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Legislative Vetoes After *Chadha*

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Summary

In *INS* v. *Chadha*, 462 U.S. 919 (1983), the Supreme Court struck down Congress's use of the "legislative veto," a device used for half a century to control certain activities in the executive branch. Congress had delegated power to executive officials on the condition that Congress could control their decisions without having to pass another law. These legislative controls, short of a public law, included one-house vetoes, two-house vetoes, and committee vetoes. Congress no longer relies on one-house or two-house vetoes, but committee and subcommittee vetoes continue to be a part of executive-legislative accommodations. This report will be updated as events warrant.

The *Chadha* Case

Congress often enacts limitations, prohibitions, and provisos in statutes that prevent agencies from engaging in certain actions or activities. In *INS* v. *Chadha*, 462 U.S. 919 (1983), the Supreme Court addressed a particular type of "legislative veto," an oversight mechanism used by Congress for half a century to monitor and control the executive branch without having to pass a law. Congress could approve or disapprove executive decisions through legislative actions that were short of a public law: one-house vetoes, two-house vetoes, and committee vetoes. Those legislative actions were not submitted to the President for his signature or veto.

Writing for the majority, Chief Justice Warren Burger invalidated the legislative veto. The Court ruled that whenever congressional action has the "purpose and effect of altering the legal rights, duties, and relations" of persons outside the legislative branch, Congress must act through both houses in a bill or resolution submitted to the President. 462 U.S. 919, at 952. Congress therefore had to comply with two elements of the Constitution: bicameralism (passage by both houses) and the Presentation Clause (presenting a bill to the President for his signature or veto). All legislative vetoes violated the latter principle because they were not presented to the President. Some legislative vetoes violated bicameralism because only one house (or committee) had to exercise the congressional approval or disapproval. Under *Chadha*, Congress could no longer exercise executive control merely by passing "simple resolutions" (adopted by either chamber),

"concurrent resolutions" (passed by both chambers but not sent to the President), or by committee action.

In response to *Chadha*, Congress eliminated the legislative veto from a number of statutes. The legislative veto continues, however, as a practical accommodation between executive agencies and congressional committees. A CRS review of statutes enacted since 1983 reveals that more than 400 new legislative vetoes (usually of the committee variety) have been enacted since *Chadha*. In addition, legislative vetoes of an informal and nonstatutory nature continue to affect executive-legislative relations. Practice in this area has been determined more by pragmatic agreements hammered out between the elected branches than by doctrines fashioned and announced by the Supreme Court.

Compliance with *Chadha*

Following the Supreme Court's ruling in 1983, Congress amended a number of statutes by deleting legislative vetoes and replacing them with joint resolutions, which must pass each house and be submitted to the President. Congress replaced the one-house veto in the executive reorganization statute with a joint resolution of approval. 98 Stat. 3192 (1984). Although this satisfied the twin requirements of *Chadha* (bicameralism and presentment), the position of the President was weakened. The President now had to obtain the approval of both houses within a specified number of days in order to reorganize executive agencies. Under the procedure that operated before *Chadha*, a reorganization plan automatically became effective within a fixed number of days unless one house acted to disapprove. The shift to a joint resolution of approval meant that Congress had, in effect, a one-house veto. The refusal of one house to support a joint resolution of approval would defeat a President's reorganization proposal. The new procedure was apparently considered so burdensome that the Reagan Administration decided not to request a renewal of reorganization authority after it expired.

Congress also replaced several legislative vetoes in the District of Columbia Home Rule Act with a joint resolution of disapproval. 98 Stat. 1974, § 131 (1984). This form of legislative action puts the burden on Congress to stop a District of Columbia initiative. Three statutes in 1985 removed legislative vetoes from statutory procedures. The concurrent resolution governing national emergencies was replaced by a joint resolution of disapproval. 99 Stat. 448, § 801 (1985). The same approach was used on legislation concerning export administration. 99 Stat. 160, § 301(b) (1985). A number of legislative vetoes had been used in the past to deal with federal pay increases. Congress eliminated those legislative vetoes and again relied on a joint resolution of disapproval. 99 Stat. 1322, § 135(e) (1985).

After *Chadha*, some Members of Congress introduced legislation to change the War Powers Resolution, which contains a provision that allows Congress to pass a concurrent resolution to order the President to withdraw troops engaged in combat. 87 Stat. 556-57, § 5(c) (1973). These lawmakers suggested that the concurrent resolution be replaced by a joint resolution of disapproval. 129 Cong. Rec. 28406-08, 28673-74, 28683-84, 28686-89 (1983). As finally enacted, however, the procedure for a joint resolution was not added to the War Powers Resolution. It became a freestanding legislative procedure that is available to force a vote to order the withdrawal of troops. 97 Stat. 1062, § 1013 (1983); 50 U.S.C. § 1546a (2000).

The Impoundment Control Act of 1974 gave Congress a one-house veto to disapprove presidential proposals to defer the spending of appropriated funds. 88 Stat. 335, § 1013(b) (1974). Even before *Chadha*, Congress began to disapprove deferrals by inserting language in bills passed through the regular legislative process, and continued to rely on that procedure after *Chadha* was decided. In 1986, however, when the Reagan Administration turned to deferrals to meet the deficit targets in the Gramm-Rudman-Hollings Act, affected parties went to court to contest the legality of presidential deferrals. They argued that if the one-house veto was invalid under *Chadha*, the President's deferral authority was inextricably tied to the unconstitutional legislative veto. According to the argument of the plaintiffs, Congress would not have delegated the deferral authority to the President unless it knew it had a one-house veto to maintain control. If one part of the statute fell, they argued, so should the other. The federal courts accepted that reasoning, holding that the deferral authority and the one-house legislative veto were inseparable. *City of New Haven, Conn.* v. *United States*, 809 F.2d 900 (D.C. Cir. 1987); *City of New Haven, Conn.* v. *United States*, 634 F.Supp. 1449 (D.D.C. 1986). Congress promptly converted this judicial position into statutory law. 101 Stat. 785, § 206 (1987). The effect was to limit the President to routine, managerial deferrals and prohibit the use of deferral authority to delay the spending of funds simply because the President disagreed with the budgetary priorities enacted into law.

Informal Vetoes After *Chadha*

One effect of *Chadha* has been to drive some legislative vetoes underground, where they operate on the basis of informal and nonstatutory understandings. This impact became clear when President Reagan signed an appropriation bill in 1984 for the Department of Housing and Urban Development and independent agencies. He objected to the presence of seven provisions that required executive agencies to seek the prior approval of the Appropriations Committees. In stating that he would implement legislation "in a manner consistent with the *Chadha* decision," he implied that committee-veto provisions would be regarded by the Administration as having no legal effect. *Public Papers of the Presidents*, 1984, II, at 1057. Under this understanding, agencies would notify committees and then pursue activities without obtaining committee approval.

The House Appropriations Committee decided to confront the Administration on this issue. It reviewed a procedure that had worked well with the National Aeronautics and Space Administration (NASA) for a number of years. Statutory ceilings (caps) were placed on various NASA programs, usually at the level requested in the President's budget. NASA could exceed those caps if it received permission from the Appropriations Committees. Because the Administration now threatened to ignore committee controls, the House Appropriations Committee said it would repeal both the committee veto and NASA's authority to exceed the caps. H.Rept. No. 98-916 48 (1984). If NASA wanted to spend more than the caps allowed, it would have to comply with the Court's mandate in *Chadha* by securing passage of a bill in each House, assuring that it emerges from conference committee and is submitted to the President.

NASA did not want to obtain a new public law whenever it needed to exceed spending caps. To avoid that heavy burden, NASA Administrator James M. Beggs wrote to the Appropriations Committees on August 9, 1984, suggesting a compromise. Instead of putting caps in a public law, he recommended that they be placed in the joint explanatory statement accompanying a conference report, the nonstatutory document that

explains how Congress expects a public law to be carried out. He then pledged that NASA would not exceed any ceiling identified in the conference report without first obtaining the prior approval of the Appropriations Committees:

> Without some procedure for adjustment, other than a subsequent separate legislative enactment, these ceilings could seriously impact the ability of NASA to meet unforeseen technical changes or problems that are inherent in challenging R&D programs. We believe that the present legislative procedure could be converted by this letter into an informal agreement by NASA not to exceed amounts for Committee designated programs without the approval of the Committees on Appropriations. This agreement would assume that both the statutory funding ceilings and the Committee approval mechanisms would be deleted from the FY 1985 legislation, and that it would not be the normal practice to include either mechanism in future appropriations bills. Further, the agreement would assume that the future program ceiling amounts would be identified by the Committees in the Conference Report accompanying NASA's annual appropriations act and confirmed by NASA in its submission of the annual operating plan. NASA would not expend any funds over the ceilings identified in the Conference Report for these programs without the prior approval of the Committees. (Letter from NASA Administrator Beggs to House Appropriations Committee, August 9, 1984).

This type of informal agreement poses no problem under *Chadha*, which focused solely on legislative vetoes placed in statutes. Another type of informal arrangement is reflected in the "Baker Accord" of 1989. In the early months of the George H. W. Bush Administration, Secretary of State James A. Baker III decided to give four committees of Congress and certain party leaders a veto power over the divisive issue of funding the Nicaraguan Contras. In return for receiving $50 million in humanitarian aid for the Contras, Baker agreed that a portion of the funds could be released only with the approval of certain committees and party leaders.[1] White House Counsel C. Boyden Gray reportedly objected to this level of congressional involvement in foreign policy, especially through what appeared to be an unconstitutional legislative veto.[2] Former federal judge Robert Bork regarded the Baker Accord as "even more objectionable" than the legislative veto struck down in *Chadha* because it permitted control by mere committees instead of a one-house veto. 135 Cong. Rec. 6528 (1989).

However, the informal nature of the Baker Accord was not prohibited by *Chadha*. Baker was willing to accept the compromise as the only feasible means of obtaining funds from Congress for a controversial purpose. In a letter to Congress on April 28, 1989, he agreed that the Contras would not receive financial assistance after November 30, 1989, unless he received letters from the "Bipartisan Leadership of Congress and the relevant House and Senate authorization and appropriations committees." Four Members of Congress sued the President and the Secretary of State for entering into this "side agreement" with Congress, claiming that it represented a forbidden legislative veto. A federal district court dismissed the suit on the grounds that the plaintiffs lacked standing

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[1] John Felton, "Bush, Hill Agree to Provide Contras With New Aid," *CQ Weekly Report*, March 25, 1989, at 656.

[2] David Hoffman and Ann Devroy, "Bush Counsel Contests Contra Aid Plan," *Washington Post*, March 26, 1989, at A5.

and that the case constituted a question of national defense and foreign policy committed to the elected branches. *Burton* v. *Baker*, 723 F.Supp. 1550 (D.D.C. 1989).

Statutory Committee Vetoes

Congress continues to add legislative vetoes to bills and Presidents continue to sign them into law, although often in their signing statements they object to these legislative vetoes and regard them as unconstitutional under the Supreme Court's ruling. From the date of the court's decision in *Chadha* to 2005, Congress has enacted more than 400 of these legislative vetoes, most of them requiring the executive branch to obtain the approval of specified committees.

In these signing statements, Presidents often indicate that the new legislative vetoes will be treated as having no legal force or effect. Although Presidents have treated committee vetoes after *Chadha* as having no legally binding value, agencies often adopt a different attitude. They have to work closely with their review committees, year after year, and have a much greater need to devise practical accommodations and honor them.

The Treasury-Postal Service and General Government Appropriations Act for fiscal 1992, 105 Stat. 834 (1991), is an example of committee-veto provisions placed in statute. The Internal Revenue Service could not transfer funds in excess of 4% of an appropriation without the advance approval of the Appropriations Committees. Id. at 840. Any transfer of funds by the Treasury Department must be approved in advance by the Appropriations Committees. Id. at 842, § 104. Certain reprogrammings by the General Services Administration are subject to the approval of the Appropriations Committees. Id. at 850. Certain GSA funds may be obligated only upon the advance approval of the House Committee on Public Works and Transportation and the Senate Committee on Environment and Public Works. Id. Transfers of funds for the Federal Buildings Fund must be submitted promptly to the Appropriations Committees for approval. Id. at 856, § 6.

Statutes continue to include committee vetoes. The Treasury-General Government Appropriations Act for fiscal 2002 contained 20 committee vetoes. Most of them involve prior-approval requirements for the Appropriations Committees. Certain aircraft funds could not be transferred to agencies outside the Treasury Department without prior approval from the Appropriations Committees. 115 Stat. 520. Funds appropriated for Automation Modernization could not be obligated for the Automated Commercial Environment until the Appropriations Committees approved the expenditure plan. Id. See also 115 Stat. 522, 523 (two), 524 (§§ 113, 114, 115), 525 (§§ 121, 123), 530-31, 534 (two), 535, 536, 537 (§ 403), 544 (§ 511), 548 (§ 614), 549 (§ 615), and 551 (§ 625).

Agency Instructions and Directives

In addition to committee vetoes that appear in statutes and correspondence between agency heads and review committees, agency documents often recognize that certain types of actions must be presented to designated committees for their advance approval. An example is the Defense Department Financial Management Regulation, issued August 2000. Chapter 6 of volume 3 focuses on the procedures for "Reprogramming of DOD Appropriated Funds."

Reprogramming involves a shift of funds within an appropriations account. At times the word "reprogramming" is applied generally to a transfer of funds from one appropriations account to another, a shift that requires statutory authority. Elaborate procedures are established to assure that the executive branch does not violate understandings entered into with the Appropriations Committees and, at times, with the authorization committees that have jurisdiction. The Defense Department has a form, DD 1414, that establishes the base for reprogramming actions, and DD 1415, used to request the prior approval (DD 1415-1) of the congressional committees.

Approval for a reprogramming action is obtained by letter from the congressional committees prior to implementation of the proposed action. The Pentagon takes each separate committee response into account, with final implementation reflecting "the lowest of the approvals received for proposed sources and increases." Only when "the final committee approval has been received" does the Pentagon prepare an implementation memorandum. Depending on the reprogramming request, approval may be required from the Appropriations Committees, the Armed Services Committees, or the Intelligence Committees. Procedures are established to permit the Defense Department to return to a committee to appeal its decision on a reprogramming action.

Federal courts recognize the need for informal clearance procedures between executive agencies and congressional committees. A case decided after *Chadha* involved a statute that required the General Services Administration (GSA) to notify appropriate committees of Congress in advance of a negotiated sale of surplus government property in excess of $10,000. GSA regulations further provided that in the "absence of adverse comment" by the review committees, the disposal agency may sell the property on or after 35 days. 40 U.S.C. § 484(e)(6); 41 C.F.R. § 101-47.304-12(f). The U.S. Claims Court found the procedure to be tantamount to committee disapproval and therefore unconstitutional under *Chadha*. *City of Alexandria* v. *United States*, 3 Ct. Cl. 667, 675-78 (1983). The U.S. Court of Appeals for the Federal Circuit reversed, finding nothing unconstitutional about the decision of agencies to defer to committee objections: "There is nothing unconstitutional about this: indeed, our separation of powers makes such informal cooperation much more necessary than it would be in a pure system of parliamentary government." *City of Alexandria* v. *United States*, 737 F.2d 1022, 1026 (C.A.F.C. 1984).

Conclusions

Chadha put an end to one-house and two-house legislative vetoes but it has had little effect on the legislative vetoes that operate at the committee and subcommittee level. Executive agencies and congressional committees have developed a variety of voluntary accommodation procedures over the years that result in a standard quid pro quo; Congress agrees to delegate substantial discretion to executive agencies if they accept a system of review and control by the committees of jurisdiction. These provisions remain an important mechanism for reconciling legislative and executive interests.