



ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

United States Department of Justice
Washington, D.C. 20530

4 MAR 1981

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cc: Files
Sudo
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Retrieval

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: The Constitutionality of Legislative
Veto Devices

This responds to your request for our analysis of the constitutional issues raised by legislative veto devices. As you are aware, Presidents and Attorneys General have, since President Wilson vetoed the first bill passed by both Houses of Congress containing such a provision, uniformly concluded that legislative veto devices are unconstitutional encroachments on the Executive. While we adhere to that historic position, we thought it would also be useful to set out, in summary fashion, both the arguments historically asserted by the Executive against the constitutionality of such devices and the arguments asserted by Congress in support of their constitutionality.

I. The Executive Branch Position

The Executive's position on this constitutional issue has generally invoked two lines of analysis. Under one line of analysis, the position has been that such devices violate the separation of powers written into our Constitution by impermissibly concentrating Executive or Judicial functions in Congress. The other line of analysis is that such devices, because they almost invariably permit Congress to take action of public effect which is functionally and analytically indistinguishable from legislation, deprive the President of his crucial role in the legislative process guaranteed by Article I, Section 7, Clauses 2 and 3 -- the President's veto power.

A. Separation of Powers

The Framers of our Constitution intended the Congress to legislate, the Executive to execute the law, and the Judiciary to ensure that the execution of the law by the Executive stayed within constitutional and statutory bounds. See, e.g., Buckley v. Valeo, 424 U.S. 1, 120 (1976). Under Article II, §1 of the Constitution, "The Executive Power shall be vested in a President," who shall "take Care that the Laws be faithfully executed,"

Article II, § 3. Article I, § 1 of the Constitution vests "All legislative Powers . . . in a Congress of the United States, which shall consist of a Senate and House of Representatives." As discussed in part B below, Section 7 of Article I also preserves for the President a crucial role in the exercise by Congress of these "legislative Powers." In addition, Section 6 of Article I specifically forbids any Members of Congress from holding an Executive or Judicial office. Finally, Article III vests the Judicial power in the Judiciary, consisting of a Supreme Court and such inferior federal courts as Congress may establish.

The principle of separation of powers embodied in these constitutional provisions, although not an inflexible one, was recently relied on by the Ninth Circuit Court of Appeals in declaring a legislative veto device found in the Immigration and Nationality Act of 1952 to be unconstitutional. In that case, Chadha v. I&NS, No. 77-1702 (Dec. 22, 1980), under the Act, Congress has given the Attorney General the power to stay indefinitely the deportation of an otherwise deportable alien. Congress, however, attempted to reserve to itself -- indeed, to one of its Houses -- the power to supervise or supplement the Executive's implementation of the statute by disapproving, or vetoing, specific exercises of that power by the Attorney General. The Ninth Circuit held that "such [congressional] involvement trespasses upon central functions of the Executive," and that, therefore, the provision was unconstitutional. The court stated its view, with which we are in complete agreement, that the administration of statutes is reserved by the Constitution to the Executive. The court made clear that the responsibility for ensuring that the Executive faithfully executed the laws was assigned by the Constitution to the Judiciary.

B. The President's Veto Power

Because the exercise of legislative veto power generally operates to block the exercise of either statutory or constitutional power by the President, it permits Congress to bind the Executive and to effect the rights of private citizens by means other than plenary legislation subject to the President's veto power under Article I, § 7, Clauses 2 and 3 of the Constitution. When the Framers of the Constitution determined that the considerable legislative power vested in Congress should be subject to check by the President by giving him veto power over legislation, they were also concerned that Congress would not be able to circumvent this veto power through other forms of action having the same substantive effect as legislation. As James Madison observed at the Constitutional Convention,

"If the negative of the President was confined to bills: it would be evaded by acts under the form and name of Resolutions, votes & c.,"

5 Elliot, Debates on the Federal Constitution 431 (1845). Thus, it was not happenstance that the Constitutional Convention placed in a separate clause, Article I, § 7, Clause 3, a provision that "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 of the United States" and that the same veto power granted the President in Article I, § 7, Clause 2 should be applicable to these other measures.

The plain language, as well as the drafting history of these two Clauses, demonstrates the Framers' determination to ensure that legislation, or actions by Congress under some other name having the substantive effect of legislation, be submitted to the President for his approval or disapproval. In short, these two Clauses prevent actions of Congress from becoming law or having legally binding effect, in and of themselves, absent presentation to the President.

II. The Position of Congress

Congress, through its attorneys, has advanced several arguments in support of the constitutionality of legislative veto devices. Most recently in the Chadha case, Congress has argued that its power to legislate regarding a specific subject, supplemented by the authority granted by Article I, § 8, Clause 18 of the Constitution to "make all Laws which shall be necessary and proper for carrying into Execution" its legislative power, give Congress "discretion and flexibility in choosing methods in carrying out its powers," including the power to determine that legislative veto devices are both "necessary" and "proper." ^{1/} In their briefs filed in the Chadha case, neither the Senate nor the House articulated any argument as to why the legislative veto device at issue there should not be viewed as an attempt to evade the requirements of Article I, § 7, Clauses 2 and 3. Their avoidance of this issue was apparently predicated on the proposition that the exercise of such "veto" power by one House of Congress should be regarded as something other than a legislative act.

^{1/} Chadha v. I&NS, Brief for United States Senate at 18.

Congress argued to the Ninth Circuit that Congress has power, under the Necessary and Proper Clause, to retain to itself, in connection with the delegation of statutory power to the Executive, the power to correct the application by the Executive of statutory power to the objects of that power. The Ninth Circuit determined that this "corrective" power was an impermissible invasion of the roles of the Executive in administering, and the Judiciary in supervising the administration of, the law. Congress also argued that the legislative veto device involved there was simply a mechanism by which Congress could share in the administration of that statutory power. Congress argued that the statutory scheme did not in fact or in law give final decisionmaking power to the Attorney General in such cases; rather, Congress argued that the Attorney General had been given only "the limited function of dispensing temporary suspensions of deportation and reporting them to Congress . . . , " with Congress retaining its "plenary and sovereign function of making its own final determinations of when suspensions of deportation should be made permanent." 2/ The Ninth Circuit's response to this argument was, in essence, that administration of the law is an "Executive function" and that Congress' attempt to execute or administer the law was an unconstitutional interference in the responsibilities assigned to the Executive by the Constitution. 3/

Finally, Congress argued that legislative veto devices could be viewed as essentially legislative procedures not subject to the bicameralism requirements of Article I, § 1 and the President's veto power under Article I, § 7. The Ninth Circuit's response to that argument was that the Necessary and Proper Clause "authorizes Congress to 'make all laws' not to exercise power in any way it deems convenient." The court went on to state that "the power to 'make all laws' has important formal and procedural limitations . . . , " including the limitations of Article I, § 7. The Ninth Circuit specifically

2/ Chadha v. I&NS, Brief of the House of Representatives at 49-50.

3/ We believe that both the principle of separation of powers and the procedure fashioned by the Framers in Article I, § 7 to govern the enactment of the laws do not allow for Congress' passage of legislation which delegates power to the Executive but which leaves the extent or even existence of such power undetermined until that or a subsequent Congress, by inaction or action not subject to the President's veto, finally determines the extent or existence of such power. Whatever such a process might be, it is certainly not the legislative process contemplated by the Framers and written into our Constitution.

rejected the proposition advanced by Congress that legislative inaction under a legislative veto device could be viewed as having any legal significance. As the court stated:

"The article I authorization to make law does not permit positive law which alters the substantive legal rights of individuals to be enacted by a mere executive recommendation, which is not a final exercise of specifically delegated power to alter these legal rights, followed by legislative inaction -- an inaction that can equally imply endorsement, acquiescence, passivity, indecision, or indifference. [Congress has] offered us no reasoning by which we might distinguish their view . . . from a regime under which any presidential proposal on a given subject would become part of the United States Code if no House of Congress objected within, say, sixty days."

We believe that this language from the Chadha opinion accurately reflects the design of our constitutional system, which requires the political Branches to reach a consensus prior to the application of federal power to the people or, absent a consensus, that such power be authorized only by the passage of legislation over the veto of the President by an extraordinary two-thirds vote by Senate and House. It is this structural limitation on the application of federal power over the people which must ultimately be denied by the proponents of legislative veto devices; we are convinced that this limitation is a part of the Constitution and that, when presented with an appropriate case, it will be recognized by the Supreme Court.

III. Conclusion

In concluding that the legislative veto device involved in the Chadha case resulted in an unnecessary and dangerous concentration of power in one Branch, the Ninth Circuit drew on the words of Mr. Justice Brandeis:

"The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the

governmental powers among three departments,
to save the people from autocracy." 4/

. In directing his subordinates to regard as invalid a legislative veto device signed into law by him in 1955, President Eisenhower recognized this tension built into the Constitution: "Since the organization of our Government, the President has felt bound to insist that Executive functions be maintained unimpaired by legislative encroachment, just as the legislative branch has felt bound to resist interference with its power by the Executive."

We adhere to our firm and consistent position that legislative veto devices are unconstitutional.



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4/ Myers v. United States, 272 U.S. 52, 293 (1926) (dissenting opinion).