

WHO NEEDS THE LEGISLATIVE VETO?

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I. INTRODUCTION

I have been asked to appraise the likely impact of the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*¹ on the way our government works. As a member of the United States Senate—and especially as a member of the Senate Foreign Relations Committee—I am greatly concerned with what I take to be the most fundamental question regarding the *Chadha* decision: Does it leave the federal government more or less able to meet its responsibilities?

On the one hand, I believe our government can and will function, for the most part, more effectively in the absence of the legislative veto. Especially with regard to the regulatory agencies, the legislative veto has too often tempted Congress to delegate to administrative agencies the hard legislative work of writing law, too often resulted in the intrusion of Congress upon the proper ground of the Executive, and much too often thrust Congress into the role of a court of appeals for the regulatory agencies, where legions of lobbyists descend to plead their narrow, special interests and disrupt the proper work of Congress.

On the other hand, I believe that the loss of the veto will make it difficult for Congress to meet its responsibilities in a limited number of policy areas. My primary concern is foreign policy—especially war powers and arms-export control—where *Chadha* strikes at the foundations of carefully structured systems for sharing power between the executive and legislative branches.

To discuss the impact of *Chadha* on the way the government functions I do not think I need delve very far beneath the surface of the *Chadha* decision. Other participants in this symposium have done that, and have done so far more expertly than I could.

For members of Congress, the fundamental message of

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1. 103 S. Ct. 2764 (1983).

Chadha is clear: Every act of legislative power that does not adhere to what the Court called the "finely wrought and exhaustively considered procedure"² of bicameral consideration and presentment to the President is unconstitutional. Indeed, in light of the Court's summary decisions regarding the natural-gas pricing rule promulgated by the Federal Energy Regulatory Commission³ and the "used-car rule" issued by the Federal Trade Commission (FTC),⁴ there can be little doubt that all legislative vetoes are unconstitutional.

Accordingly, the appropriate congressional response to *Chadha* is not to challenge the Supreme Court's legal reasoning, nor to doubt its wisdom. Whether or not we personally agree with the decision, it now governs our actions. Instead, we must take *Chadha* as our starting point, seek to understand the purpose of each legislative veto Congress has enacted, and then, in each individual case, find alternate means of fulfilling that purpose.

II. THE CONGRESSIONAL RESPONSE

The immediate reaction to *Chadha* in Washington was near panic. One wire service reported the decision as a "shattering blow to legislative power."⁵ Scholars, editorial writers, lawyers, and many of my colleagues in Congress denounced the Court's uncompromisingly rigid interpretation of the Constitution, a decision which, in the words of Justice White's dissenting opinion, "strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history."⁶

Fortunately, most members of Congress responded more calmly, and quickly got down to the business of determining what had to be done. The Senate Judiciary Committee, of which I am the Ranking Minority Member, held hearings as did the Foreign Relations Committee of which I am a member. Other hearings were held by the Senate Finance Committee and by the House Judiciary and Foreign Affairs Committees.

2. *Id.* at 2784.

3. *See Process Gas Consumer Group v. Consumer Energy Council*, 103 S. Ct. 3556 (1983).

4. *See United States Senate v. FTC*, 103 S. Ct. 3556 (1983).

5. *See Sundquist, Without the Legislative Veto: More Confrontation, Stalemate and Deadlock*, *The Washington Post*, June 26, 1983, at D8, col. 4.

6. 103 S. Ct. at 2810-11 (White, J., dissenting).

Within five weeks, nine days of hearings had been held, with testimony from more than forty witnesses. Numerous items of legislation were introduced, each intended to solve all or part of the problem created by the Supreme Court, with proposals ranging from constitutional amendments to study commissions. The Democratic Party in the Senate responded almost instantaneously, forming a task force, of which I am a member, to study the problem. In addition, the Congressional Research Service, the General Counsel of the House, and Senate Legal Counsel issued voluminous analyses of the ramifications of *Chadha*. In short, there was never any danger that the problem would suffer from inattention.

III. A BLOW TO LEGISLATIVE POWER?

The testimony at these hearings convinced me that there would be no radical shift in the balance of legislative and executive power. The Presidency would not necessarily become more imperial, nor would Congress find it necessary to throw legislative barricades up around Capitol Hill, specifically by withdrawing all powers previously delegated to the Executive and the regulatory agencies.

At least with regard to domestic issues, and especially concerning agency rulemaking—which has been the major target of the veto—the legislative veto is not primarily a balance-of-power issue. The contest for power that is affected is between the legislature and the regulatory agencies. Those agencies do not necessarily share in the power of the executive branch, nor do they necessarily share their powers with the Executive. Enhancing agency power does not necessarily mean augmenting the power of the President. Indeed, it often means just the opposite.

Those who were asking which branch had won, or would win, after the *Chadha* decision were not asking the important question. The real danger is that Congress and the executive branch will believe what they read in the press and turn the current mood of accommodation on the *Chadha* decision into confrontation.

As political scientist James Sundquist has stated, "[t]he fundamental problem in trying to make the government of the United States work effectively, is not to preserve the separation of powers but to overcome it."⁷ The legislative veto is a mechanism that has

7. Sundquist, *supra* note 5, at D8.

been used for precisely that purpose for more than fifty years.

But Sundquist goes too far, in my judgment, when he argues that the two branches are now condemned "to the confrontation, stalemate and deadlock that so frequently leave the government of the United States impotent to cope with complex problems."⁸ Congress has lost one of the *means* it had developed for "fine-tuning" its power, but its basic constitutional power remains intact.

Congress, I believe, has both the means and the will to restore the equilibrium that prevailed on domestic issues between the executive and legislative branches prior to *Chadha*.

IV. ALTERNATE MEANS OF FULFILLING THE PURPOSE OF THE VETO IN THE DOMESTIC ARENA

Chadha is, after all, much more of an inconvenience than a disaster. Congress still has ample means for controlling the agencies. And Congress is proceeding, realistically in my opinion, on the assumption that a separate accommodation will have to be fashioned for each occasion where the veto has been applied. That is the central conclusion of the Senate Democratic task force on which I served, and that makes sense to me. Legislative vetoes were of many types—by both houses, by one house, or by committee—so the alternatives should likewise be flexible. A "global solution," a single solution that would apply to every legislative veto, would be as undesirable as it is unlikely.

There have been, however, some suggestions that I do not support. I do not approve of the constitutional amendment, introduced by Senator DeConcini in the Senate⁹ and by Representative Jacobs in the House,¹⁰ to restore the legislative veto over agency actions. I oppose that amendment for two reasons. First, I have become convinced that using the legislative veto to overrule agency actions creates more problems for Congress than it solves. Second, this amendment would restore the veto only in areas where I think we are better off without it, and not where we need it, or something like it, as with the War Powers Resolution.¹¹

I also strongly oppose the creation of a new type of executive

8. *Id.*

9. See S.J. Res. 135, 98th Cong., 1st Sess. (1983).

10. See H.R.J. Res. 313, 98th Cong., 1st Sess. (1983).

11. 50 U.S.C. §§ 1541-1548 (1976 & Supp. V 1981).

calendar in both houses, providing for time to review all agency actions and giving those matters privileged time. I do not believe Congress has the time or the expertise to review every agency action.

For the same reason, I oppose the concept of a joint resolution of approval, which would require Congress to pass affirmatively on each new agency rule or regulation. I see no reason to resort to such measures when Congress can still exercise its traditional methods of careful legislative drafting and effective oversight to make its intent known and force the agencies to act accordingly.

Congress has become extraordinarily vague in its instructions to the agencies, giving them *carte blanche* to do as they please, until, of course, the Washington lobbyists begin clamoring in the corridors and reception rooms of the Capitol. This problem is illustrated by legislative instructions to several agencies. The Consumer Product Safety Commission is instructed "to protect the public against unreasonable risks."¹² The Federal Trade Commission is charged with protecting the public from "unfair and deceptive acts and practices in . . . commerce."¹³ Finally, the Interstate Commerce Commission is to control various industries on behalf of the "public convenience, interest and necessity."¹⁴

The definition of these terms, and the regulations that flow from them with the force of law, are left to the agencies to determine. Then, when special interests become dissatisfied with the results, Congress is swamped with special pleadings pouring in from all directions. That is what the legislative veto has done for us, and I am convinced that we have better ways of spending our time.

Congress is entirely capable of putting its intent into words. And where that intent is unclear, Congress can clarify it with the agencies in oversight hearings. After all, Congress controls their purse strings—indeed, mandates their very existence—so I think it is reasonable to assume that they will listen closely. It is my experience that they do listen. And if an agency still refuses to listen, Congress can enact legislation to overrule or control agency action or to cut off funds. For example, in the mid-1970's Congress was unhappy because the Department of Health, Education and Wel-

12. 15 U.S.C. § 2051(b)(1) (1982).

13. 15 U.S.C. § 45(a)(1) (1982).

14. 49 U.S.C. § 1 (1976 & Supp. V 1981).

fare (HEW) was ordering busing on its own, without the authority of the courts or Congress. So I ushered an amendment through Congress that put an end to administrative busing orders.¹⁵

I have no doubt that by enacting clearer statutory standards, engaging in active oversight, passing legislation to overcome agency action that is objectionable, and limiting agency funds where necessary, Congress can make the agencies accountable in ways that retain and improve upon the powers of the legislative veto, without incurring its very real disadvantages. One of those disadvantages is that the legislative veto provides only for a negative vote, limiting Congress, therefore, to only a negative role. Applying the methods I have outlined above, however, will make the role of Congress far more positive and productive.

There are two other proposals that will assist Congress in its effort to assure that its intent is carried out. The first is the so-called Bumpers Amendment.¹⁶ This amendment would modify the judicial review provisions of the Administrative Procedure Act to give courts more authority to overturn erroneous agency action. The central provisions of the amendment would require courts to make sure that agencies do not exceed the jurisdiction or authority conferred upon them by statute, and to set aside agency action that is "without substantial support in the rulemaking file."¹⁷ This amendment will be especially effective if used in concert with clearer statutory delegations to the agencies. The Bumpers Amendment is included in a major regulatory reform bill pending in the Senate.¹⁸

A second proposal is one I have worked on throughout my years in the Senate—sunset legislation.¹⁹ The effect of sunset legislation is to set, for each agency of the federal government, a date certain at which its programs will be terminated unless they are affirmatively revived by Congress. The purpose is to force the

15. See Pub. L. No. 95-205, 91 Stat. 1460 (1977).

16. Bumpers Amendment to S. 1080, 98th Cong., 1st Sess., 129 CONG. REC. S17080 (daily ed. April 19, 1983).

17. *Id.*

18. See S. 1080, 98th Cong., 1st Sess., 129 CONG. REC. S17080 (daily ed. April 19, 1983).

19. I introduced the Senate's first free-standing sunset bill in 1975. See S. 2067, 94th Cong., 1st Sess. (1975). I introduced the bill again in the next Congress, see S. 1244, 95th Cong., 1st Sess. (1977), and in 1978 a sunset measure was approved by the full Senate on a vote of 87-1. See 124 CONG. REC. 35531, (1978) (approving S. 2, 95th Cong., 1st Sess. (1977)). Unfortunately, a similar bill never got through the House.

agencies, at regular intervals, to justify their missions and functions before Congress. That puts the responsibility on the agencies, where it belongs, and it would have a tonic effect in keeping agency actions in accord with congressional intent. I believe that the American Bar Association was correct in telling the Senate Judiciary Committee that sunset legislation "is an idea whose time has come, gone and [in light of the *Chadha* decision] returned."²⁰

V. ABUSE OF THE LEGISLATIVE VETO

Clearly, in my judgment, the loss of the legislative veto has not deprived Congress of any of its real powers for dealing with the regulatory agencies. Over its fifty-one year history the legislative veto became a classic example of a good idea that was overextended to the breaking point. It was first applied in 1932 to reorganizations of the executive branch. Congress, very sensibly in my judgment, felt that the primary responsibility for reorganizations should rest with the Executive.

Through 1975 Congress had enacted approximately 150 veto provisions—but then the dam broke. In the 95th Congress thirty-eight veto provisions were enacted, in the 96th Congress another fifty-eight were added, and in the 97th still another sixty-four were enacted. More and more often Congress used the veto to evade legislative labors and responsibilities, and more and more often the result was to tempt growing hordes of lobbyists onto Capitol Hill.

In my eleven years in the Senate there has been a dramatic change in the way in which that body is lobbied. Single-interest groups have multiplied, representing business, trade associations, unions, political action committees, and others. All of them claim to speak in the name of the American people, but very often I have found them speaking only to the narrowest of goals, goals that are not infrequently contrary to the public interest. The impact of this intense, large-scale, and narrow-gauged lobbying has been dramatic and unfortunate. It has seriously eroded the once well-deserved reputation of the United States Senate as the greatest deliberative body in the world. Instead of addressing the great issues

20. *Effects of the Supreme Court's Decision in Immigration and Naturalization Service v. Chadha on Legislative Veto: Hearings Before The Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess.* 161 (July 20, 1983) (statement of the American Bar Assoc.) [hereinafter cited as *Hearings on Effects of Chadha*].

of the day, setting national priorities, and formulating national policies, we have found ourselves more and more often haggling with the lobbyists over their real or imagined grievances with the regulatory agencies.

The extended 1982 Senate debate over the FTC "used-car rule" is a case in point. The FTC had proposed a rule to protect consumers from unfair warranty practices by used-car dealers.²¹ The immediate result was an awesome lobbying performance by the used-car dealers, and the veto of the rule by an overwhelmed Senate.²²

I voted against that veto, partly because I felt that there had been enough abuses in the industry to justify the FTC rule, but also because I felt that the proper role of the Senate was being abused as an alternative to the courts and the FTC public-comment procedures.

One of my Republican colleagues, Senate Commerce Committee Chairman Robert Packwood of Oregon, stated the problem very well, in explaining why he had voted in favor of the used car regulation: "I had previously been a supporter of [the] legislative veto, but I changed my mind after the used-car fight because I realized what disparity there is between a group that feels they are adversely affected by an administrative decision versus the general public."²³

I wish Senator Packwood had been listening when I and a handful of other Senators made that exact argument two years earlier. As a powerful force on the Commerce Committee he might have been able to block adoption of the FTC veto provision.

It is worth noting that while the Senate was spending three full legislative days in May of 1982 coping with lobbyists and second-guessing the FTC—while the nation was plunging into the worst recession in forty years—the Budget Resolution was awaiting action on the Senate floor. To my mind that represents a seriously misplaced Senate priority.

The legislative veto also represents a serious misuse of Senate resources and staffing. From 1980 through 1982 the agencies promulgated an average of approximately 7000 regulations each

21. See 48 Fed. Reg. 36,096 (1983) (to be codified at 16 C.F.R. § 455).

22. See 128 CONG. REC. S5401 (daily ed. May 18, 1982).

23. Packwood, Cong. Q. W. Rep. June 25, 1983 p.1264.

year, hundreds of them highly technical in nature. The agencies are staffed and equipped to assess such technical regulations. Congress is not, and I do not believe it should be. A Senate office already resembles a mini-corporation or a medium-sized law firm. Supporters of the legislative veto argue that we need the veto to ensure agency accountability. But the staffing requirements that would be necessary to review the number of regulations that many of my colleagues want reviewed would push Senate staffs beyond the bounds of manageability.

The *Chadha* decision, then, has done Congress a service. By doing away with the legislative veto, the Court may have helped clear the lobbyists off Capitol Hill, and has stemmed the movement toward full-blown congressional review of agency regulations. Congress can now concentrate on its most important role—shaping national policy on issues that affect the public as a whole. It is almost possible to say that the Supreme Court has saved Congress from itself.

VI. *Chadha's* FOREIGN POLICY IMPACT

Chadha seems to me, in fact, to be a blessing in disguise, in every respect save one. *Chadha* leaves us, I believe, dangerously uncertain about the role of Congress, and especially the Senate, in formulating and implementing foreign policy. Therefore, I confess, the Court has raised for me and for many of my colleagues some very real concerns.

In a few instances affecting foreign policy—principally the Arms Export Control Act²⁴ and the War Powers Resolution²⁵—the legislative veto was part of a historic compromise between Congress and the Executive over making foreign policy and making war. This is an area in which the Constitution itself deliberately divides the responsibility between the two branches, and it is here that I believe *Chadha* creates genuine cause for alarm.

It is alarming not so much because *Chadha* constitutes a jolt to the power of Congress, although that is more the case here than it is regarding agency rulemaking, but because of the dangers inherent to the field of foreign relations. The conduct of foreign policy requires consistency, coherence, and certainty. It requires a

24. 22 U.S.C. § 2776(b) (1982).

25. 50 U.S.C. §§ 1541-1548 (1976 & Supp. V 1981).

clear division of responsibility so that in times of crisis our leadership is not incapacitated by internal disputes. Invalidating the legislative vetoes in the War Powers Resolution and the Arms Export Control Act has resulted in a potentially dangerous destabilization of established power-sharing systems and could lead to the kind of uncertainty that we must avoid at all costs in foreign policy.

The Reagan Administration has taken a very conciliatory tone in discussing the implications of *Chadha*, not wanting to give Congress further cause for alarm. For example, Deputy Secretary of State Kenneth Dam told the Senate Committee on Foreign Relations that the *Chadha* decision presents an opportunity "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."²⁶

Mr. Dam's words do not put me entirely at ease. In situations involving the sale of arms to foreign nations and sending troops overseas, the division of power between the President and Congress is not clear. My fear is that disputes over the sharing of power could turn into crises in our foreign policy.

A. *The Arms Export Control Act*

Prior to the mid-1970's, the executive branch had broad authority to sell arms to foreign nations under the Foreign Assistance Act of 1961.²⁷ The Foreign Military Sales Act of 1968²⁸ placed additional, limited restrictions on arms sales, but did not seriously inhibit the Executive's authority to enter into such sales. In fact, between 1969 and 1974 foreign military sales rose from 1.5 to 5.9 billion dollars, and concern in Congress rose proportionately. Some members of Congress questioned whether we had the constitutional authority to act.

The Senate Foreign Relations Committee held Congress as well as the President responsible for the troubling ambiguity surrounding arms sales:

26. *Arms Export Control Act Amendments: Hearings on S. 1050 Before the Senate Comm. on Foreign Relations*, 98th Cong., 1st Sess. 22 (1983) [hereinafter cited as *Hearings on Arms Export Control Amendments*].

27. Pub. L. No. 87-329, 75 Stat. 719 (1968) (codified as amended in scattered sections of 22 U.S.C. §§ 2151-2443 (1982)).

28. Pub. L. No. 90-629, 82 Stat. 1320 (1970) (codified as amended in scattered sections of 22 U.S.C.).

This program was not the product of a careful and deliberate policy arrived at through joint action by Congress and the Executive Branch; it developed through its own momentum . . . Congress bears a measure of the responsibility as well, because of its failure to give more effective policy guidance and to exercise proper oversight on arms sales matters.²⁹

When arms sales almost doubled in 1975, jumping to 9.5 billion dollars, Congress became fully aware of how significant these sales had become as an instrument of foreign policy, and how dangerous to our interests they could be if they were not handled wisely. Therefore, in 1976 Congress passed the Arms Export Control Act, which included a two-house legislative veto.³⁰ But that veto is now almost certainly unconstitutional under *Chadha*.

The Supreme Court's decision has shattered a careful and workable accommodation between Congress and the Executive, a development that, in my opinion, threatens our ability to fashion a foreign policy that is consistent, coherent, and safe. In spite of Deputy Secretary Dam's reassuring testimony, the differences of opinion on the issue of severability demonstrate how dangerously confused we are on this issue.

Mr. Dam, for example, tells us that the State Department believes that the veto provision in the Arms Export Control Act is severable from the remainder of the statute, thereby leaving intact the delegation of power to the President, but eliminating the veto that Congress included to restrain that power. The Senate Legal Counsel's office concurs with the State Department, arguing that the Act's requirement that the President report proposed arms sales in advance "provides the Congress with an opportunity to act legislatively in response to those arms sales which it opposes," and that since this system is "workable" it does not fall with the veto provision.³¹

On the other hand, Senator Sarbanes argued at the Foreign Relations Committee hearing that Congress would not have given the President authority to make arms sales if it could not have reserved to itself the power to reverse those sales. The Congressional Research Service agrees with Senator Sarbanes, finding that

29. S. REP. NO. 605, 94th Cong., 2d Sess. 5 (1976).

30. International Security Assistance & Arms Export Act of 1976, Pub. L. No. 94-329, § 211(a), 90 Stat. 729, 746 (codified as amended at 22 U.S.C. § 2776(b)(1) (1976)).

31. *Hearings on Effects of Chadha*, *supra* note 20, at 60.

"the legislative history is replete with actions and statements that favor the conclusion that [arms sales] would not have been authorized but for the accompanying Congressional check in the form of a concurrent resolution of disapproval."³²

It is unfortunate that we are forced by *Chadha* to talk in such extremes. Certainly Congress did not intend to give the President unrestricted authority, as demonstrated by the fact that it went to the trouble of passing the Act in 1976. On the other hand, Congress certainly does not want the authority for the President to make arms sales to fall with the veto provision. Congress has made very plain that it wants the President to make the initial decisions regarding arms sales subject only to congressional rejection.

This is not as contradictory as it may sound. Foreign policy initiatives must remain with the President; the 535 members of Congress obviously cannot negotiate the details of arms-sales agreements. But we must find the means for Congress to play its proper role of oversight of such agreements. Congress has demonstrated, even before the veto was overruled, that it will not exercise its power frivolously. Congress has never vetoed an arms sale, but that does not mean that Congress has not exercised influence over such sales.

The Administration knew that Congress *could* veto a sale, and that encouraged the Administration to work with Congress, giving early notification of proposed arms sales and taking the opinions of Congress into account. In 1976, for example, concurrent resolutions were introduced to block the sale of Hawk and Vulcan air-defense systems to Jordan. Although the sale went through, the possibility of a veto appeared to influence the Administration's decision to secure a commitment from Jordan that the Hawk missile system would be permanently installed at fixed sites as defensive weapons. Resolutions introduced in 1977 may have influenced the Administration's obtaining assurances from Iran on safeguarding the AWACS system. And in 1978 the Administration made concessions to congressional concerns regarding a package of aircraft sales to Egypt, Israel, and Saudi Arabia.

The danger is that the present Administration, or some future Administration, will not respond to congressional concerns, leading

32. *Hearings on Arms Export Control Amendments*, *supra* note 26, at 48 (statement of J. Celeda, Senior Specialist in American Public Law, American Law Div.).

to confrontation between the branches. By risking heightened confrontation in arms sales, we risk having a foreign policy apparatus that does not speak with one voice, we risk alienating those to whom we sell arms, we risk our credibility, and we risk being unable to act decisively in times of crisis.

Therefore, we must re-establish a workable system of congressional oversight over arms sales, and I believe solutions are in sight. One such solution is a bill that Senators Byrd, Pell, Sarbanes, and I introduced prior to the *Chadha* decision.³³ That bill was intended to augment the then-existing legislative veto in the Arms Export Control Act by requiring that all arms sales in excess of 200 million dollars be approved by joint resolution.³⁴

In order to fill the gap created by the loss of the legislative veto, we are presently amending our bill to lower the threshold amount. We do not want to subject all arms sales to this requirement. Our desire is to divide arms sales into "major" and "minor" sales, or into "controversial" and "non-controversial" sales, and require enactment of a joint resolution of approval for the "major" or "controversial" ones and a joint resolution of disapproval for the "minor" or "non-controversial" ones. Since a joint resolution must be presented to the President for his signature, there is no *Chadha* problem.

Under a joint resolution of approval, of course, a sale cannot go through until it is approved by both houses and signed by the President. That can take up a lot of Senate and House time, but it is the only way for Congress to retain the same degree of control we had over arms sales before *Chadha*. For under a joint resolution of *disapproval*, Congress can get its way only if it has enough votes to override a Presidential veto. So instead of needing fifty-one Senators' votes to defeat an arms sale we would need sixty-seven, plus two-thirds of the House of Representatives. Given how difficult it is to get even fifty-one votes, as the sale of AWACS planes to Saudi Arabia demonstrated, it would be almost out of the realm of the possible to get the necessary two-thirds vote of both houses.

To get the President to take the threat of a veto seriously we have no choice but to adopt the joint resolution of approval on controversial sales. The difficulty is in defining "controversial," but

33. See S. 1050, 98th Cong., 1st Sess., 129 Cong. Rec. S4608 (daily ed. April 14, 1983).

34. See *id.* § 5, 129 Cong. Rec. at S4608.

I am confident that we will be able to settle on a dollar figure, combined with limitations regarding the nations involved, to arrive at that definition.

The confusion and disagreement generated by *Chadha* are substantial, and restoring a voice for Congress in arms sales will be difficult, but with a sufficiently determined Congress it can be managed. With regard to the War Powers Resolution, however, the problem is more difficult, more unmanageable, and potentially more dangerous.

B. The War Powers Resolution

Finally, I would like to discuss what is the most perplexing problem created by the *Chadha* decision—the demise of the legislative veto contained in the War Powers Resolution.³⁵ The War Powers Resolution was passed over President Nixon's veto in 1973 in response to the continuation of the Vietnam War without a declaration of war or the support of the American people. The Resolution contains four requirements or constraints on the President when he introduces American troops into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.

First, the President is required to consult with Congress "in every possible instance" before introducing troops.³⁶ Second, he is required to make a formal report to Congress in any case where troops are introduced.³⁷ Third, the President is required to withdraw the troops after sixty days unless Congress has affirmatively authorized their continued presence (plus thirty days if necessary for purposes of withdrawal).³⁸ The fourth requirement is the legislative veto, under which the President must withdraw the troops even before the end of the sixty days if Congress so directs by concurrent resolution.³⁹

The key questions in the wake of *Chadha* are whether the veto provision is constitutional, and if it is unconstitutional, whether it is severable. I believe it is clear that the veto is invalid under *Chadha*. Thus, the key question, as in all *Chadha* cases, is whether

35. See 50 U.S.C. §§ 1541-1548 (1976 & Supp. V 1981).

36. *Id.* § 1542.

37. *See id.*

38. *See id.* § 1544.

39. *See id.* § 1545.

the invalid section is severable. If it is severable, then the statute, minus the veto, stands. If the veto is not severable, then the entire statute falls with the veto. The consensus at the hearings seemed to be that the legislative veto provision is severable and that the other three operative sections remain intact.

The severability argument made by the Senate Legal Counsel, the Congressional Research Service, the State Department, and a number of witnesses at the hearings is that the *Chadha* test for severability⁴⁰ is met in that (1) Congress would have enacted the consultation, reporting, and automatic termination provisions even if it had not enacted the legislative veto, and (2) the consultation, reporting, and automatic termination provisions constitute a "workable" system.

That we still have a "workable" War Powers Resolution, then, seems to be the consensus, although I should add that there is a strong minority opinion that the entire Resolution falls with the veto provision. The problem is that although the reporting, consultation, and automatic termination provisions may be "workable," there is a sixty day gap in Congress' ability to involve itself in the President's deployment of troops around the world. That is a gap that Congress had intended to close when it passed the resolution.

I do not question that the three remaining provisions are valuable constraints upon the President. But Congress' intent, according to the language of the statute, was to ensure that the "collective judgement of both the Congress and the President will apply to the *introduction* of armed forces into hostilities."⁴¹ Congress' intent was to assert its prerogative to become involved at *early* and critical stages in the policy process. Our intent was not to give the President unlimited authority to commit American troops around the globe for sixty days.

The primary danger here is not that Congress will be unable in specific circumstances to force the President to withdraw troops. I hope we never get to that point. The danger is that we have lost a *deterrent* to unilateral presidential action. We have lost one of the most effective means we have of encouraging, forcing if necessary, the President to consider the views of Congress and the American people in committing troops overseas.

40. See 103 S. Ct. at 2774.

41. 50 U.S.C. § 1541(a) (1976 & Supp. V 1981).

One suggested option is to substitute a joint resolution of disapproval for the legislative veto. Indeed, an amendment providing for expedited congressional procedures on joint resolutions concerning troop commitments was added to the State Department authorization bill in October of 1983.⁴² But a deterrent that requires the President's signature—as a resolution of disapproval does—is unlikely to deter a President very much. In order to prevail the President needs the support of only 34 out of 100 senators, or only 146 out of 435 representatives.

The uncertainties bequeathed to us by *Chadha* have been especially painful in the case of Lebanon, because the dilemma of our Marines at the Beirut airport elevated the case from the academic to the tragic. The turn of events in that bloodily divided nation, and the lack of clear focus to our own government's policies, transformed the Marines' original "peacekeeping" mission into a role perceived by the contending Lebanese factions as an active American intrusion into their hostilities.

Majorities in both houses of Congress, as well as a majority of the American people, recognized, long before the President was willing to admit it, that our Lebanese policy was a failure and that our Marines should be withdrawn to safety, not in eighteen months but immediately.

It was for this reason that I drew up a joint resolution to express the strong sense of Congress that the Marine presence no longer served any useful national purpose and that the troops should be withdrawn by the President at the earliest feasible moment. A similar resolution was under consideration in the House of Representatives. If such a resolution were adopted by Congress, it would not, of course, bind the President as a matter of law. But it would place upon him the full weight of congressional and public opinion, and the case of Lebanon demonstrates clearly that a President will find it difficult to resist such pressure. The Marines have been withdrawn.

The Lebanon example also demonstrates vividly, I believe, why it is so important for Congress to find the means to participate as a full partner in decisions to send American armed forces

42. See H.R. 2915, 98th Cong., 1st Sess. § 1013 (1983); see also H.R. CONF. REP. 563, 98th Cong., 1st Sess. (1983). H.R. 2915, as amended, was enacted as Pub. L. No. 98-164, 97 Stat. 1017, 1062 (1983).

in harm's way. The Constitution divides war powers between the President, who is designated the Commander in Chief,⁴³ and Congress, which is given the power to declare war and to maintain an army and navy.⁴⁴ The Constitution, at least in this area, is an invitation to the legislative and executive branches to do battle with each other. It is also a challenge to the common sense of our national leaders. The War Powers Resolution was an effort to codify that common sense in a way that would minimize our internal differences and maximize our unified response to external threats.

The Supreme Court has upset that arrangement for accommodating the conflict implicit in a Constitution that, on the one hand, rigorously separates the powers of government, while on the other hand it yokes the President and Congress irreversibly together in the formulation of foreign policy and the making of war. It is now up to Congress, the President, and the American people—with the advice and counsel of those learned in the law—to rediscover that balance that is so crucial to our security and our future as a Nation.

43. U.S. CONST. art. II, § 2.

44. U.S. CONST. art. I, § 8, cl. 11.