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Legislative Veto

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Synonyms

Congressional veto

Definition

Legislative vetoes are negotiated arrangements between Congress and the executive branch whereby Congress gives agencies discretionary authority to establish administrative regulations that have the force of law, while Congress exercises supervisory control by retaining the authority to prohibit certain executive actions by passing either a concurrent resolution in both of its chambers or a simple resolution in one of its chambers or committees. Legislative vetoes technically occur outside the Constitution's step-by-step lawmaking process, and they reverse the bargaining roles traditionally occupied by the legislative and executive branches in their negotiations with one another.

Introduction

Most scholars believe that legislative vetoes originated in the 1930s, but others say that they can be traced to an earlier time. Legislative vetoes have been inserted into substantive pieces of legislation dealing with the environment, the economy, arms sales, federal salaries, product safety standards, student loans, and executive branch reorganizations. This procedural device was invented because presidents and their administrators sought more discretion over public policy, but Congress would not yield this authority without retaining supervisory control. Congress found that exerting control in the constitutionally prescribed manner—by passing a public law—was unacceptable because it was cumbersome, slow, and subject to the president's veto. The legislative veto, therefore, serves as a compromise whereby executive agencies are allowed to promulgate administrative regulations and make policy decisions that have the force of law unless Congress objects. Congress can object by passing concurrent resolutions in both chambers or by passing a simple resolution in one of its chambers or committees. These efficient arrangements essentially reverse the lawmaking process set out in the United States Constitution. Rather than Congress presenting legislation to the president for approval or veto, it is the executive branch's responsibility to initiate proposals and Congress's responsibility to decide whether proposals will take effect. Furthermore, the legislative veto relaxes the Constitution's bicameral requirement that calls for both chambers of Congress to play a role in the lawmaking process. This entry considers the

constitutional dimensions of the legislative veto and the implications of the United States Supreme Court's decision to declare such arrangements unconstitutional.

The Way Federal Courts Have Approached the Legislative Veto

Although the legislative veto seems to have emerged in the 1930s, it was not until the 1970s when federal courts began seriously considering whether this practice violated the United States Constitution. The federal courts initially decided these cases on narrow or procedural grounds, seeming to appreciate that these legislative-executive arrangements were collaborative compromises designed to satisfy pressing and legitimate institutional needs. Federal courts, however, became more willing to engage the substantive issue as Congress began using legislative vetoes to broadly dictate administrative policy rather than using them to carefully target specific administrative determinations (Fisher, 2007; Nowak and Rotunda, 1995). This evolutionary process reached its dénouement when the United States Supreme Court considered *Immigration and Naturalization Service v. Chadha* in 1983.

In *Chadha*, the Court struck down a legislative veto embedded in the Immigration and Nationality Act that allowed either chamber of Congress to pass a resolution overruling the Attorney General's decision to suspend certain deportations. Chief Justice Warren Burger wrote the Court's opinion, which was joined by six other justices on the issue of the one-chamber veto. According to Burger, this legislative veto and others like it violated separation of powers derived from the Constitution's overarching structure as well as two constitutional requirements emanating from the separation of powers: One, bicameralism located in Article I, Sections 1 and 7; and, two, both "presentment" clauses found in Article I, Section 7. In other words, the Court concluded that, when making law, both chambers of Congress must participate because this facilitates deliberation and debate in varied settings, encourages thorough analysis of issues, and safeguards liberty by distributing power. Furthermore, the Court concluded that any legislation that Congress passes must be subject to the possibility of a presidential veto so presidents may protect the public from imprudent laws, encourage laws to have a national perspective, and prevent Congress from usurping executive power. The Court insisted that Congress comply with bicameralism and presentment whenever its actions change the legal rights, obligations, or relationships of persons who are not part of the legislative branch. Presumably this means that Congress may manage its internal affairs as it sees fit, and it need not honor these precepts when fulfilling its role in treaties, impeachments, and appointments. However, it must forgo the legislative veto after it assigns administrative responsibilities to executive agencies. Taken at face value, *Chadha* stands for the proposition that once a bill is enacted into law, Congress may not intervene in executive branch affairs unless it passes another public law.

The decision was formalistic. Rather than valuing efficiency and other practical considerations, the Court suggested that it would closely adhere to the Constitution's text, history, and structure when resolving these types of disputes (Korn, 1994-1995). Some aides in the Reagan Administration favored this approach because they believed that it would reduce congressional interference in executive branch affairs. Likewise, some administrators applauded the ruling because they believed that the legislative veto negatively affected the policy implementation process. These administrators reasoned that the Administrative Procedure Act of 1946 created a process that allowed administrative rules to be put in place only after the public had been given an opportunity to comment on the proposals so as to promote due process, transparency, and responsiveness (West and Cooper, 1983). They thought that the legislative veto work against these objectives because congressional control was exercised privately, the public was not directly involved, and Congress was assumed to be more responsive to organized interests than the general public.

Although the legislative veto is a "creature" of the federal government, states have experimented with it from time-to-time. Beginning with Kansas in 1939, as many as seventeen general assemblies wielded the legislative veto at one time or another (Levinson, 1987). The Court's ruling in *Chadha* did not affect these legislative vetoes because their validity turns on how each state's constitution is interpreted. Nevertheless, many state courts eventually ruled that legislative vetoes violate separation of powers.

Criticisms of the *Chadha* Decision

Justice Byron White, who dissented, and scholars such as Eskridge and Ferejohn (1992) expressed concern that *Chadha* impaired the government's ability to make policy in a way that was practical, feasible, flexible, and efficient. These functionalists suggested that courts should either adopt a more elastic interpretation of separation of powers or be more reluctant to intervene in situations where the other branches of government have streamlined the policy-making process through consensual negotiation. Rather than a decision based on the Constitution's text and structure, functionalists would have preferred *Chadha* to have turned upon the legislative veto's origin, purpose, and how it balanced power between the branches (Korn, 1994-1995). Furthermore, functionalists pointed out that *Chadha* is difficult to reconcile with many time-honored congressional shortcuts such as the suspension of rules, unanimous consent agreements, and the placement of riders on appropriations bills. Similarly, they noted that *Chadha's* call for strict procedural adherence is at odds with the president's unilateral creation of law-like policies with executive orders.

Critics also challenged the way the *Chadha* Court applied the separation of powers doctrine, which, at its core, is designed to ensure that the governmental branches are coequal and dominant in their constitutionally assigned areas. First, according to Justices Rehnquist and White, the Court should not have struck down the legislative veto in the Immigration and Nationality Act while still preserving the remainder of this legislation. By doing so, the Court advantaged the president in a deal that Congress would have been reticent to accept without this concession. Second, critics reject the Court's assertion that legislative vetoes create new law each time they are invoked (Fisher, 2007). Instead, they see the legislative veto as a part of the original bargain struck between Congress and the president. Hence, when courts invalidate a legislative veto like the one in *Chadha*, it is the judiciary that creates new law by altering the original agreement. Finally, Justice White observed that legislative vetoes maintain the *status quo* rather than conferring some special advantage upon Congress. In the Constitution's lawmaking process, Congress initiates proposals and the president must approve or disapprove without modifying their content. The legislative veto is similar in that one branch initiates proposals, while the other must accept or reject them without amendment. Therefore, from White's perspective, both branches remain equal bargaining partners although their roles have reversed.

Aftermath of *Chadha* and Fate of the Legislative Veto

Shortly after *Chadha*, some scholars predicted that the decision would induce conflict between the executive branch and Congress because it invalidated a mechanism that promoted institutional bargaining and cooperation (Cooper, 1983; Franck and Bob, 1985). More recently, scholars have contended that the importance of the legislative veto has been exaggerated (Korn, 1996) or that Congress has been able to fulfill its intuitional role because it found other strategies and procedural devices to replace the legislative veto (Fisher, 2007; Franklin, 1986). According to the later perspective, relationships between the branches remained substantially the same because presidents and their administrators still demanded flexible authority, while Congress still insisted on a satisfactory means of supervisory control.

The literature gives great attention to strategies and procedures that Congress began using in place of the legislative veto (Fisher, 2007; Franklin, 1986; Korn, 1994-1995). Congress exercised control by writing laws that placed detailed constraints on executive agencies, by granting agencies authority for shorter periods of time, and by attaching language to appropriations bills that prohibited agencies from using funds for specific activities. Congress also relied on a court sanctioned "report-and-wait" strategy where it passed statutes requiring agencies to notify an oversight committee before taking certain actions or implementing particular programs. This approach compelled agencies to seek prior approval from the oversight committee if they desired to take prompt action. Moreover, Congress passed statutes containing a joint resolution of approval procedure, which required presidents to garner the support of both chambers of Congress within a given time period or particular regulations or programs would automatically lapse. This procedure honors bicameralism and presentment, occurs within the lawmaking process, yet produces the same result as a legislative veto if one chamber withholds support. As these examples illustrate, Congress demonstrated great procedural ingenuity while attempting to comply with *Chadha*, but many of its alternative approaches inconvenienced the executive branch.

There have also been instances where the two political branches of government circumvented *Chadha*. On some occasions, Congress inserted legislative vetoes into legislation, while presidents often signed these bills into law without complaint (Fisher, 2007, 1993, 1985; Glennon, 1989). On other occasions, the bargainers entered into these arrangements informally by moving the "legislative vetoes" from the face of the legislation to the conference reports and by giving their agreements innocuous designations such as "legislative-executive understandings" (Fisher, 2007, 1993; *see also*, Glennon, 1989). Although these gentlemen's agreements are contrary to the spirit of *Chadha*, they are unlikely to violate the letter of the law because they are unenforceable and not technically part of the legislation. Yet, in application, they function like an overt legislative veto when they satisfy the institutional needs of the bargainers. Fisher (2007) explains that presidents and their administrators usually acquiesce and are disinclined to litigate because they attach considerable value to administrative flexibility. In essence, presidents and their administrators have generally concluded that it is better to tolerate the occasional congressional intrusion rather than receive no grant of authority at all or receive only small modicums of discretionary authority through a series of *Chadha*-compliant laws. In sum, administrators have come to realize that Congress is more willing to grant them authority and flexibility so long as it is convinced that it has a sufficient means of supervisory control.

Does Congress have any limit when using procedural devices like the legislative veto? In a legal sense, the answer is, "yes." In *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise* (1991), the Supreme Court, relying on separation of powers, struck down a federal law that created a congressional review board that could veto the actions of a regulatory body that operated two District of Columbia airports. Hence, the Court has been willing to reassert *Chadha* even though the other branches of government find it to be out-of-step with the realities of modern government. Yet it is difficult for the federal courts to reassert *Chadha* and to insist on close adherence to the Constitution's formalities when the executive branch consensually bargains with Congress and is disinclined to litigate. Therefore, as a practical matter, members of Congress and their bargaining partners in the executive branch can enter into these arrangements in satisfaction of their institutional needs so long as no third-party stakeholder is willing and able to bring the matter before the federal courts.

Conclusion

The legislative veto is a procedural mechanism that enables Congress to oversee executive branch agencies after it has granted them discretionary authority. It works by reversing the direction of the

Constitution's lawmaking process so that executive agencies initiate proposals and Congress accepts or rejects them through various forms of resolution. The Supreme Court, in *INS v. Chadha* (1983), declared this practice to be a violation of the Constitution's separation of powers framework, as well as bicameralism and the presentment, which both emanate from separation of powers. However, functionalists objected to the Court's wooden interpretation of separation of powers and argued that the decision denied governmental actors a flexible and efficient means of completing their responsibilities. In the end, scholars concluded that the importance of the legislative veto has been overstated, or that Congress continues to fulfill its institutional role because it either found sufficient procedural substitutes or ways to circumvent the *Chadha* decision.

Cross-References

Agency rulemaking, legislative power and public administration.

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