
LEGISLATIVE VETO: ARMS EXPORT CONTROL ACT

[Editor's Note: Following are some excerpts from: US Congress, Senate, Committee on Foreign Relations, Legislative Veto: Arms Export Control Act, Hearings on S. 1050, a bill to amend the Arms Export Control Act to provide increased control by the Congress over the making of arms sales, 98th Congress, 1st Session (Washington, D.C.: Government Printing Office, 1983). The reprints below are primarily from prepared statements. Readers may want to obtain the full committee print for an even more thorough discussion of the subject; a copy of S. 1050 is included. For an introduction to this issue, see 2LT William S. McCallister's "The 'Legislative Veto' Supreme Court Decision," DISAM Journal, Vol. 5, No. 4 (Summer 1983), pp. 32-33. Concerning the related issues regarding arms transfer restraint and other policy concerns, see the reprint of Congressman Tony P. Hall's comments, followed by testimony of Anne H. Cahn, and Editor's Note in the Fall 1983 issue of the DISAM Journal, Vol. 6, No. 1, pp. 48-55.]

PREPARED STATEMENT OF HONORABLE 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 State 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 Chadha 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 [Control Act] 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 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.

PREPARED STATEMENT OF HONORABLE 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

[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).

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 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, has also been able to produce coherent and effective national policy. This success is a tribute to the Founding Fathers who built the structure; it is also a tribute to the generations of leaders and statesmen since then who have put the nation's well-being first and foremost as they played their constitutional roles in the various branches of government. As Justice White acknowledged in his dissent in Chadha, "the history of the separation of powers doctrine is also a history of accommodation and practicality."

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

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

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

THE LEGISLATIVE VETO

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

early 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 to 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.

Under the Arms Export Control Act, for example, we have regularly and formally notified the Congress of proposed sales under the Foreign Military Sales 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 pre-notifications 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 commitment.

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 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 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.

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

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

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

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

Thank you.