay comparability case is complicated because the Fourth Circuit previously found, with respect to a similar legislative veto provision in a similar federal pay statute, and at the urging of the Department of Justice, that there was no severability, McCorkle v. U.S., 559 F. 2d 1258 (4th Cir. 1977). The Department's position in that case was advanced in order to avoid the court's reaching the issue of the constitutionality of the legislative veto mechanism. The Department will presumably be taking the opposite position on severability in this case. Estimates of OPM are that 20-30 billion dollars may be at stake.

(c) EEOC Litigation.

Private litigants are contending that the EEOC lacks certain enforcement authority because the power which was transferred from the Labor Department to it by an executive order occurred pursuant to reorganization statute which contained a legislative veto provision. The litigants contend that the legislative veto provision was not severable from the President's reorganization authority and that, therefore, the authority of the President to delegate power to the EEOC is invalid. Accordingly, they argue, the decisions of the EEOC which are at issue in the case are invalid. EEOC is representing itself in this case but is accepting advice and assistance from the Civil Division.

(d) Another immigration case similar to Chadha is pending which apparently presents no peculiar problems.

(e) On July 5, 1983, Exxon Corp. filed a motion for reconsideration and relief from a $1.6 billion judgment of June 7, 1983 against it for gasoline overcharges. United States v. Exxon Corp., Civ. No. 78-1035 (D.D.C.). Exxon's motion is based on its argument that the statutes under which the judgment was obtained fall in their entirety based on the alleged in-severability of the legislative veto devices in those statutes. Exxon's motion does not discuss nor cite to the FERC decision on severability, discussed above, a decision probably decisive of the severability issue against Exxon's position.

2. Administration actions and decisions pursuant to statutes which contain legislative veto provisions.

(a) Specialty Steel Decision. The President's decision on July 5, 1983 establishing quotas and duties on specialty steel imports required us to advise the President (through advice to the Office of the United States Trade Representative) that presidential power to enforce the contemplated restrictions on imported steel products was severable from a legislative veto provision. The discussion of this issue was memorialized in a memorandum prepared by Deputy Assistant Attorney General Ralph Tarr. The Office of Legal Counsel also reviewed and approved as to any legislative veto concerns the transmittal letters to Congress advising it of the decision as required by statute. The office is currently reviewing the President's proclamation in the office's usual role.

(b) Arms Sales.

Noncontroversial arms sales are being reported to the Congress, pursuant to 22 U.S.C. § 2776(b), after coordination with and notification to the Office of Legal Counsel of the Department of Justice, the Office of General Counsel to the Office of Management and Budget, and the Office of the Counsel to the President. The more controversial sales are being examined more closely, but will probably also be sent forward.

(c) Budget Deferrals Under the Impoundment Control Act of 1974.

Noncontroversial deferrals were being held by OMB to permit consultation and coordination with OLC and White House Counsel; we were informed today by OMB that a deferral message was in fact transmitted to Congress today, the first since Chadha was decided, due to an adminisrative error. The more controversial items are being studied to determine whether the deferrals are of such a nature that they ought to be forwarded also.

(d) CAFE Standards.

This misleading acronym relates to fuel efficiency standards for cars sold in the United States and the fact that several major automobile manufacturers are liable for substantial fines because aggregate automobile sales are averaging higher fleet miles per gallon than required by statute, due to increased sales of larger automobiles. The Secretary of Transportation apparently has the power to modify the statutory standards by rule, which rule is subject to a legislative veto provision.

The question of the Secretary's power under this statute is extremely important because millions of dollars of potential fines or penalties are apparently involved. The industry itself is split on whether presidential relief should be granted (General Motors is exposed to substantial penalties, whereas Chrysler is within or much closer to the requirements and thereby exposed to a lesser or no liability). OLC is looking into the scope of presidential power and the severability question.

(e) The Jackson-Vanik Amendment

The President sent a message to Congress on June 3, 1983 renewing "most favored nation" trade status for the People's Republic of China, Rumania and Hungary. The statute which authorizes this extension has a legislative veto provision, and the President's decision is presently being considered by the House Ways and Means Committee. Rep. Crane of Illinois has introduced a veto measure.

(f) Atomic Energy Act.

Pursuant to § 129 of the Atomic Energy Act, a waiver of restrictions on the sale of nuclear reactor components to India has been, or will be, sent to the Hill pursuant to a 60 day (continuous session) concurrent resolution legislative veto provision. The State Department feels that the legislative veto provision is severable and that the Administration will probably go forward with this transaction because of promises Secretary Schultz has made to India.

(ii) Under § 123 of the Atomic Energy Act, certain nuclear components are contemplated for sale to Sweden and Norway. Again, there is a 60-day (continuous session) concurrent resolution legislative veto provision. It is contemplated that notification of the Administration's intended action will be sent to the Hill. These transations do not promise to be particularly controversial because of the two nations involved.

3. Analysis of Legislative Veto Decision and Expected Reaction to it.

(a) The OLC study is ongoing. OLC is making an inventory of existing legislative veto statutes and examining potential legal issues. Completion of the inventory of statutes awaits final responses from agencies. A target for completion of a preliminary inventory and analysis will be set as July 15, 1983.

(b) The Congressional Research Service has released a summary and preliminary analysis of Chadha. It contains some previously prepared inventories of statutes and some comments on the Supreme Court's decision. The analysis states that the "substantive ruling was not unexpected [but] the reach of the Court's rationale came as a surprise to many." The author declares that the court's analysis "apparently invalidates all legislative vetoes irrespective of their form or subject."

4. Contemplated Testimony.

The following hearings have been scheduled and are now presently pending:

(a) July 14. Testimony by the State Department expert before the Trade Subcommittee of the House Ways and Means Committee relative to the Jackson-Vanik Amendment and the President's decision of June 3 to renew "most favored nation" trade status for Hungary, Rumania and the People's Republic of China.

(b) July 18. Testimony before Senator Grassley's Subcommittee on Administrative Practice of the Senate Judiciary Committee. Senator Grassley expects to receive testimony from counsel to the House and Senate, the American Bar Association and certain academicians. He will accept testimony from an Administration witness, but will not require it.

(c) July 19. Testimony has been requested from the Department of Justice (either the Attorney General or the Deputy Attorney General) before the Administrative Law Subcommittee of the House Judiciary Committee (Congressman Sam Hall).

(d) July 20. Testimony is requested from the Department of Justice and the State Department before the House Foreign Affairs Committee.

The persons attending the working group meeting generally felt that the Administration should try to avoid testimony regarding legislative veto before the August recess, but that if testimony cannot be avoided, the testimony should be as narrow as possible and provided at a reasonably low level. In other words, the general sentiment at the meeting was that we should provide as little headline potential to these hearings as possible. The Legislative Affairs people from the White House, the Department of Justice and the Department of State were to try to implement the foregoing objective.

I have subsequently been advised by the Office of Legislative Affairs of the Department of Justice that it is not considered possible to avoid testimony on July 19th before Congressman Hall and that the Attorney General or the Deputy Attorney General (but probably the Attorney General) will be the witness. The same is true for the hearing on the 20th by representatives of State and Justice.

Theodore B. Olson

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

cc: Edward C. Schmults
Deputy Attorney General

Fred F. Fielding
Counsel to the President

Chadha

THE WHITE HOUSE

WASHINGTON

July 15, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Proposed Testimony of Edward C. Schmults Concerning Legislative Veto

The effort of the Department of Justice to postpone any testimony on the impact of the legislative veto decisions until after the recess has failed, and Justice is now scheduled to present views before the Administrative Law Subcommittee of the House Judiciary Committee on July 18 and the House Foreign Affairs Committee on July 20. (The State Department will also testify at the latter hearing, but OMB has yet to receive a copy of State's proposed statement.) The Deputy Attorney General will be the witness for Justice at both hearings, and his proposed statements have been submitted for our review.

Each statement begins with identical introductory language, stressing that the Supreme Court has introduced elements of certainty into a long standing debate between Congress and th Executive. Each statement also draws a distinction between the problems addressed by legislative vetoes in the domestic area and the foreign affairs area. In the former the issue is the "political accountability" of unelected bureaucrats, while that issue is not present in the latter area, in which the actions implicate the President's inherent powers and are typically taken by the President himself or high-ranking officials. Finally, each statement contains the same 7-page legal analysis of Chadha, Consumer Energy Council v. FERC, and Consumers Union v. FTC. This analysis includes a discussion of severability, noting the trend to finding legislative veto provisions severable from the accompanying grants of authority.

The Foreign Affairs Committee testimony contains little in addition to the foregoing beyond a statement that Justice is typically not involved in the policy aspects of the foreign affairs questions. The Administrative Law Subcommittee testimony, at pages 4-6, discusses how to ensure political accountability in the absence of the legislative veto. With respect to executive branch agencies, the testimony cites the new OMB review process (mandated by Executive Order

12291), which makes the President accountable for executive agency rules. With respect to independent agencies, the testimony suggests in a general way that the time may be ripe to reconsider the existence of such entities, and take action to bring them back within the executive branch.

Only this last point has generated controversy among those reviewing the testimony. I agree that the time is ripe to reconsider the Constitutional anomaly of independent agencies, and the testimony does no more than suggest such a fresh look in the broadest terms. More timid souls may, however, desire to see this deleted as provocative.

Justice would like to clear the testimony this afternoon. If you agree, I can call Jim Murr to advise him that we have no objections. I think, in view of the monumental nature of the Chadha decision, that it may be more appropriate for the Attorney General to deliver the first testimony on it, but I leave it to you whether to raise that question with Schmults.

cc: H.P. Goldfield
Peter J. Rusthoven

ID # ______ CU

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Subject: Statement of Edward C. Schmults concerning legislative veto

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Referral Note:					
CWAT09	I	83/07/15			/ /
Referral Note:					
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- C - Comment/Recommendation
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO Mike Horowitz
Fred Fielding

- [ ] Take necessary action
- [ ] Approval or signature
- [ ] Comment
- [ ] Prepare reply
- [ ] Discuss with me
- [ ] For your information
- [ ] See remarks below

FROM Jim Murr (x4870)

DATE July 14, 1983

REMARKS

Justice testimony -- Legislative Veto

Attached are two Justice statements concerning the legislative veto:

1. July 18 House Judiciary Committee hearing.

2. July 20 House Foreign Affairs Committee hearing.

Please let me have your comments as soon as possible and I will clear statements with Justice.

(The State Department testimony for the July 20 hearing will be delivered to you as soon as it arrives at OMB.)

cc: Department of State
Ed Strait

OMB FORM 4
REV AUG 70

DRAFT

STATEMENT

OF

EDWARD C. SCHMULTS
DEPUTY ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

BEFORE

THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

CONCERNING

LEGISLATIVE VETO

ON

JUL 1 4 1983

JULY 1~~4~~8, 1983

Mr. Chairman and Members of the [Subcommittee][Committee]:

I appreciate the opportunity to appear before you today as a representative of the Administration and the Department of Justice in connection with your effort to assess the impact of the recent decisions handed down by the Supreme Court holding legislative veto devices unconstitutional.

Before addressing those cases and the practical consequences of their impact on statutes containing legislative vetoes, I want to make two brief points that will, I hope, put the remarks that follow in their appropriate context. First, we believe that a large portion of the legal debate between Congress and the Executive that has gone on with increasing intensity for 63 years since President Woodrow Wilson vetoed a bill containing such a device _/ has been resolved by the Judicial Branch, which is of course charged with deciding what the Constitution means. Thus, although some legal issues remain which I will discuss generally below, our purpose today should be to look forward rather than to reiterate the sincerely held and vigorously articulated views on the constitutional issue which have now been definitively addressed and adjudicated by the Supreme Court.

_/ 59 Cong. Rec. 7026 (1920). Under that bill, the Congressional Joint Committee on Printing would have been empowered to control, through the issuance of regulations, the right of the Executive Branch to print information generated within the Executive Branch. President Wilson argued that once Congress had made an appropriation, it was to the Executive to administer that appropriation and that committees of Congress could not be empowered to share in that administration.

Second, the policy debate regarding Congress's oversight over the Executive's execution of the law, an important issue that so often became hopelessly entangled with the constitutional debate, may now proceed with both of our Branches knowing, for the first time, the constitutional ground rules governing that debate. To the extent that certainty is a virtue in the law, and I believe it almost invariably is, both of our Branches were benefitted by the clarity and scope of the Supreme Court's decisions.

Turning to that policy debate, I would start by reiterating, with emphasis, a point consistently made by my predecessors and other representatives of the Department of Justice who have appeared over the years before various Committees of Congress to discuss legislative vetoes: There are many effective and fully constitutional mechanisms whereby Congress can carry out its constitutional oversight function.

To a certain extent, especially in the domestic area, Congress can effectively limit its need to review the Executive's execution of the law by placing more specific and precise limits on the authority, for example, of agencies to issue rules. And, to the extent that going at the problem at the front end is unsuccessful, Congress, with participation by the President, can override unwise, inappropriate or excessively burdensome rules, by enactment of legislation through the use of expediting mechanisms which do not have to be tied to the unconstitutional legislative veto devices with which they have so often been associated.

Because administative rulemaking has been such a focal point of legislative veto proponents, especially in the House of Representatives, I believe it warrants special attention now. If there has been a theme that has reverberated time and again in the debate over legislative veto, it is that the rulemaking agencies are out of control and that rules embodying major policy decisions are issued by non-elected officials and are constantly imposing excessive burdens on the private sector.

All of these concerns have come to be reduced to the rather simplistic phrase "political accountability." I could not agree more with the proponents of legislative vetoes that political accountability is of enduring and central importance in our constitutional system. The bringing to bear of federal power in a system originally designed to provide for a limited federal government nearly always will raise a fundamental issue regarding the distribution of power between the federal government and the States. In addition, if the electorate comes to believe that they no longer have control, through the ballot box, over their government, the original design of the Framers will have been frustrated.

So the question arises: how are we to ensure the attainment of political accountability in our system of administrative rulemaking without reliance on legislative veto?

It was to ensure such accountability over Executive Branch rulemaking that President Reagan instituted, less than a month into this Administration, systematic review of proposed rules though issuance of Executive Order 12291. Although the Administration believes this program has been notably successful in reducing the growth of regulatory burdens while maintaining critical aspects of regulation central to the statutes passed by Congress, my point is a more limited one: since Executive Order 12291 was signed on February 13, 1983, the electorate has been able to look to the President for the kind of political accountability that is so necessary in our system. As members of this subcommittee and Congress are aware, some of the rules issued in this Administration have been more popular with some segments of the population than with others. But no one has had any doubt that this Administration, including the President himself, stood politically accountable for those rules. As the Chief Justice observed in _Chadha_, the President is often the _only_ elected official who can and does bring a truly "national" perspective, and, I would add, accountability, to matters of pervasive national interest.

Of course, political accountability is much less easy to maintain where there is little or no responsibility and power to maintain it, which brings me to the subject of the so-called independent regulatory commissions. Although the existence of these commissions has been tolerated in our constitutional jurisprudence, I could not disagree more with the suggestion, contained in Justice White's dissenting opinion in the natural gas pricing rule case, that the "Constitution commands" that these commissions cannot be made "subject to the direct control of either Congress or the Executive Branch." _/ First, through the use of an expedited joint resolution procedure, the Legislative and Executive Branches can, together, ensure greater control over rules issued by such commissions. Second, I believe the legislative veto decisions mark an appropriate point in our history for serious reexamination of the wisdom of the creation of this "fourth branch of the government . . . ." _/ The interrelationships between various federal regulatory schemes and their collective impact on the economy have become, in many instances, too complex to administer absent the unifying force of Presidential oversight. I know that this subject is regarded as both complex and politically sensitive, but I believe the

_/ Process Gas Consumers Group v. Consumers Energy Council of America, Nos. 81-2008 et al. (U.S. July 6, 1983)(White, J., dissenting) slip op. at 4-5.

_/ Id., at 5.

complexity derives from historical considerations that, for the most part, no longer exist, and the political sensitivity arises from the erroneous perception that "independence" in our government is somehow more virtuous or effective than "accountable" and "responsive" management.

I raise the subject simply to suggest that the time is ripe for a reexamination of the nature of these "independent" commissions and the justifications for their continued existence. Those that perform largely adjudicatory functions, such as the Merit Systems Protection Board, could well deserve to continue with their "independent" status. Others may, in the judgment of our two Branches, deserve to be brought under the supervision of the Presidency as a means of securing the accountability with which we are all concerned. My remarks are not intended to prejudge the outcome of such a debate, but rather to foster that debate.

In the non-domestic areas of foreign affairs and trade, political accountability as discussed above has not presented the same problem because the interest of Congress is usually directed towards oversight of relatively highly visible public actions taken by the President or his Cabinet officers. Because the Department of Justice has very little involvement in these areas outside the provision of legal counsel to those officials charged with that decisionmaking, I will make only two brief, related points. First, because virtually all Executive decisions in this area implicate this Nation's foreign relations, they -- and the statutory authorities implicated -- must be viewed as involving the delicate interplay between the exercise of Congress's legislative power and the exercise by the President of his inherent constitutional powers.

Second, because of this interplay of constitutional powers, great care must be taken in any restructuring of Congressional oversight in this area to ensure that the tools necessary for the President to conduct our foreign relations are not denied. In this area, much more than in the domestic area, the need for flexibility in meeting the exigencies of any particular situation should remain paramount.

Turning now to the Supreme Court decisions themselves, I believe their thrust is captured most succinctly at that point in the Chief Justice's opinion in which he defines that kind of "legislative action" that is subject to the requirements of the Presentment Clauses. In Chadha, he defined that action as action having "the purpose and effect of altering the legal rights, duties and relations of persons, including . . . Executive Branch officials and [other persons] outside the legislative branch." _/ The sweep of this analysis, confirmed beyond any serious doubt by the Court's summary affirmances on July 6, 1983 of the unanimous decisions of the United States Court of Appeals for the District of Columbia Circuit involving the "Phase II" natural gas pricing rule and the Federal Trade Commission's "used-car" rule, _/ may well, in the words of Justice Powell in his concurring opinion in Chadha, "give . . . one pause." But, as I said at the outset, the clarity and breadth of the Court's decisions provide certaintly as regards the substantive constitutional issue and set the ground rules for an ongoing dialog on the question of Congressional oversight of the Executive's execution of the law.

Because the Court's opinion speaks for itself, the outstanding legal questions (and therefore uncertainties) revolve around what we lawyers refer to as the "severability" issue. Let me use the three cases actually decided by the Court to illustrate this issue.

_/ Immigration and Naturalization Service v. Chadha, No. 80-1832 (U.S. June 23, 1983) slip op. at 32.

_/ Process Gas Consumers Group v. Consumers Energy Council of America, Nos. 81-2008 et al. (U.S. July 6, 1973), aff'g 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).

In Chadha, the House and Senate had argued vigorously that if the one-House veto device were unconstitutional, then the statutory power of the Attorney General "attached" to the veto device -- the power to suspend deportation of an otherwise deportable alien -- should likewise fall because Congress would not have extended such power to the Attorney General without the legislative veto "string" attached.

In rejecting Congress's argument on this issue, the Court began its analysis by restating its prior view that "the invalid portions of a statute are to be severed '"[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not."' Buckley v. Valeo, 424 U.S. 1, 108 (1976), quoting Champlin Refining Co. v. Corporation Comm'n, 280 U.S. 210, 234 (1932)." Slip op. at 10-11. The Court then relied on two distinct presumptions; first, the presumption that arose from the inclusion in the Immigration and Nationality Act of 1952 of a so-called "severability clause"; _/ second, the presumption the Court identified

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_/ Immigration and Naturalization Service v. Chadha, slip op. at 10-11. The severability clause, 8 U.S.C. § 1101, provides:

> "If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby."

(emphasis in opinion of the Court).

based on the fact that the statutory scheme was, as a practical matter, "fully operative" once the unconstitutional provision was severed. _/ In addition, the Court found nothing in the legislative history of the 1952 Act to rebut these presumptions. _/

In Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), the Court of Appeals was faced with deciding the severability of a one-House legislative veto device attached to rulemaking authority in a statute that did not contain a severability clause and a statute the legislative history of which arguably suggested non-severability. Notwithstanding the absence of a severability clause and the presence in the legislative history of the Natural Gas Policy Act of "contradictory comments" on point, the Court of Appeals found the one-House veto mechanism to be severable, 673 F.2d at 442, despite arguments of the House and Senate and other parties to the contrary.

_/ Id. at 13. The Court found this "presumption" in its earlier decision in Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932). I note, however, that the Champlin decision did not specifically analyze the continuing operability of a statute after severance of its unconstitutional part as creating a "presumption" of severability. Thus Chadha should probably be viewed as having recognized a new "presumption" as regards severability.

_/ I note that Justice Rehnquist, joined by Justice White, dissented from the Court's holding and analysis of the legislative history, concluding that that history demonstrated "that Congress was unwilling to give the Executive Branch permission to suspend deportation on its own." Slip op. at 3 (Rehnquist, J., dissenting).

Finally, in Consumers Union Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982), the issue of severability was not contested, largely because the two-House legislative veto involved was enacted separately from, and subsequent to, the underlying rulemaking authority as part of a statute specifically designed to secure judicial resolution of the constitutionality of that legislative veto device.

Because we anticipate that the issue of severability will arise or be introduced into litigation involving statutes containing legislative veto devices, I believe it would not be especially appropriate for me to delve too deeply, or with any particularity, into it at this time. _/ I will say that we regard

_/ For example, on July 5, 1983, Exxon Corp. fixed a motion in the United States District Court here in Washing to be relieved from a $1.6 billion judgement entered by that court on June 7, 1983. Exxon's argument is essentially that the statutes under which the judgment was obtained, the Emergency Petroleum Allocation Act and the Energy Policy and Conservation Act, are invalid because they contain legislative veto mechanisms that are, Exxon alleges, in severable from the remainder of those statutes. United States v. Exxon Corp., Civ. No. 78-1035 (D.D.C.).

In addition, federal employee unions have sued in that same court, arguing that the one-House veto provision in the federal statute governing federal workers pay, the Federal Pay Comparability Act of 1970, 5 U.S.C. §§ 5301 et seq., is unconstitutional and that the alternative pay plans submitted by the President in 1979, 1980 and 1982 were therefore invalid and full "comparability" raises are now due. AFGE, AFL-CIO v. Reagan, Civ. No. 83-1914 (D.D.C. filed July 5, 1983).

the Supreme Court's summary affirmance of the Consumer Energy Council of America v. FERC case as significant, because if the Court had wanted to reverse the apparent trend toward "severability" in the recent cases decided by the D.C. Circuit, _/ it presumably would have used that case as a vehicle to do so. Thus, as it has done with regard to the merits of the legislative veto issue, we believe the Court has injected considerable certainty into the "severability" issue even though the issue will remain, as it always has been, one to be decided in otherwise appropriate cases on a statute-by-statute basis.

In closing, I want to emphasize as strongly as possible that the Executive Branch will continue, as it has done in the past, to observe scrupulously the "reporting" and "waiting" features that are central to virtually all existing legislative veto devices. Although some minor adjustments to these provisions may prove desirable after we gain experience with their use

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_/ Most recently in that Circuit a three-judge panel of the D.C. Circuit found severable an unconstitutional "committee approval" provision attached to the authority of the Department of Housing and Urban Development to spend appropriations for internal reogranizations that had not been "approved" by the House and Senate Committees on Appropriations. In that particular case, Congress had placed a prohibition on HUD's existing power to engage in internal reorganization but had permitted its appropriations committees in effect to waive that new statutory prohibition. The Court of Appeals struck down the prohibition as being inseverable from the "committee approval" device, thereby rendering this congressional checks on HUD's exercise of statutory power a total nullity. AFGE, AFL-CIO v. Pierce, No. 82-2372 (D.C. Cir. Dec. 8, 1982).

absent their unconstitutional feature, we believe that experience under them -- with the informal give-and-take they envision as well as the opportunity for the enactment of legislation they provide -- will be the soundest basis on which to proceed.

In reaction to Chadha, some Members of the House have suggested that the engine of Government is broken and that there is an urgent need to fix it. I disagree as the Chief Justice concluded in his opinion for the Court:

> "With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution. _/

The engine is not broken. Whether it will need some oil here and there after Chadha is something that time and experience will demonstrate, but I believe the important thing is that we approach the post-Chadha era with the same spirit of comity and mutual respect that must characterize the relations between our two Branches if we are to continue to realize the full potential in that truly unique document, the Constitution of the United States.

_/ Immigration and Naturalization Service v. Chadha, slip op. at 39.

Mr. Chairman, once again I want to thank you and the [Subcommittee] [Committee] for the opportunity to present our views on this important subject. I have attached to this statement a compilation of currently enacted legislative veto devices prepared since Chadha was decided by the Office of Legal Counsel of the Department of Justice. I hope this compilation will prove useful to this and other Committees of Congress in the coming months. I will endeavor as best I can to respond to a question you may have.

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Subject: Statement of Edward C. Schmults Concerning Legislative Veto and War Powers Act.

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U.S. Department of Justice

Assistant Attorney General
Legislative Affairs

July 14, 1983

Mr. Fielding:

To coordinate clearance contact: Jim Murr, OMB, 395-4870.

Attachment

DRAFT

STATEMENT

OF

EDWARD C. SCHMULTS
DEPUTY ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

BEFORE

THE

COMMITTEE ON FOREIGN AFFAIRS
HOUSE OF REPRESENTATIVES

CONCERNING

LEGISLATIVE VETO
WAR POWERS ACT

ON

JULY 20, 1983

Mr. Chairman and Members of the [Subcommittee][Committee]:

I appreciate the opportunity to appear before you today as a representative of the Administration and the Department of Justice in connection with your effort to assess the impact of the recent decisions handed down by the Supreme Court holding legislative veto devices unconstitutional.

Before addressing those cases and the practical consequences of their impact on statutes containing legislative vetoes, particularly those of interest to this Committee I want to make two brief points that will, I hope, put the remarks that follow in their appropriate context. First, we believe that a large portion of the legal debate between Congress and the Executive that has gone on with increasing intensity for 63 years since President Woodrow Wilson vetoed a bill containing such a device _/ has been resolved by the Judicial Branch, which is of course charged with deciding what the Constitution means. Thus, although some legal issues remain which I will discuss generally below, our purpose today should be to look forward rather than to reiterate the sincerely held and vigorously articulated views on the constitutional issue which have now been definitively addressed and adjudicated by the Supreme Court.

_/ 59 Cong. Rec. 7026 (1920). Under that bill, the Congressional Joint Committee on Printing would have been empowered to control, through the issuance of regulations, the right of the Executive Branch to print information generated within the Executive Branch. President Wilson argued that once Congress had made an appropriation, it was to the Executive to administer that appropriation and that committees of Congress could not be empowered to share in that administration.

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Turning to that policy debate, I would start by reiterating, with emphasis, a point consistently made by my predecessors and other representatives of the Department of Justice who have appeared over the years before various Committees of Congress to discuss legislative vetoes: There are many effective and fully constitutional mechanisms whereby Congress can carry out its constitutional oversight function.

Because this Committee, in the Chairman's letter to the Attorney General of July 7, 1983, has quite naturally indicated particular interest in the impact of the Supreme Court's decision in Immigration and Naturalization Service v. Chadha _/ on statutes within this Committee's jurisdiction, I will focus very generally on those statutes, virtually all of which implicate the conduct of this Nation's foreign affairs.

_/ No. 80-1832 (U.S. June 23, 1983).

Before doing so, however, I would like to articulate for the Committee what I believe to be a fundamental difference between the policy implications Chadha may be expected to have in the domestic area as contrasted with Congressional oversight of our foreign relations and trade.

In the domestic area, much of the Congressional impetus for enactment of legislative veto devices has found its origin in the belief that too many major policy decisions that are concededly within the province of Congress to make in the first instance have been delegated by Congress to the Executive, only to be made by unelected officials who are not "accountable" in any direct sense to the electorate. This problem has been perceived to be most acute with respect to the so-called "independent regulatory commissions" which, because they are not subject to direct Presidential control, have been viewed as a "fourth branch" of Government essentially beyond the control of either Congress or the President. _/

In the non-domestic areas of foreign affairs and trade, in contrast, political accountability as discussed above has not presented the same problem because the interest of Congress

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_/ Process Gas Consumers Group v. Consumers Energy Council of America, Nos. 81-2008 et al. (U.S. July 6, 1983)(White, J., dissenting) slip op. at 5.

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_/ Immigration and Naturalization Service v. Chadha, No. 80-1832 (U.S. June 23, 1983) slip op. at 32.

_/ "The War Powers Resolution: A Special Study of the Committee on Foreign Affairs," House Committee on Foreign Affairs, 97th Cong., 2d Sess. 283 (1982)(comm. print).

_/ Process Gas Consumers Group v. Consumers Energy Council of America, Nos. 81-2008 et al. (U.S. July 6, 1973), aff'g 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).

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_/ Id. at 13. The Court found this "presumption" in its earlier decision in Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932). I note, however, that the Champlin decision did not specifically analyze the continuing operability of a statute after severance of its unconstitutional part as creating a "presumption" of severability. Thus Chadha should probably be viewed as having recognized a new "presumption" as regards severability.

_/ I note that Justice Rehnquist, joined by Justice White, dissented from the Court's holding and analysis of the legislative history, concluding that that history demonstrated "that Congress was unwilling to give the Executive Branch permission to suspend deportation on its own." Slip op. at 3 (Rehnquist, J., dissenting).

the severability of a one-House legislative veto device attached to rulemaking authority in a statute that did not contain a severability clause and a statute the legislative history of which arguably suggested non-severability. Notwithstanding the absence of a severability clause and the presence in the legislative history of the Natural Gas Policy Act of "contradictory comments" on point, the Court of Appeals found the one-House veto mechanism to be severable, 673 F.2d at 442, despite arguments of the House and Senate and other parties to the contrary.

Finally, in Consumers Union Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982), the issue of severability was not contested, largely because the two-House legislative veto involved was enacted separately from, and subsequent to, the underlying rulemaking authority as part of a statute specifically designed to secure judicial resolution of the constitutionality of that legislative veto device.

Because we anticipate that the issue of severability will arise or be introduced into litigation involving statutes containing legislative veto devices, I believe it would not be especially appropriate for me to delve too deeply, or with any particularity, into it at this time. _/ I will say that we regard

_/ For example, on July 5, 1983 Exxon Corp. fixed a motion in the United States District Court here in Washing to be relieved (cont'd) the Supreme Court's summary affirmance of the Consumer Energy Council of America v. FERC case as significant, because if the Court had wanted to reverse the apparent trend toward "severability" in the recent cases decided by the D.C. Circuit, _/ it presumably would have used that case as a vehicle to do so. Thus, as it has done with regard to the merits of the legislative veto issue, we believe the Court has injected considerable

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(footnote cont'd)

from a $1.6 billion judgement entered by that court on June 7, 1983. Exxon's argument is essentially that the statutes under which the judgment was obtained, the Emergency Petroleum Allocation Act and the Energy Policy and Conservation Act, are invalid because they contain legislative veto mechanisms that are, Exxon alleges, in severable from the remainder of those statutes. United States v. Exxon Corp., Civ. No. 78-1035 (D.D.C.).

In addition, federal employee unions have sued in that same court, arguing that the one-House veto provision in the federal statute governing federal workers pay, the Federal Pay Comparability Act of 1970, 5 U.S.C. §§ 5301 et seq., is unconstitutional and that the alternative pay plans submitted by the President in 1979, 1980 and 1982 were therefore invalid and full "comparability" raises are now due. AFGE, AFL-CIO v. Reagan, Civ. No. 83-1914 (D.D.C. filed July 5, 1983).

_/ Most recently in that Circuit a three-judge panel found severable an unconstitutional "committee approval" provision attached to the authority of the Department of Housing and Urban Development to spend appropriations for internal reorganizations that had not been "approved" by the House and Senate Committees on Appropriations. In that particular case, Congress had placed a prohibition on HUD's existing power to engage in internal reorganization but had permitted its appropriations committees in effect to waive that new statutory prohibition. The Court of Appeals struck down the prohibition as being inseverable from the "committee approval" device, thereby rendering this congressional checks on HUD's exercise of statutory power a total nullity. AFGE, AFL-CIO v. Pierce, No. 82-2372 (D.C. Cir. Dec. 8, 1982).

certainty into the "severability" issue even though the issue will remain, as it always has been, one to be decided in otherwise appropriate cases on a statute-by-statute basis.

This Committee has, of course, more than a passing acquaintance with this "severability" issue. In the course of its 1982 special study of the War Powers Resolution, note __ supra, the Committee noted the presence of a severability clause in that legislation. _/ Because the impact of Chadha on the War Powers Resolution has been the focus of considerable media attention, it is, I believe, important to reiterate here the relatively simple point made by this Committee in that 1982 special study:

> "[I]f the High Court should declare all concurrent resolution vetoes -- one House or two -- unconstitutional, it would not invalidate other requirements of the War Powers Resolution." _/

Simply stated, the Supreme Court's decision does not affect any of the procedural mechanisms contained in the War Powers Resolution other than that procedure specified in § 5(c), which purported to authorize Congress effectively to recall our troops from abroad by a resolution not presented to the President for his approval or disapproval.

_/ Special Study, note ___ supra, at 283 n.9.

_/ Id., at 283.

In closing, I want to emphasize as strongly as possible that the Executive Branch will continue, as it has done in the past, to observe scrupulously the "reporting" and "waiting" features that are central to virtually all existing legislative veto devices. Although some minor adjustments to these provisions may prove desirable after we gain experience with their use absent their unconstitutional feature, we believe that experience under them -- with the informal give-and-take they envision as well as the opportunity for the enactment of legislation they provide -- will be the soundest basis on which to proceed.

In reaction to Chadha, some Members of the House have suggested that the engine of Government is broken and that there is an urgent need to fix it. I disagree. As the Chief Justice concluded in his opinion for the Court:

> "With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution. _/

The engine is not broken. Whether it will need some oil here and there after Chadha is something that time and experience will demonstrate, but I believe the important thing is that

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_/ Immigration and Naturalization Service v. Chadha, slip op. at 39.

we approach the post-Chadha era with the same spirit of comity and mutual respect that must characterize the relations between our two Branches if we are to continue to realize the full potential in that truly unique document, the Constitution of the United States.

Mr. Chairman, once again I want to thank you and the [Subcommittee] [Committee] for the opportunity to present our views on this important subject. I have attached to this statement a compilation of currently enacted legislative veto devices prepared since Chadha was decided by the Office of Legal Counsel of the Department of Justice. _/ I hope this compilation will prove useful to this and other Committees of Congress in the coming months. I will endeavor as best I can to respond to any questions you may have.

_/ I note that this compilation does not include § 118(b) of Pub. L. No. 96-533, which provides that Congress may by joint resolution, authorize the President to provide certain kinds of assistance in Angola. Because joint resolutions are laws presented to the President, for his approval or disapproval, they do not constitute legislative veto devices. I note this because that provision was listed as a legislative veto provision in the enclosure to the Chairman's July 7, 1983 letter to the Attorney General.

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Message: Note CRS report beginning on page 48.

Chadha file

S. Hrg. 98-316

LEGISLATIVE VETO: ARMS EXPORT CONTROL ACT

HEARING

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

S. 1050

A BILL TO AMEND THE ARMS EXPORT CONTROL ACT TO PROVIDE INCREASED CONTROL BY THE CONGRESS OVER THE MAKING OF ARM SALES

JULY 28, 1983

Printed for the use of the Committee on Foreign Relations

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LEGISLATIVE VETO: ARMS EXPORT CONTROL ACT

THURSDAY, JULY 28, 1983

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, D.C.

The committee met, pursuant to notice, at 2:28 p.m., in room SD–419, Dirksen Senate Office Building, Hon. Charles H. Percy (chairman of the committee) presiding.

Present: Senators Percy, Mathias, and Sarbanes.

Senator MATHIAS. The committee will come to order. We are privileged this afternoon to have with us the Deputy Secretary of State, Mr. Kenneth Dam, and we are beginning the first in what will be a series of hearings to consider the legal impact of the decision of the Supreme Court in declaring that the so-called legislative veto is an unconstitutional procedure.

Our purpose is not to exercise the Blackstonian privilege of cursing the Court but rather to consider the consequences of the decision for the statutes which affect the area of foreign relations. Those would include by way of illustration and not by way of limitation the Arms Export Control Act, the Nuclear Non-Proliferation Act, and the War Powers Resolution.

The committee will hold a joint hearing with the Committee on Governmental Affairs concerning the Nuclear Non-Proliferation Act. That is presently scheduled to take place on September 15, and the hearing on the War Powers Resolution is presently scheduled for September 29.

Today's hearing will concentrate on the Arms Export Control Act and the possibilities for amending the statute to accommodate the opinion of the Court. Since this is also our first opportunity to hear the general views of the administration on the question of legislative vetoes and on the decision of the Court, we have asked the Deputy Secretary to present a more comprehensive statement.

Witnesses other than Secretary Dam will be asked to keep their comments as closely focused as possible on the arms control issue. What we would hope to resolve today or to shed light on today is first what is the justification for congressional involvement in arms export decisions, how such involvement relates to the constitutional responsibilities of the Congress in foreign relations.

Second, what standards should govern such decisions by the United States, how can they be effectively promoted by the Congress. Third, is the Arms Export Control Act without availability of a legislative veto an adequate basis for promoting wise decisions on congressional involvement.

If what is left of the act, what has survived the Court's decision, is defective in this regard, should it be improved or should it be replaced? We had anticipated that the opening witness would be the distinguished minority leader of the Senate, the Senator from West Virginia, Mr. Byrd.

He has a proposal to revise the Arms Export Control Act procedures, a proposal which predates the action of the Supreme Court. However, as everyone can be aware from the bells that are ringing, Senator Byrd is detained on the Senate floor, and so he has asked that his statement be included in the record which will hereby be done.

[Text of S. 1050 follows:]

II

98TH CONGRESS
1ST SESSION

S. 1050

To amend the Arms Export Control Act to provide increased control by the Congress over the making of arms sales.

IN THE SENATE OF THE UNITED STATES

APRIL 14 (legislative day, APRIL 12), 1983

Mr. BYRD (for himself, Mr. PELL, Mr. BIDEN, Mr. SARBANES, Mr. BINGAMAN, Mr. CRANSTON, and Mr. PROXMIRE) introduced the following bill; which was read twice and referred to the Committee on Foreign Relations

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A BILL

To amend the Arms Export Control Act to provide increased control by the Congress over the making of arms sales.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "National Security and Arms Export Review Act of 1983".

POLICY ON LIMITING TRANSFERS OF CONVENTIONAL ARMS TO DEVELOPING COUNTRIES

SEC. 2. The first section of the Arms Export Control Act (22 U.S.C. 2751) is amended by adding at the end thereof the following:

"In recognition of the goals and policies set forth by this section, it is further the sense of the Congress that the President should initiate, through the North Atlantic Council or other appropriate committees of the North Atlantic Treaty Organization, discussions to limit the transfer by member countries of the North Atlantic Treaty Organization to developing countries of conventional arms with regard to the level of sophistication of such arms, with regard to the region of which the country eligible to receive certain arms is a part, and with regard to any other appropriate criterion for the limitation of such arms.".

DEFENSE REQUIREMENT SURVEYS

SEC. 3. Section 26 of the Arms Export Control Act (22 U.S.C. 2765) is amended—

(1) by inserting after "in the survey" the following: "and shall provide as an addendum to such quarterly report the text of all defense requirement surveys completed during the preceding calendar quarter"; and

(2) by striking out subsection (c).

REQUIREMENT OF CONGRESSIONAL APPROVAL FOR CERTAIN ARMS SALES SOLD UNDER THE ARMS EXPORT CONTROL ACT

SEC. 4. (a) Section 36(b)(1) of the Arms Export Control Act (22 U.S.C. 2776(b)(1)) is amended—

(1) by inserting before the period at the end of the second sentence the following: "and an item stating whether the proposed recipient country or organization has entered into an agreement with the United States under section 3 and, if so, including the text of such agreement; and

(2) by striking out in the fifth sentence "The letter of offer" and inserting in lieu thereof "A letter of offer to sell any defense articles or defense services under this Act for not less than $50,000,000 but less than $200,000,000 or a letter of offer to sell major defense equipment for not less than $14,000,000 but less than $200,000,000".

(b)(1) Section 36(b) of such Act (22 U.S.C. 2776(b)), as amended by subsection (a), is further amended—

(A) by redesignating paragraphs (2), (3), and (4) as paragraphs (3), (4), and (5), respectively; and

(B) by inserting after paragraph (1) the following:

"(2) A letter of offer to sell any defense articles or defense services under this Act for $200,000,000 or more, any design and construction services for $200,000,000 or more, or any major defense equipment for $200,000,000 or more shall not be issued, unless—

"(A) the Congress within thirty calendar days after receiving such certification agrees to a joint resolution stating that it approves the proposed sale and such joint resolution is enacted; or

"(B) the President states in his certification that an emergency exists which requires such sale in the national security interests of the United States and sets forth in the certification a detailed justification for his determination, including a description of the emergency circumstances which necessitate the immediate issuance of the letter of offer and a discussion of the national security interests involved.".

(2) Paragraph (3) of section 36(b) of such Act (22 U.S.C. 2776(b)), as redesignated by paragraph (1)(A), is amended by inserting before "resolution" each of the four places it appears "joint or concurrent".

(3) Paragraph (4) of section 36(b) of such Act (22 U.S.C. 2776(b)), as redesignated by paragraph (1)(A), is amended—

(A) by inserting "and joint resolutions" after "concurrent resolutions"; and

(B) by inserting "joint or concurrent" after "any such".

REQUIREMENT OF CONGRESSIONAL APPROVAL FOR CERTAIN COMMERCIAL SALES

SEC. 5. (a)(1) The first sentence of section 36(c)(1) is amended—

(A) by striking out "$14,00,000 or more" and inserting in lieu thereof "not less than $14,000,000 but less than $200,000,000"; and

(B) by striking out "$50,000,000 or more" and inserting in lieu thereof "not less than $50,000,000 but less than $200,000,000".

(b)(1) Section 36(c) of such Act (22 U.S.C. 2776(b)), as amended by subsection (a), is further amended—

(A) by redesignating paragraph (3) as paragraph (4); and

(B) inserting after paragraph (2) the following:

"(3) A license for the export of any defense articles or defense services sold under a contract in an amount of $200,000,000 or more or any major defense equipment sold under a contract in an amount of $200,000,000 or more shall not be issued, unless—

"(A) the Congress within thirty calendar days after receiving such certification agrees to a joint resolution stating that it approves the proposed export and such joint resolution is enacted; or

"(B) the President states in his certification that an emergency exists which requires such proposed export in the national security interests of the United States and sets forth in the certification a detailed justification for his determination, including a description of the emergency circumstances which necessitate the immediate issuance of the export license and a discussion of the national security interests involved.".

(2) Paragraph (4)(A) of section 36(c) of such Act (22 U.S.C. 2776(b)), as redesignated by paragraph (1)(A), is amended by inserting "joint or concurrent" before "resolution".

(3) Paragraph (4)(B) of section 36(c) of such Act (22 U.S.C. 2776(b)), as redesignated by paragraph (1)(A), is amended—

(A) by inserting "and joint resolutions" after "concurrent resolutions"; and

(B) by inserting "joint or concurrent" after "any such".

PROHIBITION AGAINST FRAGMENTATION OF ARMS SALES

SEC. 6. Section 36 of the Arms Export Control Act (22 U.S.C. 2776), as amended by sections 4 and 5, is further amended by adding at the end thereof the following new subsection:

"(e)(1) No letter of offer to sell any defense article, defense service, design and construction service, or major defense equipment under this Act may be constituted so as effectively to circumvent any reporting or review requirement of this section.

"(2) Each letter of offer for the sale of any defense article or major defense equipment under subsection (b) shall include, as part of its proposed sales price, the sales price of any related defense article or defense service, including related munitions, support equipment, spare parts, training, training equipment, and technical assistance, proposed to be sold in connection with such sale.".

APPLICATION OF CERTAIN AMENDMENTS MADE BY THIS ACT

SEC. 7. The amendments made by sections 4, 5, and 6 of this Act shall apply to any letter of offer or any application for a license for export, as the case may be, under the Arms Export Control Act the numbered certification for which is required to be submitted to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations by section 36(b) or section 36(c), as the case may be, of such Act and which certification is so submitted after the date of enactment of this Act.

[Senator Byrd's prepared statement follows:]

PREPARED STATEMENT OF HON. ROBERT C. BYRD, A U.S. SENATOR FROM WEST VIRGINIA

I express my appreciation to the distinguished Chairman and the members of this Committee for affording me the opportunity to submit this statement offering my views as to the impact of the *Chadha* case as it relates to arms transfers abroad.

In addition, I take this opportunity to express my appreciation to the distinguished ranking member, Mr. Pell, and Senators Biden and Sarbanes for their help and support over the past months in addressing the concerns we have over our arms transfer policy. Their insights and views were invaluable to me in the preparation of the National Security and Arms Export Review Act of 1983 (S. 1050) which the four of us introduced on April 14.

Finally, through the efforts of Senator Sarbanes, the portions of our bill which call for negotiations leading to the restraint on the transfer of sophisticated weapons to the third world, and the mandatory submission of Defense Requirements Surveys to the Congress, were adopted by this Committee during the mark-up of the fiscal year 1984 Foreign Assistance Authorization.

In accepting these amendments, Mr. Chairman, the Committee demonstrated concern in addressing one of the most significant expressions of United States foreign policy—the transfer of some of the most sophisticated military hardware we have in our own inventories to other countries.

At the time of the Committee mark-up, it was determined that our proposal for a joint resolution of approval for arms sales in excess of $200 million was deserving of a special set of hearings. Our proposal was an effort to create what is now clearly, in the light of the Supreme Court's ruling on *Chadha*, a constitutional system for more effective congressional oversight of the largest, and most important sales. Our proposal was designed to augment the then existing mechanism of the Arms Export Control Act procedure which permitted the Congress to exercise a legislative veto by passing a concurrent resolution of disapproval. That legislative veto mechanism had been at the heart of the Arms Export Control Act and was the focus of extensive debate and consideration when the measure was enacted into law in 1976.

However, the Supreme Court's decision in the *Immigration and Naturalization Service* versus *Chada* leaves little doubt that this carefully crafted system of oversight by concurrent resolution of disapproval is now unconstitutional. As a result, this Committee finds itself confronted with the challenge of reestablishing a workable system of congressional oversight for arms transfers. Because the veto provisions of the Arms Export have now been invalidated by the Supreme Court's decision, I will be modifying S. 1050 to fill that gap. I will be introducing, at a future date, legislation which addresses the basic concern Congress was addressing when the Arms Export Control Act was first enacted into law.

Mr. Chairman, let me take a few moments to discuss that challenge as I see it, and to share my thoughts on the impact of the *Chadha* case. As a student of the institutional prerogatives and responsibilities of the Senate as laid out by the Constitution, I see the Supreme Court decision as a major turning point in the relationship between the Executive and Legislative branches of government. Already much has been said about the merits of the Court's decision. Legal scholars will debate for years whether the Court should have followed the narrower grounds recommended by Justice Powell in his separate concurrence, or the practical, political arguments advanced in Justice White's dissent. Justice Powell argued on the merits of the particular case whereby the House should not perform a judicial or administrative function and demurred on the broader question as to whether or not legislative vetoes per se were invalid under the presentment clauses.

Justice White in his dissenting opinion recognized that the legislative veto was a practical delegation of constitutional authority to the President, in return for mechanism which gave Congress the right to oversee this delegation of authority.

Whatever we might personally believe, the Court's majority ruling now governs our actions. And nowhere is the responsibility for those actions greater than those which repose within the jurisdiction of this Committee. Both the Arms Export Control Act and the War Powers Resolution are affected by the Court's decision. The remedies we fashion and the methods we use to reaffirm congressional prerogatives under the Constitution will shape the relationship of the Congress to the Executive branch in a way that few statutes can. To appreciate the gravity of these issues and to place them in their proper context, we must return to the Constitution and its interpretation by the Court.

In writing for the majority in *Chadha*, Chief Justice Burger relied upon the "explicit and unambiguous provisions of the Constitution" in reaching the holding that any act which is "essentially legislative in purpose and effect" may not be delegated to the Executive agencies. The operation of Article I, Section 7 prohibits legislative action by the Executive. When action has the effect of legislation, it must have the dignity of legislation as described by the Constitution.

In effect, the majority opinion of the Court held that with the exception of enumerated responsibilities regarding Presidential appointments, treaties, or the very extraordinary actions of the separate houses with respect to impeachment proceedings, all other matters must be "essentially legislative in purpose and effect." In other words, they must comply with the constitutional mandates of bicameralism and presentment. In the case of the Arms Export Control Act, it is the presentment clause which voids the concurrent resolution of disapproval process.

There could be concerns regarding the separability issue. If our "veto" power has been removed, and if that "veto" power is "separable" from the rest of the statute, then that would mean that the Executive now has total, unrestricted authority to engage in any and all arms transfers it chooses. And Congress would be without any role whatsoever.

On the other hand, an argument could be made that our now invalid "veto" powers cannot be "separated" from the rest of the Arms Export Control law. If that were so, then that would mean that the entire statute is invalid. And that, in turn, would mean that the President is now without *any* authority to engage in *any* arms transfers.

It seems to me that either of these results is intolerable. No matter which conclusion is reached on this issue of "separability," there is a void which must be filled. And that is the reason why I believe it is imperative that the Congress, beginning with the consideration of this Committee, must come to grips with this problem and attempt to plug the gap.

Does Congress have a legitimate role, under the Constitution, to involve itself in arms sales decisions? I think the answer to this question is clearly stated in Article I, Section 8, Clause 3 which stipulates that Congress shall "regulate Commerce with Foreign Nations . . ."

And in their testimony last week before the House Foreign Affairs Committee, Deputy Secretary of State Kenneth Dam and Deputy Attorney General Edward Schmultz, stated they understood the ability of the President to make arms sales to be predicated on the statutory grant of Congress.

I concur with this analysis. In fact, there is nothing in the enumerated powers of the President, or in our experience, to suggest that the Executive would have such authority absent a grant by the Congress. It is a natural outgrowth of the power to regulate commerce and, thus, the responsibility of the Congress.

In coming to grips with how we address the problem posed by the *Chadha* decision, I think we should draw upon the views of a former colleague of ours whose legal scholarship contributed immensely to the work of this institution. I am referring to Senator Jacob Javits who led the fight for passage of the original Arms Export Control Act. In particular, I want to refer to Senator Javits' views on the rationale behind the legislative veto:

". . . It is my best judgment that because these are delegated powers which Congress does not have to delegate, Congress can reserve the right to withdraw that authority, just as it can repeal a bill. Because it is extending power by this very bill, it seems to me this is a very appropriate technique by which the power can be withdrawn by the same authority. It is power delegated to the President, who is the one who would have to sign a bill. Therefore, it makes sense, under the Constitution, to reserve the right to revoke that authority by the granting power, which in this case is Congress."

Additional insight into the rationale behind the Arms Export Control Act can be found in this Committee's report on The International Security Assistance and Arms Export Control Act of 1976–1977. The Committee stated:

"The major purpose of S. 2662 is to bring about centralized and more effective control within the Executive branch over, and a stronger voice in Congress in, the United States arms exports, government and commercial. The Arms Control and Disarmament Act states that the policy of our nation is to 'seek a world which is free from the scourge of war and the dangers and burdens of armaments . . .' This bill will help to put that policy in practice, Arms sales, for good or evil, have become a major tool of American foreign policy."

I agree with the Committee view as stated in your own report of May 14, 1976 that:

"The Committee does not contend that the sale of arms to foreign countries is evil per se. The United States has important security and foreign policy interests in the sale of arms to many countries . . . But enactment of S. 2662 will improve the scrutiny given to the foreign policy aspects of arms sales proposals, both within the Executive and the Congress."

As you are well aware, S. 2662 was incorporated into S. 3439, the International Security Assistance and Arms Export Control Act of 1976–1977.

Mr. Chairman, the concerns of the Congress today should be the same concerns which led the Congress to pass the Arms Export Control Act in 1976. Congress was concerned over the quantity and quality of arms being transferred in addition to the regions of the world receiving arms from the United States. The only thing that has changed is the mechanism under which Congress can exercise its Constitutional responsibilities.

Mr. Chairman, I am convinced that the goal of meaningful Congressional participation in arms transfer policy is as crucial today as when the Act was first passed. As I noted when I introduced S. 1050, recent administrations have demonstrated a growing tendency to rely upon high technology arms sales as a foreign policy tool. As you know, I was critical of the Carter Administration when the sale of AWACs to Iran was proposed. I also criticized the current Administration regarding the sale of AWACs and AIM–9L Sidewinder missiles to Saudi Arabia and the trend toward sales of more sophisticated weapons to developing countries. I reiterate what I said earlier: Had the Joint Resolution of Approval process been in place, the sale of F–16s to Pakistan, as proposed by the Administration, might not have been supported by the Congress.

I do not see this as a partisan issue. I see this as an issue whereby we expose the qualitative technological edge we presently enjoy over the Soviets in conventional armaments to potential compromise. I am worried that our own needs and those of our closest allies are not being met adequately because of the accelerated sales of systems, such as the F–16s to developing countries.

And I know the members of this Committee appreciate this is not a partisan issue. We all recognize that whatever solution we recommend to address the problems created by the *Chadha* decision, must address the essential institutional issue of the constitutional relationship between Congress and the President and not the policies of any one Administration or Congress.

With that task in mind, the Committee will need to consider several approaches which are as consistent as possible with the purpose of the Arms Export Act as it was originally enacted. Perhaps the most obvious remedy would be to retain all notice periods and dollar thresholds ($14 million for major defense items and $50 million for aggregate sales). The Joint Resolution of Approval process for all sales could be the appropriate mechanism in dealing with this problem. I recognize the problems this would pose for the Committee and the workload of the Senate. Therefore, the modifications to S. 1050 which are presently being drafted will take these concerns into account.

Mr. Chairman, I know the Committee is presently weighing several approaches. In so doing, I think we should look at our responsibilities under the Constitution and arrive at a solution that protects the institutional integrity of the Congress.

As Senator Javits stated so eloquently, when Congress enacted the Arms Export Control Act, it delegated to the President authority he did not have under the Constitution. The only alternative to an adequate oversight mechanism, such as the Joint Resolution of Approval, is for Congress to withdraw that authority. This is the balance we have to strike. I urge the Committee to carefully weigh the two options I pose—withdraw the authority or ensure that we maintain our institutional control over the sale of arms abroad, consistent with the authority delegated to us under Article I, Section 8, Clause 3, the so-called "Commerce Clause" of the Constitution.

Thank you for affording me the opportunity to have this statement entered into the record of hearings.

Senator MATHIAS. Senator Tower, the chairman of the Arms Services Committee, has also been invited to testify but will be unable to appear at this session today. So now Mr. Deputy Secretary, the floor is yours.

STATEMENT OF HON. KENNETH W. DAM, DEPUTY SECRETARY OF STATE

Mr. DAM. Thank you, Senator Mathias. I have a statement covering the area of the legislative veto generally. I would like to read a considerably foreshortened version of that focusing on the arms export issues that you have mentioned.

Senator MATHIAS. We are happy to have you proceed any way you want. Your full statement will, of course, appear in the record.

Mr. DAM. Thank you very much.

Mr. Chairman, I appreciate the opportunity to appear before the committee this afternoon. The Supreme Court has now decided in *INS* v. *Chadha*, and two related cases, that the legislative veto is 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 interest in devising cooperative ways to fulfill our shared responsibilities. We owe the American people a constructive response to the issues 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. 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, also has 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.

There are more than a dozen statutes in the foreign affairs and national security areas 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 nonproliferation controls, and trade controls related to emigration. Let me discuss these in turn.

First, arms export controls. I know this subject is of pressing concern to this committee. It is also of importance to the administration. It is important to the administration because of the importance of such transactions to the security of friendly countries and to our political relations with friendly countries.

Under the *Chadha* decision we believe that the procedures for legislative vetoes in several sections of the Arms Export Control Act are not valid but that the reporting and waiting periods remain. The Court decision in no way alters the elaborate structure of reporting, consultation, and collaboration that the executive branch and the Congress have worked out over recent years to insure effective congressional oversight.

Under the Arms Export Control Act, for example, we have regularly and formally notified the Congress of proposed sales under the foreign military sales [FMS] program and of proposed licenses of arms exports sold through commercial channels. We also provide the Congress with additional advance notification of many of those transactions.

As a matter of practice and accommodation, we have agreed to provide the Congress with informal prenotifications of proposed sales under the FMS program before the final notice is submitted. This procedure, which is not in the statute, has given Congress the opportunity to review and comment upon proposed transactions informally and privately before the executive branch makes a formal public submission.

In addition, under the Javits amendment we submit an annual Arms Sales Proposal covering all FMS sales and commercial exports above certain thresholds which are considered eligible during the current calendar year, as well as an indication of which ones are most likely to result in a letter of offer or an export license.

We also provide under section 28 of the act quarterly reports of each price and availability estimate provided to a foreign country, together with a list of requests received from a foreign country for a letter of offer to sell defense articles and services.

Thus, the Congress has received and will continue to receive annual, quarterly, and case-by-case information, formal and informal, on all actual and potential arms sales. In the last 3 years we have set up more than 240 formal reports of intended arms sales—110 in fiscal year 1981, 90 in fiscal year 1982, and 41 in fiscal year 1983 to date. In addition, three informal notifications are currently before you.

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 of arms exports.

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 necessity of congressional oversight. As in any other important area of national policy, both Congress and the Executive have a heavy responsibility to work together in the national interest.

Next, the War Powers Resolution. The War Powers Resolution contains four major operative parts. The first of these is a consultation requirement. The second is a reporting requirement.

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 in any way on national security policy and the way in which it 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, and 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.

In the portion of my statement that I have deleted in my reading, I go through the severability test under *Chadha*. I am just referring back to that here.

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, or even considered in the *Chadha* decision.

As you know, the executive branch has traditionally had questions about this requirement of congressional authorization for a Presidential disposition of our Armed Forces, both in the 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.

Let me now turn to nuclear nonproliferation. Nuclear nonproliferation is another important policy area in which statutes have contained legislative veto provisions. 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, they have provided for a congressional veto of 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 and the Congress share the same 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 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 process.

A fourth important statutory area involving a legislative veto is the procedure for granting most-favored-nation [MFN] treatment to certain nonmarket countries. Under the Jackson-Vanik amendment, nondiscriminatory tariff treatment may be granted to these countries only when they comply with certain conditions affecting 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 waiver as currently enforced.

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.

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.

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 insure 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 area of constructive and fruitful policymaking, of creativity and statesmanship. That is President Reagan's goal and the goal of all us in his administration.

Thank you.

[Mr. Dam's prepared statement follows:]

PREPARED STATEMENT OF HON. KENNETH W. DAM

Mr. Chairman and members of the Committee.

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

The Supreme Court has now decided, in *INS* v. *Chadha* and two related cases,[1] that the legislative veto is 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 interest in devising cooperative ways to fulfill our shared responsibilities. We owe the American people a constructive response to the issues 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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[1] *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).

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 rulemaking by administrative agencies. Adoption of the legislative veto procedure reached its zenith in the early 1970's, 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 Mr. 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 considered the device unconstitutional, while the Congress has tended to favor it as another useful check on executive authority. This specific controversy is now decided. 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, the Court's decision 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 on problems that may arise as a result of the *Chadha* 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 more than a 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 to the security of friendly countries and to our political relations with friendly countries.

Under the *Chadha* decision, we believe that the procedures for legislative vetoes in several sections of the Arms Export Control Act are not valid, but that the reporting and waiting periods remain. The Court decision in no way alters 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.

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In addition, under the Javits Amendment, we submit an annual Arms Sales Proposal covering all FMS sales and commercial exports above certain thresholds which are considered eligible for approval during the current calendar year, as well as an indication of which ones are most likely to result in a letter of offer or an export license. We also provide, under Section 28 of the Act, quarterly reports of each "price and availability" estimate provided to a foreign country, together with a list of requests received from a foreign county for a letter of offer to sell defense articles and services.

Thus, the Congress has received and will continue to receive annual, quarterly, and case-by-case information, formal and informal, on all actual and potential arms sales. In the last 3 years we have sent up more than 240 formal reports of intended arms sales—110 in fiscal year 1981, 90 in fiscal year 1982, and 41 in fiscal year 1983 to date. In addition, three informal notifications are currently before you. 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 of arms exports. 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 necessity of Congressional oversight. As in any other important area of national policy, both Congress and the Executive have a heavy responsibility to work together in the national interest.

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(a) 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 statutes have contained legislative veto provisions. 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, they have provided for a Congressional veto of 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 and the Congress share the same 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 affecting 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 Chairman 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 these 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 policy-making, of creativity and statesmanship. That is President Reagan's goal and the goal of all of us in his Administration.

Thank you.

Senator MATHIAS. Thank you very much, Mr. Secretary. First of all, it seems obvious from your testimony that the administration takes the view that all of the veto provisions in the principal statutes that you have mentioned are severable and that all of the remaining provisions of the statutes would survive the decision.

Do I interpret your statement correctly?

Mr. DAM. That is correct in these four major areas.

Senator MATHIAS. In the four major areas. Now in the three cases addressed by the Court in this term on the question of the legislative

veto, each of them presented a situation where the Congress had delegated authority by statute and then in effect sought to second guess the Executive by provision for either a one-house or a two-house resolution that amounted to a veto.

Our distinguished colleague who sat on this bench for many years, Senator Javits, advances the argument that that classic use of the legislative veto is a different proposition both in a constitutional sense and in a practical sense from the case of the War Powers Resolution where the Congress is not seeking to delegate responsibility but on the contrary is attempting to establish a mechanism for the coordinated exercise of joint responsibilities.

Do you think the Court adequately addressed this different kind of approach to joint responsibilities?

Mr. DAM. It is certainly true that some statutes, some acts of the Congress, let's say, have to do with substance and others have to do with procedures for decisionmaking. The fact is, however, that the approach of the Court in *Chadha* was that where Congress acts and acts in a binding way, it has to comply with the presentment clause.

I do not see that the distinction that you suggest in any way deals with the presentment clause and, therefore, I do not see where there is a difference. I can understand that Congress can create its own procedures internally without presenting them to the President, but I do not see how it can bind the President without presenting the proposed binding legislation to the President.

Senator MATHIAS. Well, then let me ask you the broader question. Since the Congress has constitutional authority in the field of foreign relations which is different from that in some of the other subjects that were treated in the *Chadha* decision, do you think there is any basis or any argument that could be made which would distinguish legislation in the foreign affairs field from that in the domestic area?

Mr. DAM. It is difficult for me to see any distinction. There is, of course, the point that there may be and surely are certain powers vested in the President in the foreign affairs field that he does not have in certain domestic areas.

That kind of argument might tend to run the other way in certain limited fields. I am not trying to argue that point, but I do not see anything in the Constitution—in the bicameral clause or in the presentment clause—which would give Congress greater authority in the foreign affairs field to legislate without concurrence by the President under the normal arrangements created by the presentment clause.

Senator MATHIAS. Let me just ask you one other question and then yield to Senator Sarbanes. You have told us that procedures under the Jackson-Vanik Act will not change. What in your judgment will change in the administration of the Jackson-Vanik Act as a result of the decision?

Mr. DAM. As a result of the *Chadha* decision I do not see that there is anything that will change. We will continue to consult with the committees via the reports when the criteria are met.

We will work very hard diplomatically to assure that there is free emigration. I think the recent record shows that we have done that.

Senator MATHIAS. But let us suppose a situation in which some administration down through the years would make a finding of fact that there was inadequate freedom of emigration, but that notwithstanding that fact it wished to waive the restriction on continuation of most-favored-nation treatment, would not the administration's judgment be final under those circumstances in the light of the Court's decision?

Mr. DAM. I am going to have to refresh my recollection as to exactly how Jackson-Vanik operates with regard to situations in which there is not the requisite freedom of emigration.

[Pause.]

Mr. DAM. I think there is nothing special about Jackson-Vanik in this respect. It is always possible where there is a waiver provision subject to a veto that it would be possible for a President to exercise the waiver.

There are normally waiting periods, and I do not recall what the situation is exactly in Jackson-Vanik with regard to the waiting period, but in any event to the extent that there is a waiting period there would have to be compliance with it. During that waiting period Congress could, if it chose, act to change substantive legislation.

One of the purposes of the waiting provision is to make the Executive of the day accountable, and if this waiver is done frivolously or for improper motives or if it is simply a bad judgment, then Congress has all of its powers—investigation, hearing and the like—in order to bring that message home forcibly to the Executive and to the American people. In addition, it has the power that it has normally, of legislating.

Senator MATHIAS. I am not trying to draw you into dangerous waters here, and we do have actually a pending case on this. The distinguished Senator from North Carolina, who is a member of this committee, has introduced a resolution which would in effect call for a one-House veto of continuing most-favored-nation treatment for Romania.

I suppose the disposition of that resolution, assuming it should pass, would provide us with an illustration of what would be different under Jackson-Vanik as a result of the Supreme Court's action. Let me turn now to Senator Sarbanes.

Senator SARBANES. Thank you, Mr. Chairman.

Secretary Dam, I happen to regard the legislative veto—contrary to a lot of the prevailing opinion—not as an intrusion by the legislative branch into the powers of the executive branch but an effort by the legislative branch to provide a certain degree of authority, discretionary authority, to the Executive; the grant of that authority in effect takes place on the premise that a legislative veto would accompany it. Otherwise it is reasonable to argue at least in certain instances, and you recognize that in your statement, that the legislature would not have made that grant of authority to begin with, since there is not an inherent power in the Executive constitutionally to exercise that power or authority.

Take the arms export issue. Do you think Executive action in that area has to be premised on a legislative grant of authority?

Mr. DAM. I think it always has been. I do not know of any constitutional learning on that subject. I could conceive of situations in which in exercise of the Commander in Chief power there might conceivably be some residual authority, but I think it is strictly a hypothetical situation. I do not think any President has or would claim that a general arms export program could be carried out without a statutory authority.

Senator SARBANES. In other words, it is a statute passed by the Congress giving him certain powers in the area and enabling him to act in that area, is it not?

Mr. DAM. Certainly everyone has, I think, always thought that, yes, absolutely.

Senator SARBANES. That raises the question with respect to the Court's opinion whether it is reasonable for the Court to invalidate the legislative veto and to sustain the broader grants of authority. I take it you recognize it may be necessary to ascertain that issue from the Court itself, conceivably. Is that correct?

Mr. DAM. Well, the Court addressed itself to that issue. I take it that my function here today is not to say whether or not the Supreme Court performed its constitutional functions properly or not.

Senator MATHIAS. Of course, you are always free to do that. [Laughter.]

That is the Blackstonian privilege that I referred to earlier.

Mr. DAM. I think I will reserve that for when I return to the life of an academic law professor.

Senator MATHIAS. Blackstone, I think, recommended that it be exercised in the nearest tavern. [Laughter.]

Mr. DAM. The point is that the Supreme Court addressed that question very directly, and you also can see its views from the other two cases which were decided by the court of appeals and then ruled on summarily. It started out with the premise that legislative veto provisions would normally be severable, particularly where they had a severability clause, but even where they did not, where the statute could operate quite easily with the elimination of the legislative veto provision.

Now the question is, is there evidence which would tend to offset that presumption, evidence presumably from the legislative history? So we start out with the proposition that the whole severability question has to do with a situation in which there is an affirmative grant of power and within that affirmative grant of power we have a legislative veto provision. So that is the beginning of the question but not an answer to the question, at least as the Supreme Court approaches it.

Senator SARBANES. I understand that, but the Court in the cases it has ruled on involve, in one instance, a one-House veto of natural gas pricing regulations by FERC and, in the other, a two-House veto on FTC rules on used cars—in addition to the *Chadha* case, which involved rules under the Emigration and Naturalization Service. It seems to me that some of the matters that we have dealt with in this committee, which you address in your statement, really involve much broader grants of authority in terms of the underlying delegation, and raise perhaps more difficult questions as to whether the underlying grant of authority should remain valid if the veto attached to it is to be invalidated.

Now I understood from an answer you gave to Senator Mathias that it is your view that all the underlying grants of authority are valid. In other words, you take the position, as I understood your response to the question, that in every instance the legislative veto is invalidated but the underlying grant of authority remains valid. Is that correct?

Mr. DAM. That is correct.

Senator SARBANES. But the Court does not take that position necessarily. The Court leaves that as an open question to be determined. Is that correct?

Mr. DAM. Yes; it does and what we have attempted to do——

Senator SARBANES. The Court in effect says, well, it could go one way or the other. We would have to examine that, I take it would be their position.

Your view is, having examined it, that you conclude in every instance that the veto is invalidated but that the underlying grant of authority is sustained.

Mr. DAM. What we say we have done here is on the basis of our review today, and maybe we have missed something in the legislative history, but on the basis of our review to date in these four areas, only using the tests laid down by the Court—which do not seem to turn on how weighty any particular person seems to think the underlying statute is in terms of human affairs—that that is the conclusion. But we do not do it just as an ipse dixit or as a rule of thumb.

We have tried to do a thorough job of looking at the legislation, and we would be glad to examine the legislative history jointly. We start with a proposition that there is, by the statement of the Supreme Court, a presumption of severability and that presumption can be strengthened by certain things. It can be weakened by other things, but how important the underlying statute is, is not one of the factors that the Supreme Court thought important.

Senator SARBANES. Your view, then, to take arms exports is that now the Executive has an unlimited authority to make whatever arms exports the Executive wishes even though, as I understood your answer to the earlier question, the Executive has no authority to make such exports in the absence of a statute enacted by the Congress.

Mr. DAM. Yes. I do not see any inconsistency there at all. Of course, there are many things that Congress can do to limit or affect the arms export program of an administration.

First of all, you have the budget process, which is very important with regard to FMS sales on credit. There is a possibility of other legislation.

All we are doing is looking back at legislation on the books. We are not claiming any unlimited power for the executive branch at all. All we are trying to do is apply the Supreme Court's test to past legislation.

Senator SARBANES. But that legislation was coupled with a veto. If you take the veto out of it and hold onto the basic grant, then in the current instance would you have unlimited authority?

Mr. DAM. That is exactly what the three Supreme Court decisions were about, situations in which there was a grant of authority coupled with a legislative veto, and where severability was found they found that the underlying grant of authority continued. It is the authority of Congress that the Executive would be carrying out.

Senator SARBANES. But the Court did not go as far as you are now going, as I understand it. The Court left open the question as to whether the underlying grants of authority would be valid.

In the three cases on which they have ruled they have held them to be valid and the veto to be invalid. They have left that question open with respect to other matters, though. Your conclusion with respect to those other matters is that the underlying grant, of authority is valid and the veto is invalid.

Mr. DAM. Using exactly the same methodology of the Court. Of course, in constitutional law one has to reason from case to case. We have tried to apply the standards laid down by the Supreme Court by looking at the individual statutes.

We are not claiming that, without looking at them the underlying grant stands. We are saying that when you apply the methodology of the Supreme Court, that is a conclusion that one is driven to.

Senator SARBANES. How do you feel the Executive and the Congress should now address this problem?

Mr. DAM. I think the first thing we should do is to carry on the kind of discussion that we are now carrying on both in formal hearings and in informal discussions in order to work out a method that is mutually agreeable but also effective. We have some views on that, and I am sure that you do.

In addition, I think it is particularly incumbent on us to use the consultation process on particular transactions, say arms sales, and continue to abide by the procedures that have been worked out, both statutory and informal, in order to give the Congress the fullest possible opportunity. It seems to me that this is not a period in which any administration would want to try to take advantage of ambiguity.

On the other hand, it is a period in which we have to continue to do the business of the United States, and it will require us to work together. It is this working together that is the thrust of my testimony.

Senator SARBANES. Have you had a chance to review Senator Byrd's statement, which was prepared for this hearing?

Mr. DAM. No, sir, but I have had a chance to review the outlines of his proposed legislation, and I have it here with me. But I have not reviewed his testimony.

Senator SARBANES. What is your view of that?

Mr. DAM. I take it that the original bill, which I assume is still his position, has not changed, or you will have to so advise me. It calls for a——

Senator MATHIAS. Let the Chair state the general position, as I understand it, just so everybody in the room can understand the position. Senator Byrd's proposal is to require that in any sale of more than $200 million of arms there has to be a specific congressional authorization.

Mr. DAM. Our position on that is that we think it would be unwise, and it would be unwise for three general classes of reasons. First of all, it would be unwise in that it would inject new uncertainties into the foreign policy of the United States.

The President would not be able to continue to use arms transfers in coordination with other policy instruments in carrying out the foreign policy of the United States. He would not be able to do so because he would never know whether he would be able to deliver on what he would propose.

He would not know because he might not get the followup action from the Congress conceivably for reasons that had nothing to do with the substance of the sale but had to do with the congressional calendar—how much legislation was pending and a lot of other factors which did not necessarily bear upon the merits from anybody's point of view of the proposed sale. This can be quite important because, on the one hand, that kind of uncertainty would inhibit the ability of the United States to create credible security arrangements with friendly and allied countries, and on the other hand, it would make it more difficult, more dangerous indeed, for countries to cast their lot with the United States when they would not be able to be sure in the negotiations whether the President was able to deliver.

I think it would slow things down, and that can be quite important in a rapidly changing world. I think that the proposal is based on an assumption that the world will stand still while this process is gone through across, as I say, vacation schedules and all the rest.

It is important for the President to be able to react to emergencies or even in nonemergency situations to be able to react to changing situations. The fact of the matter is that there would be an enormous volume of business that would be generated by the Byrd proposal.

It would require legislation for about 15 or 20 times a year given the volume of transactions that have been normal in recent years with a $200 million cutoff requirement. That problem would be compounded if, as other people suggested, the figures should be lower.

I simply have to ask you whether you think that the Foreign Relations Committee and the Foreign Affairs Committee would really be able to deal with affirmative legislation on that many different transactions per year, and be able to find the floor time to have those measures dealt with by the Congress as a whole. Now, one can escape some of these problems by exempting certain kinds of transactions, for NATO countries, for the ANZUS countries. Some people have suggested Israel and so forth.

But the further one goes in that direction, the more one begins to run into the problem of a bill taking on a discriminatory character being directed against the remaining countries, and right or wrong I think that legislation in itself, becomes a kind of foreign policy act. One would have to look very carefully at the specific exemptions and what countries were left.

But the exemption route would, of course, tend to reduce the number of times that this committee would have to act affirmatively. The genius, of course, of the veto idea, which, I agree with you, often lead to greater authority than might have otherwise been the case in some areas of government—though not in these particular cases, I believe—was that it permitted committees to concentrate on the controversial cases. But as we all know, many times even uncontroversial or noncontroversial legislation does not make it through in a particular Congress because of other things that are on the agenda.

Senator MATHIAS. If the Senator would yield for just a moment, I think what Secretary Dam has just said presents one side of the coin, but I think we ought to look at the other side of the coin. As I understand the history of the whole arms control legislation, there was in fact, originally a grant of authority by the Congress unfettered by any veto.

That proved to be unsatisfactory from the perspective of the Congress. That is why at a subsequent day the legislative veto procedure was grafted onto the original arms export legislation.

Now if we adopt the administration's interpretation of the effect of the Supreme Court decision on arms control, we are back to the original position, the pristine condition of the act in which there was authority for the President to make arms sales with no fetters imposed by the Congress.

Mr. DAM. I would not agree with that. That is to say, it is certainly open to the Congress to affect the arms sale program in many different ways. You could put on necessary findings. You could put on all kinds of conditions, eliminate particular countries or use the budget process. There are many ways in which to control the authority. Without trying to be argumentative about it, there is just one way in which you cannot do it as decided by the Supreme Court. You have all of the other instruments of legislation available.

Senator MATHIAS. But most of those were available under the original state of the act.

Mr. DAM. That is right.

Senator MATHIAS. And they proved to be unworkable restraints.

Mr. DAM. I am not sure about that. The legislative vetoes were put in during the 1970's at a time when they were a very popular vehicle across the entire range of legislation. I think that would be the question constitutionally: Whether they were so unworkable that the Congress otherwise would have removed the authority—from a constitutional point of view, not from a policy point of view—rather than now have the legislative veto.

Now from a policy point of view I agree. We all know that the legislative veto was enacted and that in itself tends to validate what you are saying. But that cannot be the only aspect of the question.

Senator SARBANES. I would take the view that, but for the legislative veto, the Executive's statutory grant of authority to make arms sales would have been removed at least in certain cases of larger sales; and that the use of the legislative veto provided as it were a continuing grant of authority from the Legislature to the Executive and addressed a lot of these problems you are talking about. It also incidentally gave the Executive a significant advantage in obtaining approval of his decision.

Obviously the Executive is in a stronger position if his decision stands unless disapproved by the Congress than if he has to come to the Congress fresh and obtain the approval of the Congress. In that sense it was an accommodation, I think, by the Congress to the Executive—and a practical one as, of course, the dissenters in the Court pointed out.

There is a difference between many of the things involving the legislative veto, on the one hand, the separate rules of each administrative agency and on the other what is involved in issues like arms export or war powers where it is conceded that there is no underlying Executive authority to engage in that activity. If the Court's opinion is that way maybe we should reclaim the authority, which would put us back to the basic constitutional scheme, and then see where we go from there, and work out a procedure from there to address the practicalities of the situation confronting us.

Mr. DAM. We are now talking about what would be wise policy I take it and not what the Constitution requires. Well, first we were talking about construction of the Constitution.

On the question of whether it would be wise policy to do this, I think one has to face up to the problems that I tried to outline about the importance of the President being able to act with some confidence that he could achieve what he was moving toward in foreign policy, some feeling that the Congress and this committee would really be able to deal with the burden that was being placed on the Congress itself by this kind of provision.

So it is a question of whether it is wise or unwise. I am suggesting that this legislation would be unwise. In short, I am not making a constitutional argument.

Senator SARBANES. Well, your conclusion is in effect an unfettered assumption of authority by the Executive in an area where the Executive would have no authority but for legislative grant of power.

Mr. DAM. That is true, Senator, in every single statute of the United States Code where there is a general grant of authority to the executive branch, dozens and dozens of volumes of it, and it is the normal way in which Congress legislates.

Senator SARBANES. Let me ask you this question. Is it your assumption that Congress would have made the identical grants of authority that it has made in the various instances without the legislative veto of Congress? The attachment of the legislative veto had no effect on the extent of the grant of authority which the legislature made to the Executive?

Mr. DAM. Well, we think we know it would have done so up until 1976 because it did so. Then the question is speculating about what difference there might have been in the legislation after 1976 that would have been introduced had there been no legislative veto. That, of course, is speculation.

I think it is entirely possible that there might have been some particular restrictions with regard to the kind of weapon system or country or terms and conditions of sales and so forth, but I do not know what they would have been. It is certainly entirely possible.

Senator SARBANES. In other words, you do concede that the grants of authority would be different if there had been no legislative veto attached?

Mr. DAM. I do not see that it is a question of concession or not concession. It is a fact that if the situation had been different, it would have been different. I do not know what Congress would have done or what it could have.

It is not a constitutional issue. It is a question of predicting how Congress would have acted differently under a different set of circumstances.

Senator SARBANES. But I thought you concluded that the Congress would not have acted differently, and for that reason it is your view that all the underlying grants of authority would stand, notwithstanding the striking down of the legislative veto.

Mr. DAM. No, I do not think so. I think it is a question of whether the basic authority would have been enacted by the Congress but for the legislative veto. I do not think it is necessary to say that in a statute that runs dozens of pages there never would have been any change by the Congress at some time in the future.

We are dealing with a basic grant of authority that dates back, as I recall, to 1961 and then in a different form well before that. That is the constitutional question.

You are asking me a question having to do with what I thought Congress might have done in the period after 1976 that would have been slightly different. It remains open to Congress to legislate more precise standards.

The only question that I thought you were asking is whether I thought this particular manner of proceeding—of trying to go, if I may, into the retail business with regard to arms sales—was the right way for Congress to go. I was arguing that I thought it was not wise public policy.

Senator SARBANES. Mr. Chairman, I think this is a very important issue that we are going to continue to have to address as we try to work out some way to share the judgment on authority. In effect, what the Executive is saying is they now have all of the authority and they will consult and report, but in the last analysis they can do as they choose.

My view on that is that the grant of authority came from the Congress to begin with. My own view is it was reasonable for us to condition it with a veto.

The Court has held to the contrary, but it seems to me that unless we can work out some process to share the authority it is an open issue as to whether the underlying grants ought to have been made, or ought to continue, or ought to take place in other instances. You see I think we were really trying to accommodate the Executive.

The Executive did not seem to think that because it came to assume otherwise, and I have had many hearings where this attitude was reflected. It came to assume that the underlying grant of authority was somehow within its purview, but under the basic constitutional arrangement it never had that authority to begin with. It only had it because the Legislature granted it.

I think we are going to have to think beyond the consultation and the reporting as to how we now address this question of the authority. If the Executive simply proceeds to exercise an authority without restraint, an authority obtained in the first instance by legislative grant, it seems to me that will leave us with something of a problem.

Thank you, Mr. Chairman.

Senator MATHIAS. I tend to agree with Senator Sarbanes that it does leave us with something of a problem, but it reminds me a little bit of a situation which occurred in a small town in Maryland some years ago in which a local bank made a sizable loan to one of the most prominent citizens of the community, so prominent that they simply made the loan on the basis of his signature. Some time later there was a change in the tide of fortune, and the prominent citizen did not look quite as solid as he had at the time the loan was made.

The banker went to ask for a financial statement, and the citizen said he had no intention of providing any financial statement, that he never had and he never would. But the banker then said we do not make loans unless people submit a statement whereupon he said you already have. I am afraid we already have in this case.

It is going to take some ingenuity to get out of it. Let me put one question to you that will test your ingenuity. You referred to exempting certain sales, NATO sales or ANZUS sales or others.

Suppose you would not make that kind of categorization but you would have to categorize one controversial sales and the other noncontroversial sales and that the question of classification would, in the first instance, be the responsibility of the President. The President would say this is a noncontroversial sale. We are going to sell riot control equipment to the Japanese or something of that sort, and nobody in the Congress would challenge that judgment.

But in a different instance the President might classify the sale as noncontroversial but the Congress could within say 30 days pass a resolution which would declare the sale to be in fact controversial, and in the event of a controversial sale there would have to be approval by a joint resolution. Now that is somewhat different from the case considered by the Supreme Court.

Mr. DAM. Senator, it sounds like a legislative veto to me, because if it were not for the action of Congress acting alone without presentment the sale would have gone through, but because Congress acted alone without presentment the sale does not go through pending some further act. It sounds like a legislative veto to me. In fact I would think that is almost the definition of a legislative veto.

Senator MATHIAS. I would agree that it is not clear that this approach could overcome the Supreme Court's objections. It has, however, some practical advantages for the Executive in that the great majority of business would go forward without any delay or dispute.

It has a minimal advantage for the Congress of retaining the capability of a participation in the decision where it was not certain that there was a majority of the Congress in support of the transaction. As you said in your opening statement, that is a major concern for Presidents in this day and age. The concept of bullying through when there is a congressional majority in opposition is just not a very practical political option today.

Mr. DAM. Well, first of all, one of my favorite quotations is this: Justice Brandeis said, "The doctrine of separation of powers was not designed to promote efficiency." I agree. Sometimes the constitutional requirements do not turn out to work on a substantive basis to the advantage of either the Executive or the Legislature.

Without having consulted anyone, it occurs to me that one might be able to adapt your idea procedurally. If there were indeed to be passed—contrary to what I think would be good policy—something like the Byrd proposal, which would separate procedurally the controversial items in determining committee action, committee jurisdiction, so that there would only be committee hearings in the controversial cases, cases in which the committee chose to have the hearings—I can imagine something along those lines adapting that

idea. But I just take it that we do not have a constitutional option of using the controversial-noncontroversial distinction in the way in which you have suggested.

Senator SARBANES. Will the Chairman yield?

Senator MATHIAS. Yes

Senator SARBANES. The discrimination point that you refer to is only a foreign policy political point. It is not a constitutional one.

Mr. DAM. That is correct. That is exactly what I was attempting to say.

Senator SARBANES. We could give you very broad authorities in a whole range of countries and simply limited authority in a handful of countries and certain size contracts, or make any reservation we chose. The only question then is whether that is wise as a policy matter for the impression it gives abroad.

Mr. DAM. I completely agree with you that there is no constitutional problem in such a distinction.

Senator MATHIAS. Of course, one solution is suggested by your statement. You say you will go forward every step of the way with all of the reports, all of the waiting periods, all of the procedural steps which are contemplated by the various statutes.

Now you could just take the one extra step and say that even though the Court says you do not have to do it, that you would, in fact, be bound by an expression of the opinion of the Congress.

Mr. DAM. Well, let me address that.

Senator MATHIAS. That is not altogether a facetious suggestion.

Mr. DAM. I realize that. That is why I want to address it very carefully.

Senator SARBANES. If I could interject before you respond, I had joined with Senator Byrd in introducing legislation, prior to the Court's decision, that would require the affirmative approval above the $200 million threshold. In other words, the genesis for that legislation and that legislative proposal was not the Court's decision, but a perception on the part of some of us that even the existing scheme with a veto attached to it was not working adequately, and that we needed to move certain large sales out of the veto area and into the affirmative approval area. It represented some concern about how this whole area was working, ahead of this Court's decision and the invalidation of the legislative veto.

Mr. DAM. I appreciate that, Senator; yes, indeed.

Well, Senator Mathias, I do not think it would be very seemly for us to agree to operate as if something were constitutional when it is not—to sort of make a deal that we would have a different Constitution than the one written down.

Senator MATHIAS. But that is not what I am suggesting. I am suggesting that the President would say in effect that he had such respect for the views of the Congress that if he got a negative expression of opinion, he would simply not proceed. There would not be anything unconstitutional with that. He is not constitutionally bound to do that according to the Court, but there would be nothing unconstitutional if he, as a matter of policy, should decide to do that.

Mr. DAM. But if I might just conclude, I think it is better, therefore, to use the consultation provisions for this purpose. I think it is going to be a rare case in which a President is going to want to proceed with a sale when it becomes clear that there is a majority of the Congress opposed to this sale.

All I am objecting to is the proposal I have heard that we just go ahead and use the same old process and then the President would commit himself that when the concurrent resolution passed, at that point he would give up. I think what we need to do is to work together to try to get a foreign policy that is supported by both the executive and the legislative branches.

I think that will lead in the overwhelming number of cases to sales only being made where both the legislature and the executive branch are in agreement that the sale should be made. This is particularly true of credit sales because Congress has other ways of cutting them off.

But even in the area of licensing and cash sales, I think it is also true. As I try to say in my statement, I think by working together, we are going to arrive at a result in which there will be no difference in outcome between the two systems, and what we are talking about largely here are these abstract questions of separation of power between the branches.

I think the Supreme Court has spoken on that question, and what we are trying to do is work together to get the best outcomes in the face of that.

Senator MATHIAS. I share the view that that is a necessary step to take and a necessary procedure to follow. I must say that I think a voluntary system would be very difficult to live with.

For example, in a transaction such as the AWACS sale to Saudi Arabia, I cannot conceive that the kind of passion and activity would be invested from both sides to achieve an ultimate decision that went into that particular transaction. If it were all to be just a voluntary kind of observance, I think the dynamics of the whole situation would change tremendously.

Mr. DAM. I tend to agree with you. On the other hand, that is the only example we have of a major challenge being made to a sale that the President had decided on.

Now, of course, it is true, as I said in my testimony, that there are many cases in which the transaction has been shaped or perhaps would never even have been initially advanced.

Senator MATHIAS. Well, in the presence of Senator Sarbanes so that his achievements are not overlooked, let me point out that there was a substantial suspension of arms equipment to Turkey for a period of time.

Mr. DAM. Oh, yes indeed. That just illustrates my point that Congress can, by standards and statutes, and by other means, control the arms export policy of the United States. The question goes not just to policy but to particular sales, and then it is a question of how we divide up the work.

Senator SARBANES. I think we need to go back to the thinking table, not the drawing board, because I have always approached the legislative veto from the point of view of an accommodation by the Congress to the Executive. In the absence of that, the Congress could very easily say we go back to the basic constitutional allocation of powers, and if you seek the power, you then come to us, and if we think it is advisable, we will give it to you.

That is what Franklin Roosevelt, in effect, confronted in the 1930's, and I think probably one of the reasons we have moved down this path is the perception that it did not work as it should have in policymaking. The other thing is, I know the Executive regards it as an intrusion, or at least some of the people down the line do, but the other thing it does, if it is pushed to a vote, is provide legislative support for Executive action if, in fact, the Executive is upheld.

Mr. DAM. I am sorry I could not quite hear you.

Senator SARBANES. It provides legislative support for Executive action, in fact, the Executive is upheld. In the end, the Congress has to make a decision and then has to share the responsibility.

I sometimes think that is a better way of doing it. We ought to be able to contest you and we ought to assume responsibility for the contest whichever way it comes out. Then we are in it with you or you have been stopped by our action.

I am concerned with all of the talk about consultation that it may not be adequate to address this situation. I think we need to continue to think about it.

Senator MATHIAS. Well, I think we have the Secretary's pledge that he will continue to think about it.

Mr. DAM. Yes, indeed.

Senator MATHIAS. Thank you very much for being here.

Mr. DAM. Thank you.

Senator MATHIAS. Our next witnesses are a panel of familiar faces, Matt Nimetz, who I understand is enroute from New York; Peter Lakeland, formerly minority staff director for this committee; and Gen. Ernest Graves of the Center for Strategic and International Studies.

Gentlemen, you are thoroughly familiar with congressional procedures so I do not have to tell you what the one long bell means. I think rather than interrupt you after you have started I will declare a short recess to go to the floor, and we will be back as soon as possible.

[Recess.]

The CHAIRMAN. First of all, the committee would like to apologize to its distinguished witnesses for the fact that we were doing double duty today. I think Peter Lakeland would understand that when you are managing a bill on the floor you cannot be up in the committee hearing room.

Radio Marti is down on the floor, and it required my presence there. We just could not bring loose another Senator.

The Supreme Court decision of June 23, 1983, striking down the legislative veto mechanism leaves Congress with a series of important judgments to make, particularly in the field of foreign relations. The decision has major implications for three critical areas of congressional concern and responsibility: War powers, nuclear nonproliferation, and arms transfers. Congress must now rethink its role in each of these areas and consider whether further legislative action is called for to insure effective congressional performance of our constitutional duties.

The Committee on Foreign Relations will devote one hearing to each of these important statutory frameworks: The Arms Export Control Act today, thee Nuclear Non-Proliferation Act on September

15, and the War Powers Resolution on September 29. Former Senator Jacob K. Javits, the principal author of the War Powers Resolution has already agreed to appear at the hearing on the 29th. I commend Senator Mathias for his strong interest in these issues, and I welcome the excellent statement made before the committee today by Deputy Secretary of State Kenneth Dam.

The Supreme Court decision wrote a new chapter in the relations between Congress and the Executive. But there are further chapters still to be written. It is my intention that the Committee on Foreign Relations will play a central role in this process.

We are terribly sorry that we have delayed you all, but we are very happy to have this final panel before us consisting of Hon. Matthew Nimetz, member of the New York Bar and former Under Secretary of State for Security Assistance, Science, and Technology; Peter Lakeland, president of Global Counseling Service and former minority staff director for the Senate Committee on Foreign Relations; and Gen. Ernest Graves, Center for Strategic and International Studies at Georgetown University and former Director of the Defense Security Assistance Agency.

Gentlemen, if you would care to proceed in that order we would appreciate it. Mr. Nimetz, we are happy to have you here.

STATEMENT OF HON. MATTHEW NIMETZ, MEMBER, NEW YORK BAR, AND FORMER UNDER SECRETARY OF STATE FOR SECURITY ASSISTANCE, SCIENCE, AND TECHNOLOGY, NEW YORK, N.Y.

Mr. NIMETZ. Thank you very much, Mr. Chairman. I am pleased to have been invited to testify today before this committee on the important question of how the Arms Export Control Act should be amended in order to take account of the Supreme Court's decision in *INS* v. *Chadha.*

I have prepared remarks, Mr. Chairman, and I would like at the present time merely to select a few portions to state orally. First, I would like to make a few general observations that in my view must form the basis of a sound long-term arms transfer policy.

First, military strength will continue in the indefinite future to be the major touchstone of national power, and no government will ever jeopardize what it considers its fundamental security position by voluntarily permitting a deterioration in its military position vis-a-vis perceived adversaries.

Second, except for the superpowers all states will continue to rely to a greater or lesser extent on foreign supply of major weapons systems.

Third, because of the vulnerability of nations to the vagaries of their arms suppliers, an arms supply arrangement between two nations will become an important test of the state of their relationship.

Fourth, the prime importance of weapons in modern international relations combined with the dependence of the recipient state or the supplying state makes the arms supply relationship difficult even between the closest of allies.

Fifth, because the arms supply relationships between the United States and our allies and friends are so critical and so sensitive, it is

important that both the executive and legislative branches work together to establish broad consensus on basic policies and reasonable agreement on specific sales.

The question presented by the *Chadha* case for me as one who had responsibility for administering the system is not how can we provide a new legislative veto in place of the old one since no sale was ever in fact vetoed, but rather how best can the governing law first promote the articulation of sound foreign policy; second, encourage consultation between the executive branches; and third, demonstrate to foreign countries that the U.S. Government can conduct its arms export program with a minimum of executive-legislative confrontation.

The importance of the veto provision was in my view that it provided the keystone for an important structure of notification and consultation that in the vast majority of cases resolved major differences. In my experience sensitive sales were brought to the attention of committee chairmen and ranking minority members and other concerned members and committee staffs weeks and even months before formal notification would be required.

On the basis of such consultations leaders of a foreign nation could be told that the sale of certain defense items in certain quantities would encounter resistance on the Hill. Under such circumstances a sale could be postponed or reduced in size or less advanced equipment substituted and so on.

The power of Congress to review arms sales is an important discipline on all who administer the system, the State and Defense Departments, the White House and National Security Council staffs, ambassadors in the field, and the manufacturers of defense equipment as well as foreign political and military leaders. Foreign nations do not wish to be the subject of a major vote in the U.S. Congress even when the sale is ultimately approved and will often withdraw or modify a requested purchase after receiving the State Department's assessment of congressional attitudes.

I conclude, Mr. Chairman, from these general observations that now more than ever we need a responsibly administered system and congressional scrutiny of and active participation in the entire process. However, I am not convinced that the system need be held together by a requirement that legislation be required for sales over a certain threshold. Let me outline my concerns about proposals that would require specific legislative approval for major arms sales.

First, such legislation would put an additional mandatory requirement on a Congress that already bears too great a legislative burden. While I was Under Secretary, Congress was unable to enact a foreign assistance appropriation bill for security assistance for 2 successive years.

Given the workload of this committee and the House Foreign Affairs Committee, the risk of delay will be substantial with serious consequences to the relationship with recipient countries, most of whom are close friends.

Second, even though a sale may be relatively noncontroversial, the requirement that there be a full vote of the Congress will tend to call forward a referendum on the particular country whether or not such a hearing is appropriate or useful. Every major sale to a Middle Eastern nation, I fear, would engender a full-scale debate on the myriad of problems there.

Every major sale to Taiwan would risk a full-blown vote on our China policy. Even sales to NATO countries and Japan might engender controversies that are unnecessary and evasive.

I wish to emphasize that I do not oppose full hearings on important foreign policy issues such as arms sales. I do believe, though, that they should be planned deliberately by the Senate and congressional leadership and not forced upon the Congress by what may be a routine sale of aircraft, the construction of a facility abroad, or some other transfer.

Third, the strategic or political importance of a transfer of defense items is often unrelated to the dollar value of the sale. By hinging the statute on a dollar threshold, we will focus attention on size but not political relationships or regional dynamics.

Let me give you a few examples. Major transfers to NATO and ANZUS allies, to Japan, to Israel, and a few other close friends, are rarely controversial. These allies and friends depend on us and, by and large, there was executive-legislative and bipartisan consensus that we remain a reliable supplier of their defense requirements.

Sales to these countries are often large and would thus require legislation. But a very much smaller sale, say in the $10-million to $50-million range, to another country might involve major foreign policy decisions.

This has already occurred with respect to Central America. It would, in my opinion, occur if a sale of defense-related equipment were to be proposed for Iraq, Argentina, the People's Republic of China, or for South Africa.

Also, a relatively small sale in dollar terms may involve the transfer of a seemingly advanced and sensitive technology. Thus, the size of the sale is often less important than the general context of the relationship between the United States and the recipients and the overall international situation affecting that country. A dollar threshold is, in my opinion, a rather blunt instrument that can obscure important issues and consume valuable legislative and executive time, energy, and good will.

Instead of a threshold for required legislative approval of a sale, I would focus attention on the notification procedure. The 30-day period notification will in my view be too short once the legislative veto is removed from the books.

I believe the Javits amendment gives valuable information with respect to the future sales, but assuming no legislative approval would be required for large sales, I believe that the Congress might reasonably increase to 3 months the formal notification period before a letter of offer is formally issued. Perhaps that period could be reduced for items submitted under the Javits amendment and for allied countries or countries having a special relationship with the United States such as Israel.

I believe there should be firm, informal understandings between the executive branch and the relevant committees that the committees obtain advance informal notification of proposed arms transfers that are important or sensitive and that the executive branch will delay implementing such sales if the leadership of the committees ask for consultation. These informal arrangements are not binding by law but in my experience they are critical to making our foreign policy work effectively.

In the light of the *Chadha* case I believe informal arrangements between the executive and legislative branches are more important than ever. Such a regime would give opponents of a particular sale sufficient time in my view to influence the executive branch or if a confrontation is inevitable to schedule hearings and hold a vote.

Since the executive branch and the foreign country involved are most reluctant to have such a confrontation, the Congress retains a most powerful instrument. Of course, the President can exercise the veto, but it would be a rare event indeed for him to use it under the circumstances.

If he did, he would quite clearly have to accept full responsibility for the foreign policy consequences of the act, and it should be noted Congress has other instruments at its disposal such as the Foreign Assistance Authorization and Appropriation Acts that are less amenable to Presidential veto.

In conclusion, Mr. Chairman, no nation wants its all-important arms supply relationship to depend on a Presidential veto, and the executive branch should not desire such a situation. Every major sale requires backup equipment, spare parts, ammunition and technical assistance.

I am quite certain that all parties to a controversial sale will normally strain to find accommodation rather than seek total vindication. For these reasons, I believe a system based on notification and consultation rather than formal approval of particular sales is a preferable course.

At least such a system should be tried. If there are frequent confrontations between the Executive and the Congress, then the Congress retains the power to change the governing law.

For example, I would agree that if the President exercises his veto in order to implement an arms sale that the Congress formally disapproves and does so three or four times in a 10-year period then prior legislative authority for major sales is probably warranted.

Thank you very much, Mr. Chairman, for this opportunity to testify.

[Mr. Nimetz' prepared statement follows:]

Prepared Statement of Hon. Matthew Nimetz

Mr. Chairman, my name is Matthew Nimetz. I am a lawyer, practicing in New York City, after having served in 1980 as Under Secretary of State for Security Assistance, Science and Technology, and before that as Counselor of the Department of State. I am pleased to have been invited to testify today before the Foreign Relations Committee on the important question of how the Arms Export Control Act should be amended in order to take account of the Supreme Court's decision in *INS.* v. *Chadha* that legislative vetoes are unconstitutional. Let me start with a few general observations that, in my view, must form the basis of a sound long-term arms transfer policy.

First—military strength will continue for the indefinite future to be a major touchstone of national power, and no government will ever jeopardize what it considers its fundamental security position by voluntarily permitting a deterioration in its military position vis-a-vis perceived adversaries. This is true for not only the two superpowers and regional powers, but also for smaller nations.

Second—except for the superpowers, all states will continue to rely, to a greater or lesser extent, on foreign supply of major weapons systems, particularly aircraft, armor and missile systems. Obviously, this reliance becomes acute in times of tension.

Third—because of the vulnerability of nations to the vagaries of their arms suppliers, an arms supply arrangement between two nations will become one test, if not the major test, of the state of the relationship. Critical issues will revolve around the sophistication of the weapons the supplier is willing to transfer, the quantity of items supplied, the training arrangements, the degree to which joint development and production is undertaken, the speed of deliveries, the terms of sale or credits involved—all these will be measured and analyzed. This is another way of saying that the *arms* relationship very quickly becomes a barometer of the political relationship and vice versa.

Fourth—the prime importance of weapons in modern international relations, combined with the dependence of the recipient state on the supplying state, makes the arms supply relationship difficult even between the closest of allies, with the recipient always seeking to maximize home production, to be entrusted with advanced technical information, to stockpile sufficient spare parts, to obtain reliable delivery, to maintain diverse source of supply, and to negotiate advantageous pricing; while the supplier (in our case, the United States) quite obviously is interested in minimizing its commitments. There is, to put it briefly, a built-in conflict of interest between the recipent, whch seeks reliability, and the supplier, which seeks flexibility.

Fifth—because the arms supply relationships between the United States and our allies and friends are so critical and so sensitive, it is important that both the Executive and Legislative Branches work together to establish a broad consensus on basic policies and reasonable agreement on specific sales.

The question presented by the *Chadha* case for me, as one who had responsibility for administering the system, is not how can we provide a new veto in the place of the old one, since no sale was ever in fact vetoed, but rather how can the governing law be amended to promote the articulation of sound foreign policy, to encourage consultation between the Executive and Legislative Branches and to demonstrate to foreign countries (friends and adversaries) that we, the United States Government, can conduct our arms export program with a minimum of executive-legislative confrontation.

As I have noted, the Arms Export Control Act provided that the Congress could veto major arms sales ($14 million for defense equipment and $50 million for articles or services) by passing a concurrent resolution within 30 days of receiving formal notification of the sale. In fact, no veto ever occurred. The importance of the provision was, in my view, that it provided the keystone for an important structure of notification and consultation that in the vast majority of cases resolved major differences. In my experience, sensitive sales were brought to the attention of Committee Chairmen and ranking minority members, and other concerned members and committee staffs, weeks and even months before formal notification would be required. On the basis of such consultations, leaders of a foreign nation could be told that the sale of certain defense items in certain quantities would encounter resistance on the Hill. Under such circumstances, a sale could be postponed, or reduced in size, or less advanced equipment substituted and so on.

The power of Congress to review arms sales is an important discipline on all who administer the system—the State and Defense Departments, the White House and National Security Council staffs, Ambassadors in the field, and the manufacturers of defense equipment, as well as foreign military leaders. Foreign nations do not wish to be the subject of a major vote in the U.S. Congress, even when the sale is ultimately approved, and will often withdraw or modify a requested purchase after receiving the State Department's assessment of congressional attitudes. Those who administer the defense equipment transfer programs at home and abroad tend in general—and there are exceptions—to pay more attention to the arguments in favor of a major sale than to the rationale behind certain important restraining policies, *e.g.*, the risk of compromising sensitive U.S. technology, the destabilizing effect of introducing advance systems in regions where rival powers maintain a delicate balance, and the effect on human rights and civilian rule in the recipient country.

By focusing on the sale, we have tended to neglect a key aspect of the problem: financing, particularly by developing countries, which must meet a growing debt service for goods which add nothing to their national product. Two years ago I testified before this Committee that in focusing on arms transfer we were neglecting what I called "a most important part of the problem—how to finance them." It was obvious to me that the strain on the treasury of Egypt and Israel and many

other important friends would be severe—and this financing problem for them will, I predict once again, become a political problem for us.

I conclude from these general observations that now more than ever we need a serious arms export policy, a responsibly administered system and congressional scrutiny of and active participation in the entire process. However, I am not convinced that the system need be held together by a requirement that legislation be required for sales over a certain threshold. Let me outline my concerns about proposals that would require specific legislative approval for major arms sales.

1. Such legislation would put an additional mandatory requirement on a Congress that already bears too great a legislative burden. While I was Under Secretary, Congress was unable to enact a foreign assistance appropriation bill for security assistance for two successive years. Given the workload of this Committee and the House Foreign Affairs Committee, the risk of delays and postponements will be substantial, with serious consequences to the relationship with recipient countries, most of whom are close friends.

2. Even though a sale may be relatively non-controversial, the requirement that there be a full vote of the Congress will tend to call forth a referendum on the particular country involved, whether or not such a hearing is appropriate or useful. Every major sale to a Middle Eastern nation, I fear, would call forth a full scale debate on the myriad of problems there. Every major sale to Taiwan would risk a full-blown vote on our China policy. Even sales to NATO countries and Japan might engender controversies that are unnecessary and divisive. I wish to emphasize that I do not oppose full hearings on important foreign policy issues: such as arms sales. I do believe, though, that they should be planned deliberately by the Senate Congressional leadership and not forced upon the Congress by what may be a routine sale of aircraft, the construction of a facility abroad, or some other transfer of other defense equipment.

3. The strategic or political importance of a transfer of defense items is often unrelated to the dollar value of the sale. By hinging the statute on a dollar threshold, we will focus attention on size, but not political relationships or regional dynamics. Let me give a few examples. Major transfers to NATO and ANZUS allies, to Japan, to Israel and a few other close friends, are rarely controversial. These allies and friends depend on us and by and large there is executive-legislative and bipartisan consensus that we remain a reliable supplier of their defense requirements. Sales to these countries are often large and would thus require legislation. But a very much smaller sale—say, in the $10 to $50 million range of defense equipment—to another country might involve major foreign policy decisions. This has already occurred with respect to Central America. It would, in my opinion, occur if a sale of defense related equipment were to be proposed for Iraq, for Argentina, for the People's Republic of China or for South Africa. Thus, the size of the sale is often less important than the general context of the relationship between the United States and the recipients and the overall international situation affecting that country. A dollar threshold is, in my opinion, a rather blunt instrument that can obscure important issues and consume valuable legislative and executive time, energy and good will.

Instead of a threshold for required legislative approval of a sale, I would focus attention on the notification procedure. The 30-day period notification will, in my view, be too short once the legislative veto is removed from the books. I believe the Javits Amendment (§ 25 of the AECA) gives valuable information with respect to future sales, but assuming no legislative approval will be required for large sales, I believe that the Congress might reasonably increase to three weeks the formal notification period before a letter of offer (LOA) is formally issued, although perhaps that period could be reduced for items submitted under the Javits Amendment and for allied countries or countries having a special arms supply relationship with the United States, such as Israel.

Moreover, I believe there should be firm informal understandings between the Executive Branch and the relevant committees that the committees obtain advance informal notification of proposed arms transfers that are important or sensitive, and that the Executive Branch will delay implementing such sales if the leadership of the committees ask for consultation. These informal arrangements are not binding by law, but in my experience they are critical to making our foreign policy work effectively. In the light of the *Chadha* case, I believe informal arrangements between the Executive and Legislative Branches are more important than ever.

Such a regime would give opponents of a particular sale sufficient time, in my view, to influence the Executive Branch or, if a confrontation is inevitable, to schedule hearings and hold a vote. Since the Executive Branch and the foreign country involved are most reluctant to have such a confrontation, the Congress still retains a most powerful instrument. Of course, the President can exercise the veto, but it would be a rare event indeed for him to use it under the circumstances; if he did, he would quite clearly have to accept full responsibility for the foreign policy consequences of the act. And, it should be noted, Congress has other instruments at its disposal such as the foreign assistance authorization and appropriation acts that are less amenable to Presidential veto.

No nation wants its all-important arms supply relationship to depend on a Presidential veto. And the Executive Branch should not desire such a situation. Every major sale requires back-up equipment, spare parts, ammunition, technical assistance. For these reasons I am quite certain that all parties to a controversial sale will strain to find accommodation rather than seek total vindication. For these reasons I believe a system based on notification and consultation, rather than formal approval of particular sales, is the preferable course. At least such a system should be tried. If there are frequent confrontations between the Executive and the Congress, then the Congress retains the power to change the governing law. For example, I would agree that if the President exercises his veto in order to implement an arms sale that the Congress formally disapproves, and does so three or four times in a ten-year period, then prior legislative authority and major sales is probably warranted.

Thank you very much for this opportunity to testify on this important issue.

The CHAIRMAN. Thank you very much.

General Graves, would you care to go ahead?

STATEMENT OF GEN. ERNEST GRAVES, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, GEORGETOWN UNIVERSITY, AND FORMER DIRECTOR OF THE DEFENSE SECURITY ASSISTANCE AGENCY

General GRAVES. Mr. Chairman, it is a pleasure to be here.

The CHAIRMAN. It is good to have you back with us. You can, of course, summarize your statement, considering the lateness of the hour, in any way that you see fit. The full statement will, of course, go in the record.

General GRAVES. It is quite short, Mr. Chairman. Thank you.

During my tour as Director of DSAA, I appeared before this committee many times to testify on the sale of arms to allied and friendly governments.

On several occasions, I testified in support of administration proposals to reduce the amount of detail that Congress has to address in its oversight of arms transfers. Congress did not agree with all of these proposals.

However, it did act to raise the threshold on certain transfers requiring notification under sections 3 and 36 of the Arms Export Control Act. It also shortened the notification period for sales to NATO, Japan, Australia, and New Zealand.

The rationale for these changes was simply this. Only a small fraction of the sales which by law require advance notification of Congress involve significant policy issues, issues on which there is a possible difference of view between the Executive and the Congress. In the past, because the notification process was so extensive, we have paid a heavy price in delays, lack of responsiveness to allied and friendly governments, and consumption of the valuable time of senior administration officials and Members of Congress.

In my view, arms transfers are an important instrument of U.S. policy to be used judiciously but effectively. As Director of DSAA, I was dismayed by the delays that diminished the effectiveness of this policy instrument even when there appeared to be unanimity on the desirability of the sales involved.

Over the last 5 years, it has appeared to me that on this aspect of foreign and defense policy, the Executive and the Congress have reached a reasonable accommodation. It was reassuring to me to hear Secretary Dam earlier this afternoon reaffirm the commitment of the administration to consult with, and take account of, the views of Congress concerning arms sales that involve significant policy issues.

When I learned about the Supreme Court decision in *INS v. Chadha*, my first concern was that it might lead to retrogression in the working relationship between the Executive and the Congress. Secretary Dam's statement makes clear that the administration does not want that to happen and is prepared to make every effort to assure that the review process continues to work as it has, with the sole exception of the legislative veto.

During the considerable period that it normally takes to consummate a major sale, there is ample opportunity for consultation between the Executive and the Congress. During this period, Congress receives recurring reports on estimated future sales, including the annual Congressional Presentation Document, the Javits report, and the Quarterly Report of Price and Availability Estimates.

Up to a point, executive-congressional consultation should be on a confidential basis in order not to compromise the discussions with the foreign governments. Once there is agreement in principle with the foreign government and between the Executive and the Congress, the sale should move ahead expeditiously with the tender and negotiation of the former LOA.

A great advantage of the present review process is that it can proceed at any time of year and the required congressional review can be completed in less than 2 months. If any changes have to be made, and I hope they do not, I would urge that timeliness not be sacrificed.

Mr. Chairman, it is a pleasure to have appeared.

The CHAIRMAN. Thank you, General Graves.

Peter Lakeland, we are delighted to have you back.

STATEMENT OF ALBERT A. LAKELAND, JR., PRACTICING ATTORNEY, PRESIDENT, GLOBAL COUNSELING SERVICE, BETHESDA, MD., AND FORMER MINORITY STAFF DIRECTOR FOR THE SENATE COMMITTEE ON FOREIGN RELATIONS

Mr. LAKELAND. Mr. Chairman, I welcome the committee's invitation to testify on the subject at hand. Following the Supreme Court's recent decisions declaring the legislative veto to be unconstitutional, this hearing, I understand, is convened to consider the questions, "Where do we go from here, specifically with respect to arms export control legislation?"

I have some comments and suggestions to offer the committee on this question, which I will get to in a minute. First, however, I think it is important for the committee also to consider the prior question, namely, "How did we get here in the first place?"

As one who was deeply involved on a staff level in the evolution of arms transfer control legislation over a period of 14 years, I would like to begin by addressing the second question, how did we get here in the first place? The answers to that question will, I believe, help the committee to clarify the question of what is the legitimate basis of congressional authority and involvement in the issue of the transfer of American-made arms to foreign countries.

The Congress has a very legitimate and important role to play in this matter, in my judgment. However, my own involvement notwithstanding, I also believe that the laws currently on the books incorporate many of the characteristics of legislation at its worst. There is much room for improvement.

Moreover, I always held the view that the legislative veto was unconstitutional, and in my staff capacity, I consistently opposed inclusion of that device in legislation that I worked on.

From a historical perspective, there are two distinct phases to the evolution of current legislation controlling arms transfers.

The first phase was a direct product of the Vietnam war. It is well known that the Senate Foreign Relations Committee was, in an institutional sense, the principal national focus of opposition to the Vietnam war policies of the Johnson and Nixon administrations.

The committee's national preeminence in that regard was attributable, in my judgment, to the fact that the committee had a unique claim to constitutional legitimacy in its challenge to the war policies of the President. This legitimacy derives from the special authority which the Constitution itself explicitly reserves to the Senate in foreign affairs and as the Senate's duly constituted agent in these matters, the committee's actions could not be dismissed for lack of standing even though the President's lawyers tried many times to use this line of attack.

An important facet of the committee's opposition to the Vietnam war was a determined effort to prevent or limit the spread of U.S. combat involvement to the adjacent countries of Laos and Cambodia, and the committee's jurisdiction over military assistance legislation was a vehicle for the enactment by Congress of legislative controls seeking to achieve those objectives. During that phase of the evolution of legislative controls over arms transfers, no effort was made to use the legislative veto device.

Nonetheless, it is important to bear this phase in mind for at least two reasons. First, it marked the birth of congressional rediscovery of its latent constitutional authority in the foreign policy and war-making arenas.

Second, the mutual distrust, bitterness and vituperation which broadly characterized the congressional-executive struggle over the Vietnam war established an atmosphere which has continued to affect the substance of legislation respecting arms transfer controls and certainly has continued to permeate the atmosphere of confrontation which characterizes implementation of U.S. arms transfer programs, even today in Central America.

The second phase of the evolution of legislation controlling the arms transfer process had its genesis in events of 1972, 1973, and 1974 which had no direct connection with the Indochina war. The geographic locus of the triggering events for this phase was the Mideast and the Persian Gulf.

It is even possible to pinpoint the initial triggering event with considerable precision, that is, President Nixon's visit to Iran on May 30–31, 1972. In his memoirs on page 1264 Dr. Kissinger relates what happens as follows:

> The specific decision facing Nixon was the Shah's wish for F–14 or F–15 aircraft and associated equipment. There had been opposition; some Defense Department reluctance to part with advance technology and State Department fears that the sale might be provocative. * * * Nixon overrode the objections and added a proviso that in the future Iranian requests should not be second-guessed.

That proviso against "second-guessing" had momentous consequences.

President Nixon's visit and the secret arms sales decision he took on that occasion occurred against the background of completion of the British withdrawal from the Persian Gulf in 1971 and the evolving Nixon doctrine policy of armed selected allied countries to be regional surrogates of U.S. power. Things rapidly got out of hand, however, following the quadrupling of OPEC oil prices in 1973–74.

Arms sales programs of truly extraordinary dimensions blossomed overnight principally involving Iran, Saudi Arabia, and Kuwait. As these sales were primarily for cash on commercial terms, they largely eluded the legislative controls which had been built into military assistance legislation during the earlier, Vietnam-centered period of congressional activism.

Moreover, the absence of congressional review and control procedures was highly magnified by the concurrent absence of policy review and control procedures within the administration itself due to the "no second-guessing" decision which President Nixon had taken in Tehran. Few people then or now could argue that multibillion-dollar sales of sophisticated arms to the preindustrial oil exporting states of the Persian Gulf did not have profound implications in a number of areas of legitimate congressional concern. Congress was right on policy grounds, and justified on constitutional grounds, in acting to assert order and control.

Senator Hubert Humphrey took the lead in proposing omnibus legislation to deal with the new problems posed by these multibillion-dollar Persian Gulf arms sales on commercial terms outside the provisions of existing arms sales legislation. In point of fact, the approach originally suggested by Senator Humphrey was reversed 180 degrees in the final legislation, but it was his initiative that gave birth to the Arms Export Control Act which became law in 1976.

In 1975 Senator Nelson, drawing on his experience as a legislative activist in the environmental field, had gotten an amendment attached to the foreign assistance bill which claimed for the Congress for the first time the power to veto individual arms sales by concurrent resolution. This provision was carried over and incorporated into the

Arms Export Control Act and remained there until it was invalidated by the recent Supreme Court decisions.

Leaving the constitutional issue aside for the moment, the basic inefficacy and drawbacks inherent in the use of the legislative veto of individual sales as a policy control mechanism were evident from the beginning, in my judgment. In point of fact, not a single sale was ever blocked by the exercise of a legislative veto.

Efforts to use that mechanism were, however, the focus of several major congressional-executive disputes in the arms transfer field as, for example, the sale of Hawk missiles to Jordan, the several sales of planes and missiles to Saudi Arabia and the proposed but never consummated sale of AWACS planes to Iran. From a policy viewpoint the problem inherent in use of the legislative veto to regulate arms sales is that it brought the Congress in at the worst time and in a way which inevitably aggravated both the foreign relations and the executive-congressional relations aspects of the sale in question. Congressional opposition inevitably was interpreted as an affront by the friendly buyer nations involved, and the President understandably resisted this highly public mode of challenge to his policies and authority by the Congress after he had committed himself.

My own alternative was and continues to be that the Congress should adopt the usual legislative procedure of advance annual authorization of the arms transfer program proposed and submitted by the President. For reasons I never fully understood, this approach was resisted by the administration even more vociferously than the legislative veto. I am convinced that a fully workable bill to do this can be drafted with administration cooperation. This is not the occasion to rehash this specific proposal, however. But, if on another occasion, Mr. Chairman, the committee should wish, there are files available on such a legislative approach for its consideration and I would personally be glad to assist the committee in any way appropriate.

In closing, Mr. Chairman, I wish to repeat that as a lawyer who has given this much thought, I agree with the Supreme Court's generic decision striking down the legislative veto.

In preparing for this hearing I reviewed some material which your staff kindly sent to me. Included was a copy of the statement of Deputy Attorney General Schmults before the House Foreign Affairs Committee on July 20.

On page 5 of the statement Mr. Schmults quotes approvingly from Chief Justice Burger's *Chadha* opinion in which legislative actions subject to the presentment clauses of the Constitution were defined as those having:

> The purpose of altering the legal rights, duties and relations of persons including * * * executive branch officials and other persons outside the legislative branch.

I believe that this line of reasoning has a very apt application to the underlying issues under consideration here today though that application is of a distinctly reverse nature. In the field of foreign affairs the Constitution creates very explicity one additional special procedure for enactment of law, the treaty process by which treaties attain the explicit status of supreme law of the land.

Much of the problems between Congress and the President in recent decades has grown out of the increasing use by Presidents of the so-

called executive agreement circumventing the involvement of the Senate prescribed in the Constitution for treaties or the involvement of both Houses required for other legislation. At the same time the President and his lawyers have consistently claimed that purely executive agreements made under the President's sole authority have the same binding legal effects as treaties, that is, they are the supreme law of the land.

The logic of the *Chadha* opinion dictates that executive agreements to achieve such binding legal status should be subject to the presentment clause in reverse either through submission to the Senate in treaty form or in the form of a request for approval by both Houses of Congress. Adherence to this procedure would in my judgment substantially mitigate the degree of contention between the Congress and the President in the foreign policy arena. The logic of the presentment clause also argues for the annual legislative authorization approach mentioned above.

The CHAIRMAN. Thank you very much. As you know, we have another vote on.

I do apologize to you. This is a difficult process that we go through, but all of you understand it extremely well and know the problem. I just want to conserve your time, but that does not in any way detract from our deep appreciation for your being here.

I will recommend to the full committee that they read your testimonies carefully. They are extraordinarily good statements and very helpful to us.

I want Pete Lakeland to know that Senator Javits and I have recently discussed considerably the War Powers Act and what effect it has had. His views independently coincide completely with those of Senator Pell's and mine and the statements we made.

I want to thank you very much. The hearing is adjourned.

[Whereupon, at 5:07 p.m., the committee adjourned, subject to call of the Chair.]

APPENDIX

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EFFECT OF THE LEGISLATIVE VETO DECISION ON THE TWO-HOUSE DISAPPROVAL MECHANISM APPLICABLE TO THE SALE, TRANSFER AND LEASE OR LOAN OF ARMS

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August 5, 1983

EFFECT OF THE LEGISLATIVE VETO DECISION ON THE TWO-HOUSE DISAPPROVAL MECHANISM APPLICABLE TO THE SALE, TRANSFER AND LEASE OR LOAN OF ARMS

The decision of the Supreme Court in INS v. Chadha holding a one-House legislative veto unconstitutional and subsequent High Court action affirming a lower court ruling in United States Senate v. Federal Trade Commission invalidating a two-House veto provision have widespread implications for foreign as well as domestic policy. Nowhere was the desire to get a handle on administration of the law -- both to implement congressional policy and to curb potential abuse -- more apparent than in the overlapping, sensitive fields of foreign affairs and national security. The device most frequently relied upon in recent years to carry out these twin congressional purposes has been one- and two-House resolutions of approval or disapproval of proposed Executive Branch action impacting on foreign affairs. In an appendix to his dissent in Chadha, Justice White listed some fifty-six legislative veto provisions potentially affected by the Court's decision. Conspicuously, the first sixteen fall into this category and include such high priority subjects as war powers, arms transfers and sales, national emergency authorities, and nuclear nonproliferation.

This report will discuss the impact of these recent Supreme Court actions on the legislative veto in the area of arms exports. Under the governing law, the President has to submit proposed arms aid, arms sales, and arms leases or loans that exceed certain monetary thresholds to Congress for review and possible rejection by concurrent or two-House resolution.

Resolution of the constitutional status of the veto in this important context is but the beginning of a two part inquiry. An ancillary but by no means subsidiary inquiry is the ripple effect of a finding of unconstitutionality of the veto itself on the act or the part of that act that incorporates it. This latter issue, termed the severability problem, has assumed critical significance given the fact that the underpinnings of Chadha and progeny are largely negative insofar as the status of the veto itself is concerned.

The Arms Export Control Act

The basic statutory control mechanism regulating transfers, sales and leases of arms is the Arms Export Control Act (AECA), as amended, 22 U.S.C. § 2751 et seq. The AECA provides for legislative vetoes in three general circumstances: (1) cash, credit, or commercial sales of defense articles and services; (2) third country transfers of U.S. Government supplied defense articles and services; and (3) leases or loans of U.S. defense articles.

Section 36(b)(1) of the AECA, 22 U.S.C. § 2776(b)(1) provides that Congress by concurrent resolution may disapprove a sale of major defense equipment valued at $14 million or more, a sale of defense articles or services valued at $50 million or more, or a sale of design and construction services valued at $200 million or more. The President must submit all proposed U.S. Government sales of these items at or above the specified dollar thresholds to Congress together with a detailed explanation of the relevant whys and wherefores. Congress has thirty calendar days following receipt of this information to disapprove it. Fifteen days are authorized in the case of a proposed sale to NATO, NATO member states, Japan, Australia, and New Zealand. However, the President may waive the otherwise mandatory congressional review procedures by certifying "that an emergency exists which requires the proposed sale in the national security interests of the United States."

Section 36(c)(1) of the AECA, 22 U.S.C. § 2776(c)(1) provides that all proposed commercial arms sales -- sales covered by a Department of State approved export license — of major defense equipment valued at $14 million or more or of defense articles or services valued at $50 million or more must be submitted to Congress by the President. Any proposed sale of this nature may be vetoed by action of the House and Senate within thirty calendar days of its submission to Congress. NATO, NATO member states, Japan, Australia, and New Zealand are exempt from the veto provision. As in the case of government sales, the President may waive the otherwise mandatory congressional review procedure by certifying "that an emergency exist which requires the proposed export in the national security interests of the United States."

Section 3(d)(2) of the AECA, 22 U.S.C. § 2753(d)(2) provides that Congress by concurrent resolution may prevent the transfer of U.S. supplied defense articles and services by the original recipient country or international organization. The President is required to report to Congress any proposed transfer of specific items obtained not only under the AECA but also items provided under sections 505(a)(1) and 505(a)(4) of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. §§ 2314(a)(1) and 2314(a)(4) when such items consist of any major defense equipment valued at $14 million or more or any defense article or related training or other defense service valued at $50 million or more. Within thirty calendar days of being notified of any such proposed transfer, Congress may block it by passing a concurrent resolution of disapproval. A shorter congressional review period, fifteen calendar days, is authorized in the case of transfers to NATO, NATO member states, Japan, Australia, and New Zealand. The President may waive review of the last mentioned transfer by making a certification along the lines described in connection with government and commercial sales.

Section 63(a)(1) of AECA, 22 U.S.C. § 2796b subjects leases of defense articles under the Act and loans of similar articles under chapter 2 of part

II of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2311 et seq., of at least one year duration to disapproval by concurrent resolution. As in the case of the other veto provisions contained in the AECA, the one applicable to leases and loans applies to leases and loans of major defense equipment valued (replacement cost less depreciation) at $14 million or more or defense articles valued (replacement cost less depreciation) at $50 million or more. Congress has thirty calendar days to block the agreement. NATO, NATO member states, Japan, Australia and New Zealand are exempt from the veto provision. The President has authority to waive review requirements by determining and reporting to Congress that an emergency with implications for United States security interests justifies the loan or lease.

The Legislative Veto After Chadha And Progeny

The Court in INS v. Chadha, No. 80-1832 (June 23, 1983), invalidated the one-House veto of administrative action suspending deportation on hardship grounds under section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2). The rationale for the decision is grounded in the bicameralism and presentment requirements of Article I, section 1, and Article I, section 7, clauses 2 and 3 of the Constitution. These provisions specify, respectively, that "all legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives" and that "Every Bill" as well as "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary" shall be presented to the President for an opportunity to approve or disapprove, the latter subject to override by two-thirds of both Houses of Congress. Slip op. at 25. (Emphasis in

original). These "[e]xplicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process." Id. at 24-25. As described by the Court, "the prescription for legislative action in Art I, §§ 1 and 7 represent the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." Id. at 31. Whether actions taken by either House are the type of "legislative action" subject to the bicameralism and presentment requirements of Art. I "depends not on their form but upon whether they contain matter which is properly to be regarded as legislative in its character and effect." Ibid. Insofar as the one-House veto of the Attorney General's decision to suspend Chadha's deportation was concerned, the Court said that "[i]n purporting to exercise power defined in Art. I, § 8, cl. 4 to 'establish an uniform Rule of Naturalization,' the House took action that had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch." Id. at 32.

In the Court's view, the act of reversing the Attorney General's decision to suspend deportation, like the grant of the authority to make that decision, "involve[d] determinations of policy that Congress can implement ... only" by lawmaking. Id. at 34. Accordingly, "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." Ibid. Not insignificantly, the Court at this point in its analysis, twice observed that the Constitution did not give Congress power to repeal or amend laws by other than legislative means pursuant to Art. I. Id. at 33, n. 18.

To underscore the need for compliance with the requirements of bicameralism and presentment, the Court reviewed express constitutionally authorized departures from these requirements: House impeachments and Senate trials of the same, Senate advice and consent to presidential appointments and treaties negotiated by the President, and certain internal concerns of each House. The last mentioned unilateral authority, "[h]owever ... only empowers Congress to bind itself and is noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in the specific and enumerated instances." Id. at 35, n. 20. The opinion concludes, saying: "To accomplish what has been attempted by one House of Congress in this case [i.e., reversal of administrative suspension of deportation] 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." Id. at 37.

Although the immediate effect of the Chadha decision is to invalidate the one-House legislative veto provision of the Immigration and Nationality Act at issue in the case, the Presentment Clause rationale cuts the ground out from under all legislative vetoes. Thus, while a concurrent or two-House resolution of approval or disapproval comports with bicameralism, it does not satisfy the requisite of presentation to the President for approval or veto. The broader implications of the Chadha reasoning were confirmed on July 6, 1983, when the Court summarily affirmed the District of Columbia Circuit Court of Appeals decision striking down the two-House veto contained in section 21 of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C § 57(a)(1)(B), that Congress exercised to reject that agency's proposed used

car rule. United States Senate v. Federal Trade Commission, No. 82-935 (July 6, 1983).

The Court's June 23 decision and July 6 action establish that a one-House or a two-House veto of otherwise permitted executive or agency action is an act of legislative power. As such, they violate the Constitution which requires that legislative power may be exercised only as provided in Art. I, §§ 1 and 7, i.e., by joint action of the House and Senate and by presentment to the President. The four legislative provisions of the AECA would seem to fall within the proscription established by these cases.

It seems incontrovertible that in the exercise of its plenary power to regulate commerce, including the commerce in arms, and in establishing requirements applicable to foreign aid, including foreign military assistance, Congress can set reasonable conditions relating to such activities. Similarly, Congress can delegate to others, in the case of the AECA, the President, authority to administer the program in conformity with statutorily prescribed standards and conditions. Conceivably Congress could have regulated arms sales and transfers by firms and foreign purchasers without involving the President. The AECA, however, gives the President a significant role in such arms sales and transfers while at the same time reserving to Congress the power to cancel the same. The two-House veto in these circumstances operates to overrule an executive determination without subjecting its action to presidential approval or veto. As such, the veto in these circumstances has the purpose and effect of altering the legal rights, duties and relations of persons, both governmental and private, "all outside the legislative branch."

Absent the various veto provision of the AECA, neither one nor both Houses of Congress could negative an arms contract except by law.

After Chadha and progeny such a result "cannot be justified as an attempt" at amending or repealing the standards set out in the governing law. "Amendment and repeal of statutes, no less than enactment," the Court said, "must conform with Art. I." Id. at 33. In a lengthy footnote, the Court concluded that "Congress' authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a congressional veto." Id. at 32, n. 32.

The basis for the AECA, namely the power to regulate commerce and to condition expenditures for the general welfare, no more than the power to "establish an uniform Rule of Naturalization" which undergirded the veto denounced in Chadha, appear to authorize Congress to take action short of law that alters the legal rights, duties and relations of persons outside the legislative branch. Accordingly, the legislative veto provisions of the AECA are of dubious constitutionality.

The Severability Problem

A judicial determination that a statutory legislative veto provision is unconstitutional is not the end of the matter. Thereafter, the Court must determine whether the unconstitutional veto provision can be isolated or severed from the delegated authority to which it is annexed or whether the two are so inextricably intertwined that both must fall. The general rule established by earlier cases and reaffirmed by the Court in Chadha is "that the invalid portions of a statute are to be severed '"[u]nless it is evident that the

legislature would not have enacted those provisions which are within its power, independently of that which is not."'" Id. at 10, citing Buckley v. Valeo, 424 U.S. 1, 108 (1976), quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 310, 234 (1932).

Resolution of the issue of severability involves consideration of three factors. The first factor to be considered is the presence or absence in the law of a severability clause; a provision whereby "Congress itself has provided the answer to the question of severability." INS v. Chadha, at 11. These clauses typically provide that judicial invalidation of any provision of an act, or its application to any person or circumstances, does not affect the remainder of that act or even the affected provision as it applies to other persons or in other circumstances. A severability clause creates a "presumption that Congress did not intend the validity of the Act as a whole, or of any part of the Act, to depend upon whether the [challenged provision] was invalid." Ibid.

Since a severability clause does not conclusively resolve the issue, the second factor that has to be considered is whether the presumption of severability it creates conforms to the intent of the lawmakers. This inquiry, termed "an elusive inquiry" by the Court, requires an examination of the legislative history of the provision for evidence that either supports or rebuts the presumption. Ibid.

The final factor to be considered is whether the provision less the severed part "survives as a workable administrative mechanism." Id. at 14. By implication, if the provision absent the veto is not functionally operable, the entire provision or act falls.

In summary, resolution of the severability issue in these cirsumstances depends upon a case-by-case review of the language of the act, its legislative history, and its ability to operate independent of the veto.

The Court in Chadha held the veto provision severable from the remainder of the section. This result was achieved by virtue of the broad severability clause in the Immigration and Nationality Act, § 406, 8 U.S.C. § 1101, and the Court's reading of the legislative history of the administrative deportation suspension provision. The presumption raised by the clause found support in the Court's finding that the legislative history evidenced congressional "irritation with the burden of private immigration bills" and an overriding desire to rid itself of that burden. Id. at 13.

The AECA and Severability

In applying these considerations to the AECA, it should be noted at the outset that the Act does not have a severability clause. At most, this omission means that that "elusive inquiry" into the intent of Congress does not benefit from a rebuttable presumption of severability. However, whether absence of the clause has that effect seems problematical given court doctrines regarding the presumption of constitutionality of congressional enactments and favoring a rule of constitutional law no broader than is required by the precise facts to which it is to be applied. See Powell J., concurring, INS v. Chadha, at 9.

Assuming that the absence of a severability clause imports neutrality, or a clean slate unencumbered by a presumption of any kind, the focus of attention turns to the legislative history of the AECA for any evidence of the intent of the lawmakers concerning severability.

The legislative history of this measure seems to justify the Court's characterization of examining legislative history for evidence of congressional intent as "embark[ing] on [an] elusive inquiry." This general observation is not meant to suggest that the circumstances surrounding the AECA's enactment and comments made during congressional deliberations on the legislation are devoid of evidence probative of the intent of the lawmakers. Indeed, the contrary in this instance is the case. There is a plethora of evidence, at least with regard to the four legislative vetoes applicable to sales, transfers and leases or loans of major weapons system and defense articles and services beyond a certain value authorized by sections 3, 36 and 63 of the Act, as amended, 22 U.S.C. §§ 2753, 2776, 2796b, that militates in favor of a conclusion of nonseverability. That is, the legislative history is replete with actions and statements that favor the conclusion that insofar as transactions in arms of the described kind are concerned, they would not have been authorized but for the accompanying congressional check in the form of a concurrent resolution of disapproval. Of particular significance and probative value in this regard is that Congress wrote the veto with respect to government sales of arms into the law notwithstanding that President Ford had vetoed an earlier version of the legislation because it contained a similar veto and other restrictive features which he found objectionable.

If this and other evidence which may be gleaned from the record of the legislation stood uncontradicted, it would be an easy matter to conclude that the delegated authority to make such sales subject to the veto, could not survive judicial invalidation of that veto. However, the record of the AECA is not so overwhelming one-sided but, as frequently is the case, contains elements which if not contrary are at least inconsistent with that conclusion. As indicated, the congressional review procedures applicable to arms sales and transfers are subject to presidential waiver upon his certifying that an emergency exists that requires a proposed sale in the national security interests of the United States. Although the existence of this waiver authority in and of itself may not conclusively rebut implications flowing from congressional steadfastness in the face of an earlier presidential veto regarding a similar provision, it raises not insignificant, countervailing considerations.

In brief, notwithstanding seeming clear cut rules and criteria for determining severability, their application is far from a mechanical or a pro forma process. Resolution of this issue entails weighing invariably competing considerations concerning which reasonable persons may differ. In this connection, it is instructive to read the opinions of the Court and dissenting Justice Rehnquist in Chadha which, while purporting to examine the same legislative history, arrive at opposite conclusions on the basic question of severability.

The AECA, as amended, 22 U.S.C. § 2751 et seq. is the basic authority for cash and credit sales of defense articles and services to friendly countries (§§ 2762 and 2763). In addition to authorizing sales of military equipment for cash and on credit and from Department of Defense stocks (§ 2761), the Act establishes eligibility requirements for purchases by friendly countries (§ 2753), specifies the purposes for which military sales are authorized (§ 2754), and imposes various controls on their export (§ 2771 et seq.).

The Act imposes more than a score of arms sales-related reporting requirements on the President (§§ 2753(a), 2753(c), 2753(d), 2753(e), 2753(f), 2754, 2755, 2756, 2761(d), 2761(g), 2761(i), 2762(b), 2763, 2764(c), 2765, 2766, 2767(c), 2768, 2776, 2778(f), 2791(b), 2795b, 2796a) and annual monetary ceilings on foreign military sales credits (§ 2771). It declares the sense of the Congress that sales from stocks (§ 2761) and cash sales (§ 2762) and exports of weapons for police and specified internal enforcement purposes in any fiscal year should not exceed 1976 levels (§ 2751).

It is apparent on the face of the Act that the authority to furnish arms is cabined by numerous restrictions in addition to the four mentioned legislative veto provision that evidence congressional concern for the "dangers and burdens of armaments" (§ 2751). These features of current law are a far cry from its predecessor, the Foreign Military Sales Act of 1968, which was far less circumscribed and which from that date through 1974 did not contain a legislative veto. (See § 2751 note) In the latter year, Congress in the Foreign Assistance Act of 1974, 88 Stat. 1795, 1814 amended the Foreign Military Sales Act to add a two-House legislative veto applicable to government sales of defense articles or services for $25 million or more. Congress had twenty calendar days to consider the proposed sale but it allowed the President to waive congressional review by certifying that an emergency existed that had national security implications.

The substance of this provision, popularly termed the Nelson-Bingham amendment, is the predecessor of section 36(b) of the AECA, 22 U.S.C. § 2776(b). Senator Nelson, who had backed a similar proposal on at least two prior occasions, emphasized the significant implications for foreign policy of "huge" arms sales and that the latter were largely transacted "without congressional and public debate, discussions or deliberations." 120 Cong. Rec. 38073 (Dec. 4, 1974). In further amplification of his remarks, the Wisconsin Senator said:

"Clearly we are in need of a review process to keep up with the galloping growth of this program. Congress must have the necessary information on and oversight authority over proposed foreign military sales to exercise its responsibility in this crucial area. Legislation which the Senate has twice perceived a need for is even more crucial today.

"Foreign military sales constitute major foreign policy decisions involving the United States in military activities without sufficient deliberation. This has gotten us into trouble in the past and could easily do so again.

"Despite the serious policy issues raised by this tremendous increase in Government arms sales, these transactions are made with little regard for congressional or public opinion. The Department of Defense is consulted. The manufacturers of weapons and the providers of military services are consulted. The foreign purchasers are involved. But Congress is hardly informed of these transactions, much less consulted as to their propriety. As it stands now, the executive branch of the Government simply presents Congress and the public with the accomplished facts.

"The lack of required reporting to Congress, coupled with the traditional secrecy surrounding international arms transactions, frequently results in Congress learning about arms sales only as

a result of the diligent efforts of the press. Thus, ironically, the American public learned of the 1973 sales to Persian Gulf countries only after the American media picked up an Agence France-Presse report and pressed the State Department spokesman to officially confirm the fact that we had an agreement in principle to sell Phantoms to Saudi Arabia and that we were negotiating a giant deal for arms to Kuwait.

"So, too, the American public learned about negotiations for the sale of jets to Brazil last year from a report originating in Brazil. And this summer the Washington Post correspondent in Quito, Ecuador — not Capitol Hill, Washington — reported U.S. intentions to resume military sales to Ecuador after a 3-year ban. Ecuador, which has been involved in the so-called tuna war with the United States, resulting in seizure of U.S. tuna boats and expulsion of U.S. military mission to Quito, reportedly had a long shopping list including 12 T-33 trainer jets, basic infantry equipment, and large quantities of engineering equipment.

"Congressional reliance on the press for hard data on U.S. Government arms sales abroad, however, is not the most serious deficiency in the decisionmaking system governing such sales. At this time there is no formal procedure by which Congress can participate in determining the merits of these arms deals before they are finalized. Nor is there any way for Congress to exert effective oversight authority and monitor the impact of these deals after they are negotiated." Id. at 38074.

"Mr. President, in closing, let me repeat my firm belief that this Government -- including both Congress and the executive branch — have the responsibility to its own citizens and to the international community to give very careful consideration to weapons sales of such magnitude. This amendment would provide both the essential information and the necessary procedure for congressional review.

"Mr. President, all this amendment does, as I stated previously, is require the President to submit to both Houses of Congress for approval or disapproval under the Reorganization Act, sales of $25 million or more, or cumulative sales in 1 year to one country of $50 million or more. Therefore, Congress will have the opportunity to debate the wisdom of making the sale and its impact on foreign policy. It will have an opportunity to vote approval or disapproval.

"There is one additional provision. That is a provision that, in case of emergency such as the Middle East situation a year ago, the President does not need to submit the sale to Congress for its approval or disapproval, but he must report in writing to Congress why he is waiving the congressional veto requirement. He must delineate and explain the sale and what the emergency is." Id. at 38077.

A similar provision motivated by the same concerns was recommended by the House Foreign Affairs Committee in its version of the 1974 foreign aid bill. The report, in pertinent part, stated that "[t]he purpose of this

provision is to give the Congress more effective control over the amount of defense articles sold for cash each year. ... Present reporting procedures do not provide the Congress with all of the information needed to exercise effective oversight over foreign military cash sales. ... Foreign military sales are an important tool of U.S. foreign policy and in many cases have a direct impact upon our relations with both the purchasing country and on the neighboring countries as well. While enactment of this provision will not automatically trigger congressional action, it will give the Congress the opportunity to study the circumstances surrounding each major sale, and to assess the foreign policy impact of each such transaction." H. Rept. No. 93-1471 at 48-49.

The conference committee on the legislation generally accepted the House version with "an amendment to change the time that Congress had to disapprove the sale from 20 legislative days to 20 calendar days" and it was so enacted into law. H. Rept. 93-1610 at 49.

The issue of arms sales to foreign countries was the focus of extended congressional debate in 1976. Actually a move to bring the foreign military sales program under greater congressional controls began a year earlier, but proposals were still in committee when the 1st session of the 94th Congress was ended. The Ford Administration was opposed to the extension of such controls, controls which many in Congress felt necessary to prevent arms races and economic dislocation brought on by huge expenditures for arms.

In the spring of 1976, Congress passed a measure supplanting the Foreign Military Sales Act that contained numerous provisions which would have enabled it to control sales of major weapons systems and defense equipment by the government and by arms concerns. Although not the only means toward that end, the legislative veto figured prominently in the control framework approved in the measure, S. 2662, which was sent to the President.

On May 7, 1976, President Ford vetoed the bill stating that it "would seriously obstruct the exercise of the President's constitutional responsibilities for the conduct of foreign affairs. In addition to raising fundamental constitutional problems, this bill includes a number of unwise restrictions that would seriously inhibit my ability to implement a coherent and consistent foreign policy." Although the bill had many features which he found objectionable (e.g., arms sale ceiling, human rights standards for aid, a suspension of the trade ban with Vietnam, and an end to military aid and military advisory groups), President Ford dealt at great length with its seven legislative veto provisions; provisions not only "incompatible with the express provisions of the Constitution" that require bicameral action and presidential approval, but that would make Congress "a virtual co-administrator" of foreign policy. 122 Cong. Rec. 13053-13055 (1976).

Neither the House nor the Senate attempted to override the veto but came up with new versions of the legislation. The report of the House Committee on International Relations that accompanied the revised legislation made some concessions but refused to "retreat from [the] basic reform initiatives" of the earlier measure. H.R. 13680; H. Rept. No. 94-1144 at 3. In particular, the committee recommended legislation that "retains two and deletes five" of the previously passed congressional vetoes. Ibid. One of those retained was a revised version of the 1974 Nelson-Bingham amendment to the Foreign Military Sales Act, applicable to government sales.

The Senate counterpart foreign aid bill would have allowed Congress to reject certain proposed export licenses for commercial sales as well as proposed government sales. The latter would have applied to all proposals totaling $25 million or more and all proposals to sell major defense equipment of $7 million or more. S. 3439; S. Rept. No. 94-876 at 4. In its report on the bill, the Senate Foreign Relations Committee expressed a "wish to avoid a prolonged confrontation over constitutional issues and on sharply different views over public policy." Id. at 12. However, the mentioned government and commercial sales vetoes were described as "provid[ing] a more coherent framework for the implementation of arms export policy by the Executive Branch ... [and] provid[ing] the Congress with procedures to review the implementation of the policy." Id. at 13. In summary,

> "Export arms sales are an increasingly important and sensitive aspect of our relations with other nations and of overall U.S. security policy. They cannot be regarded as the inviolate province of either the private sector or the Executive Branch. The time is long overdue for the Congress to devote more attention to arms sales. This bill will enable the Congress to exercise that responsibility in a manner which safeguards the legitimate interests of U.S. industry and coordinate prerogatives of the Executive and Legislative Branches of Government."
> Ibid.

As ironed out in conference and passed into law, the Congress by concurrent resolution could block a proposed government sale of major defense equipment for $7 million or more as well as an offer to sell defense articles or services for $25 million or more. The period for congressional consideration of a disapproval resolution was enlarged from twenty to thirty calendar days. Also, the amount of information that the President had to supply to the Congress in connection with such proposed sales was significantly increased. Although notice of the commercial sale of similar items was required, the legislative veto applicable thereto by virtue of the Senate bill did not appear in the law. These changes were incorporated into sections 36(b) and (c) of the AECA, 22 U.S.C. § 2776(b) and (c), respectively.

Among the legislative vetoes omitted by Congress between the first and second "go rounds" on the AECA in 1976 was one that would have allowed for two-House disapproval of third-country transfers of U.S. origin arms. That provision which is set forth in section 3(d) of the Act, as amended, 22 U.S.C. § 2753(d), was added by section 18 of the International Security Assistance Act of 1977, 91 Stat. 614, 622. Enactment of the provision was urged by the House Committee on International Relations which described it as a means to "strengthen congressional oversight of transfers of U.S. defense equipment and services abroad by requiring a 30-calendar-day period for congressional review and possible disapproval of proposed third-country transfers prior to the granting of Presidential consent." H. Rept. No. 95-274 at 5. At another point in its report, the committee stated that its recommendations were an extension of the 1976 reforms and reflected "increasing concern over the rapid growth of U.S. arms exports around the world." Id. at 8. "Therefore the actions of the committee as reflected in this bill correspond closely to those taken last year, that is --- ... (4) Concern over third-country transfers requires congressional oversight of Executive approval of third-country transfer requests ...." Ibid.

In the International Security and Development Cooperation Act of 1980, 94 Stat. 3131, 3136 Congress enacted yet another legislative veto provision eliminated after President Ford's veto of the 1976 foreign aid bill. This provision, now contained in section 36(c) of the AECA, 22 U.S.C. § 2776(c), permits both Houses of Congress to disapprove a commercial sale of major defense equipment in the amount of $14 million or more and defense articles or services of $50 million or more. As such, this provision complements that in subsection (b) that applies to the sale of similar items by the government. The background of the 1980 extension to commercial sales indicates that it was the quid pro quo for the elimination of the $35 million dollar ceiling on sales of weapons made directly by American arms concerns. Thus, in summarizing the major provisions of the bill, the report of the Senate Committee on Foreign Relations states that the legislation "[r]emoves the $35 million ceiling on commercial arms exports and, makes corresponding changes such as adding a concurrent resolution veto for commercial arms exports," S. 2714; S. Rept. No. 96-732 at 2. In the sectional analysis part of the report, the committee made the following observation regarding the extension of congressional review to commercial sales:

> "Section 105 was introduced by Senator Glenn and modified by Senators Javits and Church.
>
> "Section 105(a) repeals the $35 million ceiling on commercial arms contained in section 38(b)(3) of the AECA.
>
> "Section 105(b)(1) modifies section 36(c) of the AECA to provide for a concurrent resolution veto during the 30-day Congressional review of a proposed license for exports authorized under section 38 of the AECA. This provision makes

Congressional review of commercial sales comparable to its review of government-to-government sales. Congressional review during this 30-day period may be waived if the President states that an emergency exists which requires such export in the national security interests of the United States. ..."
Id. at 23.

Interestingly, at the same time that Congress was subjecting large commercial sales to the legislative veto, it amended section 3(d) of the AECA, 22 U.S.C. § 2753(d), to extend its veto provision to retransfers of commercial exports as well as government sales. 94 Stat. 3131. In other words, "Congress will be able to veto the President's consent to any ... retransfer" of U.S. supplied arms to third countries whether the original transaction was a government sale or commercial export. S. Rept. No. 96-732 at 24.

The AECA's fourth veto provision, which applies to leases or loans of major defense equipment valued at $14 million or more and defense articles valued at $50 million or more, was enacted as part of the International Security and Development Cooperation Act of 1981. 95 Stat. 1519, 1524-1526. This provision, designated section 63 of the AECA, 22 U.S.C. § 2796b, was recommended to the Senate and House by their respective Foreign Relations and Foreign Affair Committees. The former generally described the proposed new sections of the Act as "[p]rovid[ing] increased congressional control and new regulations for defense articles leasing authority." S. Rept. No. 97-83 at 2. Elsewhere, the committee gave the following account of the background and effect of the proposed new leasing regulations:

"Earlier this year the Committee received a report by the General Accounting Office on the use of section 2667 of title

10, United States Code. The GAO found that although section 2667 of title 10 was intended to provide authority for the leasing of defense property to domestic corporations and state and local governments, it has been used increasingly and inappropriately to provide military assistance to foreign countries. The GAO concluded that the practice of leasing equipment on a rent-free or nominal rent basis was tantamount to grant military assistance and as such was circumvention of the Arms Export Control Act and the Foreign Assistance Act. It also discovered the absence of control over property leased to foreign governments.

"Section 110, introduced by Senator Zorinsky, creates a new Chapter 6 in the Arms Export Control Act. It establishes authority in the Arms Export Control Act for the lease of defense articles to foreign countries and international organizations and brings all such leases under the various provisions of the Arms Export Control Act and the Foreign Assistance Act.

"It requires that the rent charged on leases to foreign governments and international organizations cover the full cost incurred by the United States in leasing the articles, which would establish rent at a rate no less than the annual amortization of the replacement value of the property computed over the useful life of the property. The requirement would not apply to leases entered into for purposes of research and development, military exercises, communications or electronics interface projects and leases of defense articles past three-quarters of their normal service lives.

"Section 110 also requires prior notification to the Congress of all leases to foreign countries and international organizations entered into for a period of one year or longer and provides for a concurrent resolution of disapproval of leases exceeding the thresholds recommends (sic) by the Administration of $14 million for major defense articles and $50 for all defense articles. It is the intent of the Committee that the Executive Branch not enter into leases of defense property for less than one-year periods specifically to avoid reporting under the requirements of the amendment. It is also the intent of the Committee that the Executive Branch consult with the Congress prior to entering into any lease which could be considered controversial or which could be considered politically or militarily significant in terms of its impact on a nation or a region of the world.

"The Committee understands that the Defense Security Assistance Agency has recently issued new guidance in the Military Assistance and Sales Manual for the valuation of leased property and expects that this guidance will enable the Administration to establish a realistic value for property leased to foreign countries and international organizations.

"The Committee further expects that the President shall establish management control and accountability procedures over leased property. These procedures shall require the monitoring of lessee compliance with the terms in lease agreements as well as the assurance that all lease payments are made when due." Id. at 30-31. See, also, H. Rept. No. 97-58 at 2325.

The 1981 Act also raised the threshold amounts to which earlier congressional review procedures applied to $14 million or more of major defense equipment (up from $7 million) and $50 million or more of defense articles and services (up from $25 million). 95 Stat. 1519.

Summary

As indicated at the outset of consideration of the severability issue in the context of the AECA, and as seemingly borne out by the foregoing, relevant highlights from the Act's legislative history, evidence abounds that insofar as sales, transfers and leases or loans of major defense equipment and significant amounts of defense articles are concerned, the authority delegated to engage in these transactions was largely dependent upon Congress' ability to cancel them. In brief, the case for nonseverability, that is, judicial invalidation of the veto carries with it the authority to engage in the sale, transfer and lease or loan of major articles of military hardware, appears to be a strong one. Initially in 1968 and for six years thereafter under the Foreign Military Sales Act, that authority was largely unrestricted. Beginning in 1974, Congress began taking a long and hard look at the impact of huge arms sales on foreign policy and its own inability to leave an imprint on that policy. In that year Congress added a veto provision to the earlier law applicable to certain government sales of arms.

In 1976, past congressional concern with the apparent global proliferation of arms races and the U.S. role as the world's major supplier of military hardware, took a quantum leap. Although efforts in 1976 to remedy the problem in one fell swoop were stymied by a presidential veto, Congress since that time has not only substantially revised the basic authority but has realized its once thwarted goals in piecemeal but unrelenting fashion. On the eve of the Chadha decision, Congress had garnered all it had originally sought and then some by way of legislative controls on significant arms transactions.

The drive to exercise its policy origination function in this crucial area was powered by three factors: congressional concern for the impact of U.S. arms sales on peace and economic stability in foreign countries, doubts about Executive Branch policies in discharging congressional delegated arms sales authority, and an unmistakable desire to obtain information indispensable to the effective conduct of oversight and the adoption of relevant, remedial legislation. The legislative veto was seized as providing the chief if not the only fool proof mechanism to discharge its responsibilities. Although it did not directly "provide[] the answer to the question of severability in" the relevant sections of the AECA, both the product of its actions and the manner in which it acted, suggest an answer, namely, that if forced to choose between delegating authority or legislative veto, it would have decided for neither. The absence in the AECA of a severability clause, whereby "Congress itself [could have] provided the answer to the question of severability", may just reflect such a decision.

While this record is instinct with results imperfectly expressed, there are a number of countervailing considerations. Notwithstanding congressional apprehension with arms races and U.S. contributions thereto, the lawmakers have always recognized the need to keep friendly countries sufficiently supplied with arms to defend themselves and to maintain internal stability so that they could develop viable democratic institutions and strong economies. Thus, AECA policy declarations in-

weigh against "the scourge of war and the dangers and burdens of armaments" but "recognize[], however, that the United States and other free and independent countries continue to have valid requirements for effective and mutually beneficial defense relationships in order to maintain and foster the environment of international peace and security essential to social, economic, and political progress." (§ 2751). Accordingly, the AECA "authorizes sales ... to friendly countries ... to maintain and equip their own military forces at adequate strength, or to assume progressively larger shares of the costs thereof, ... in furtherance of the security objectives of the United States ...." Ibid. Or, as expressed in more recent times by the Senate Foreign Relations Committee: "Security assistance provides friendly foreign countries with the means to defend themselves and hopefully reduces the temptation for neighbors or outside powers to threaten those countries." S. Rept. 97-83 at 9.

Also, while Congress in recent years has for various reasons extended its control over arms sales, it is not without some instructive value that in earlier years it delegated the authority to engage such sales without such controls. Briefly, the enactment of controls in this area fits the overall pattern of imposing similar controls in all areas of statutorily delegated authority. Moreover, in recent years Congress has frequently reviewed arms sales authority and left it otherwise untouched notwithstanding increasing doubts concerning the constitutionality of veto provisions within and without the legislative arena.

Similarly, notwithstanding the extension of the veto in the last half dozen years to first one and then another kind of arms transaction, Congress in the four AECA vetoes has authorized the President to waive review procedures and, thus, effectively circumvent the veto. The maintenance of the waiver by Congress in the face of disagreements with the Executive Branch over particularly sensitive sales may indicate that in the crunch Congress regards the authority to strengthen friendly countries to be the overriding consideration.

The AECA imposes numerous restrictions on the availability, use, and disposition of arms acquired from U.S. sources of supply. These restrictions obviously apply and can only apply to U.S. origin items. However, the U.S. is not the sole source supplier of even major defense equipment much less run of the mill defense articles and services. Accordingly, if the authority to deal in arms falls with the veto, purchasers may be able to obtain the equivalent materials from non U.S. sources unencumbered by restrictions regarding use and retransfer. This fact, while arguably outside the immediate legislative history of the sections of the AECA under consideration, could have been determinative had Congress considered the matter in this light. The Court in United States v. Jackson, 390 U.S. 570 (1968), faced with the question of whether an invalid death penalty provision was severable from the federal Kidnapping Act, noted the continued basic operability of the Act without the stricken provision and the fact that kidnapping would have been made a federal crime, given the political circumstances at the time, even without the death penalty. In such circumstances, the Court stated that it "is quite inconceivable that the Congress which decided to authorize capital punishment in aggravated kidnapping cases would have chosen to discard the entire statute if informed that it could

not include the death penalty clause now before us." 390 U.S. at 586. In like manner, one may ask whether Congress would have refused to delegate authority to the President to furnish arms abroad without the veto if potential purchasers could obtain these items from sources which do not restrict their use and disposal.

Finally, it should be noted that the four provisions in the AECA under consideration are "'fully operative' and [constitute a] workable administrative machinery without the veto provision[s]." INS v. Chadha, at 13. Formulating the narrowest rule of constitutionality, as the courts are doctrinally inclined to do, the veto could be severed without impairing requirements concerning the notice of impending sale, transfer and lease or loan and the thirty calendar day layover period before it becomes effective. During that period, Congress by appropriate legislative action could prevent the export.

Insofar as resolution of the severability issue in the context of the AECA is concerned, persuasive arguments for and against are not lacking. The absence of a severability clause and legislative history seem to incline in one direction; the existence of presidential waiver authority and practical considerations seem to cut in the other direction. As clearly evidenced by the differing views taken in the matter in Chadha, the determination is essentially a judgment call based on emphasis and nuance.

Epilogue

Although it is difficult to conceive of a litigation scenario whereby this important issue might be judicially resolved, particularly if Chadha and progeny make an exercise of the veto unlikely, such resolution from the congressional perspective is tantamount to a roll of the dice. Congress can considerably enhance its chances and, indeed, achieve a foreordained result by the adoption of an appropriate law. For example, Congress can provide for approval or disapproval of particular arms transactions by joint resolution. The latter follows all the formalities of law. A joint resolution of approval increases the congressional workload but avoids the need to muster two-thirds to override a presidential veto. Conversely, a joint resolution of disapproval reduces the workload by reducing the frequency of need for lawmaking; it, however, affords greater opportunity for the exercise of the Executive's veto. These matters aside, the constitutionality of either approach seems clear.

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