CONGRESSIONAL VETO OF EXECUTIVE ACTIONS

ISSUE BRIEF NUMBER IB76006

AUTHOR:

Thomas J. Nicola

American Law Division

Clark F. Norton

Government Division

THE LIBRARY OF CONGRESS

CONGRESSIONAL RESEARCH SERVICE

MAJOR ISSUES SYSTEM

DATE ORIGINATED 02/03/76
DATE UPDATED 11/05/82

FOR ADDITIONAL INFORMATION CALL 287-5700

1105

ISSUE DEFINITION

Statutory provisions by which Congress authorizes a Federal program to be administered by the Executive but retains the legal authority to disapprove all or part of the program before final implementation have become increasingly frequent in recent years. These statutory provisions which subject a variety of proposed executive actions to congressional review are commonly known as "congressional veto" devices. Although the constitutionality of the congressional veto has yet to be finally resolved by the Supreme Court, it has been the object of considerable discussion since the beginning of its use in the 1930s.

BACKGROUND AND POLICY ANALYSIS

Some cases challenging the constitutionality of the congressional veto device have been decided. Clark v. Valeo, 559 F.2d 642 (D.C. Cir. 1977), involved a challenge against a "one House" congressional veto (2 U.S.C. 438(c); 26 U.S.C. 9009(c) and 9039(c)) in the Federal Election Campaign Act Amendments of 1976. The case was dismissed by the U.S. Court of Appeals for the District of Columbia Circuit on Jan. 21, 1977, on the ground that it was not ripe for judicial decision. On June 6, 1977, the Supreme Court, without hearing the case or issuing an opinion, affirmed the action of the Court of Appeals. In Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977), the Court of Claims by a vote of 4-3 held that the congressional veto provision contained in the Federal Salary Act (2 U.S.C. 351, et seq.) was constitutional. On July 26, 1977, the U.S. Court of Appeals for the 4th Circuit, affirming a district court dismissal, declined to reach the constitutional allegation that the "one-House" veto provision of the Federal Salary Act, 2 U.S.C. 359(1)(B), was an unconstitutional delegation of legislative authority in McCorkle v. United States, 559 F.2d 1251 (4th Cir. 1977). The Supreme Court on Jan. 9, 1978, denied petitions for review of Atkins and McCorkle. On Dec. 22, 1980, the Court of Appeals for the Ninth Circuit unanimously held that the "one House" congressional veto provision in the Immigration and Nationality Act (8 U.S.C. sec. 1254(c)(2)) was unconstitutional in Chadha v. Immigration and Naturalization Service, 634 F.2d. 408 (9th Cir. 1980). This provision authorized either House of Congress to disapprove a decision to suspend deportation of an alien. Although the Supreme Court heard arguments on this case in the last term, it did not reach a decision. The Court is scheduled to rehear the case on Dec. 7, 1982.

On Dec. 16, 1982, the U.S. District Court in Montana in Pacific Legal Foundation v. Watt, 50 U.S.L.W. 2394 (Jan. 12, 1982), held that section 204(e) of the Federal Land Policy and Management Act (43 U.S.C. sec. 1714(e)0, authorizing a congressional committee to notify the Secretary of the Interior of an "emergency situation" regarding public lands and to direct him "immediately" to withdraw such lands from mineral leasing activities, is constitutional only if it is construed to allow the Secretary of the Interior to establish the scope and dureation of such emergency withdrawals. On Jan. 29, 1982, the U.S. Court of Appeals for the District of Columbia Circuit in Consumer Energy Council of America v. =Federal Energy Commission, 673 F. 2d 425 (1982),, unanimously held unconstitutional the "one-House" congressional veto provision, section 202(c) of the National Gas Policy Act of 1978 (15 U.S.C. sec. 3342 (c)). This section authorized either House to disapprove

incremental pricing rules issued by the Commission. A petition for review by the Supreme Court has been filed. U.S. Senate v. Consumer Energy Council of America and =U.S. House of Representatives v. Consumer Energy Council of America=, 51 U.S.L.W. 3212 (Nos. 82-177 and 82-209) (Aug. 2 and 6, 1982).

On Oct. 22, 1982, the U.S. Circuit Court of Appeals for the District of Columbia Circuit unanimously held unconstitutional the "two-House" congressional veto provision, section 21(a) of the Federal Trade Commission Improvements Act of 1980 (15 U.S.C. sec. 2881(c)) in Consumers Union of the United States, Inc. et al. v. Federal Trade Commission, et al., (D.C. Civ. Action. No. 82-1737). This provision authorized both Houses to disapprove rules promulgated by the Federal Trade Commission.

History

The congressional veto was first employed in the Legislative Appropriation Act of 1932 (47 Stat. 413) to grant President Hoover the authority to reorganize executive departments and agencies subject to a congressional veto provision allowing either House to disapprove any reorganization proposal before it goes into effect. When President Hoover submitted his reorganization order, it was disapproved by a House resolution (H.Res. 334, 72d Congress, 2d session). Although the congressional veto was originally most widely employed in executive reorganization legislation, it has in recent years been increasingly used in a great variety of other areas as well.

The congressional veto device was employed in the War Powers Act (P.L. 93-148) to restrict the authority of the President to utilize American troops in combat operations in foreign nations. It was also used to subject the rulemaking authority granted to the administrator in such areas as petroleum allocation (P.L. 93-159); access to Presidential materials (P.L. 93-526); campaign reform practices (P.L. 93-443); and education standards (P.L. 93-380) to congressional review of such proposed rules before they become legally effective. The congressional veto was also employed in the Congressional Budget and Impoundment Control Act of 1974 (P.L. 93-344) to restrict the President's deferral, rescission, and reservation of budgetary authority. The extension of the congressional veto device to these new uncharted areas has raised additional legal and practical objections to its use.

The recent case of Buckley v. Valeo, 424 U.S. 1 (1976), presented perhaps the first opportunity for a Federal Court to pass upon the constitutionality of the congressional veto device. However, the Court in Buckley expressly disclaimed deciding this issue, stating in its per curiam opinion that "[b]ecause of our holding that the manner of appointment of the members of the Commission precluded them from exercising the rule-making powers in question, we have no occasion to address this separate challenge here." (Buckley, 424 U.S., at 140, fn. 176.)

Justice White, concurring in this part of the Court's holding, agreed that since the Commission itself was unconstitutional because of its manner of appointment, rules and regulations issued by the Commission were invalid without regard to the congressional veto mechanism. However, Justice White indicated in strongly worded dicta that if the Commission were constitutionally appointed, the congressional veto device would be constitutional. (424 U.S., at 284-286.)

Although there are many types of congressional veto provisions, they typically require the Executive to submit proposed actions in accordance with the enabling statute to both or either House of Congress or to one or more of its committees within a specified period of time, usually 30, 60, or 90 days before those actions become legally effective. The proposed action becomes legally effective at the end of the specified period unless the Congress either disapproves the proposed action by "vetoing" it (the usual situation) or approves the proposed action by affirmative action (a less common occurrence).

If congressional consideration of the proposed action takes the form of a concurrent resolution, which must be passed by both Houses of Congress, the measure can be defined as a "two-House" congressional veto. If the congressional consideration takes the form of a simple resolution passed by either House, the measure can be termed a "one-House" congressional veto. If the proposed action is submitted to one or more congressional committees for their consideration, then the device can be defined as a committee veto.

Under these definitions, congressional vetoes include only those statutory provisions which enable the Congress to legally approve or disapprove proposed executive actions without requiring that such approval or disapproval be submitted to the President for his signature. Thus this definition would not include many similar provisions such as reporting provisions or conditional legislation which are sometimes characterized as congressional vetoes but do not legally prevent Executive action if congressional approval or disapproval is not given during the period of time specified by the statute. Congress could, of course, enact legislation to repeal or alter actions taken by the Executive, but such legislation would require submission to the President for his signature. Should the President veto the enactment, a two-thirds override vote by both Houses of Congress would be required for the enactment to become law.

Many congressional veto provisions enacted in recent years contain procedures for expedited treatment so that any Member can insure full congressional consideration on the proposed action, subject to the veto within the time limit specified by the statute.

Various arguments have been raised attacking the constitutionality of the congressional veto device.

The first argument is that the use of the congressional veto violates the "Presentation" clause of the Constitution, which requires that every order, resolution, or vote to which the concurrence of the House and Senate may be necessary shall be presented to the President for his signature (Article I, section 7, clause 3). The use of a congressional veto device permits the Congress to disapprove executive action taken pursuant to a statute by passing a concurrent or simple resolution or, in the case of a committee veto, by a committee vote without the necessity of presenting that concurrent or simple resolution or committee vote to the President for his consideration.

The second argument is that the congressional veto infringes upon the general constitutional responsibilities granted to the President under Article II and especially the President's responsibility to "faithfully execute the laws." Opponents of the congressional veto device would particularly object to the use of a general congressional veto to review all proposed rules and regulations promulgated by the Executive on the ground that such a blanket review infringes upon inherent executive functions.

Although the Supreme Court has never explicitly defined the boundaries between legislative and executive functions, the case of Springer v. Philippine Islands, 277 U.S. 189 (1928), is frequently cited in support of this view.

In Springer, the Supreme Court held that the Philippine Territorial Legislature illegally usurped an executive function in violation of the Philippine Organic Act by providing that members of the territorial legislature vote the stock in a commercial corporation owned by the territorial government. The Court held that the voting of stock was an executive function. Opponents of the congressional veto would argue that proposed widespread congressional review of executive rules and regulations constitutes an analagous legislative intrusion into inherently executive functions and thus violates the separation of powers doctrine.

Proponents of the constitutionality of the congressional veto argue that the "Presentation" clause has been complied with in that the underlying statute is presented to the President. The retention of a congressional veto over the exercise of authority granted to the President is, proponents would argue, a condition subsequent which must be satisfied in order for the terms of the enabling statute to become legally effective. The Constitution grants Congress considerable enumerated powers and the authority to enact all laws "necessary and proper" to effectuate these powers. The retention of a congressional "veto" to review executive action taken pursuant to a delegation of legislative powers to the Executive is, proponents of the device argue, merely conditional legislation well within the constitutional powers of Congress to enact.

Proponents of the congressional veto would argue that the Springer decision is not controlling. While proponents of the congressional veto might concede that there are certain inherent executive functions granted to the President by Article II, they would also argue that in the absence of a clear constitutional directive, the division between legislative and executive powers is necessarily flexible. As stated by Justice Jackson, in a concurring opinion, Youngstown Co. v. Sawyer, 343 U.S. 579 (1952), which dealt with, among other things, the powers vested in the President by Article II:

> "The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."

Lower courts have disposed of some cases challenging the constitutionality of the congressional veto. The first case was Clark v. Valeo, 559 F.2d 642 (D.C. Cir. 1977). Although the suit was originally brought by Ramsey Clark, a candidate for the Democratic senatorial nomination in New York, the Justice Department intervened on behalf of the United States, also challenging the constitutionality of these same provisions. Defendants were Francis R. Valeo, Secretary of the Senate, and Edmund Henshaw, Clerk of the House of Representatives, who had ministerial duties in regard to the challenged provisions, and the Federal Election Commission, which had the responsibility of administering them. The five questions certified to the Court of Appeals

are summarized as follows:

(1) Does this action challenging the constitutionality of various congressional veto provisions contained in the Federal Election Campaign Act present a justiciable case or controversy?

(2) Do the congressional veto provisions in the Act which permit a "one House" congressional veto of rules and regulations promulgated by the Federal Election Commission violate the Constitution in that they (a) violate the doctrine of separation of powers, (b) infringe upon the President's veto authority or, (c) are in excess of the grant of legislative powers enumerated in the Constitution?

(3) Do the challenged provisions violate due process under the Fifth Amendment of the Constitution in that a candidate for Federal office is (a) deprived of the right to have laws affecting his candidacy enacted by the full legislative process, including passage by both Houses of Congress, with an opportunity for Presidential veto, (b) invidiously discriminated against by allowing incumbent congressmen, but not challengers, to veto rules and regulations which affect the conduct of their campaigns?

(4) Do the challenged provisions violate the Constitution in that the delegation of the right to veto rules and regulations by one House of Congress is not accompanied by sufficient standards and criteria to guide their exercise of discretion?

(5) Do the challenged provisions which permit a single House of Congress to veto rules and regulations, or selected parts of such rules and regulations, promulgated by the Federal Election Commission violate the Constitution in that they create an extra-Constitutional legislative process in violation of Article I of the Constitution?

The plaintiffs in the Clark suit raised all of the traditional arguments challenging the constitutionality of the congressional veto device outlined above. Both plaintiffs raised specific arguments challenging the "one-House" veto provision on the ground that it violates the conception of a bicameral Congress which is required for legislative activity. Plaintiff Clark also made the argument that the right of incumbent congressional candidates to veto rules and regulations which affect their campaigns violates due process of law if such a right is denied to non-incumbent candidates.

The defendents in the case, Secretary Valeo and the Federal Election Commission, filed briefs challenging the action on the ground that the suit does not present a "case or controversy" because of lack of standing, mootness, ripeness, the prohibition against advisory opinions, and the political question doctrine. The defendants' briefs did not address the merits of the plaintiffs' contentions.

On Jan. 21, 1977, the Court of Appeals dismissed the action in a 6-2 decision. The court held that the case was not ripe for judicial intervention with respect to plaintiff Clark or to the plaintiff Department of Justice suing in the name of the United States. The court indicated that even if the action were ripe, it would refuse to reach the merits of the dispute because of the doctrine of judicial restraint. This decision was affirmed by the Supreme Court, without a hearing or opinion, on June 6, 1977 (Clark v. Kimmett, 431 U.S. 950).

Atkins v. United States, 556 F.2d 1028 (Ct.Cl. 1977), involved a suit

brought by 140 members of the Federal judiciary which challenged the constitutionality of various salary payments made to them in alleged derogation of the compensation guarantees contained in Art. III, Sec. 1, of the Constitution. Part of the plaintiff's case turned on the constitutionality of the congressional veto provision in the Federal Salary Act (2 U.S.C. 351, et seq.). Plaintiffs raised the traditional arguments that have been advanced against the congressional veto device.

In a 4-3 per curiam opinion decided on May 18, 1977, the Court of Claims held constitutional this "one House" congressional veto. Confining its analysis to the congressional veto provision of that Act, and stating that it would not attempt to suggest or forecast the fate of other situations or statutes, the court held that this device is a valid exercise of the authority of Congress to make all laws necessary and proper for executing legislative powers (Art. I, Sec. 1, cl. 8 of the Constitution). The conclusions of the majority are summarized below.

This provision does not violate the principle of bicameralism embodied in Art. I, Sec. 1, which vests all legislative powers in a Congress consisting of a Senate and House. Rejecting presidential recommendations to increase or decrease salaries is a form of legislative activity which does not require the affirmative concurrence of both Houses because the effect of that activity is not to make law but rather to preserve the status quo.

As used in this Act, the congressional veto does not violate Art. I, Sec. 7, cl. 3, which mandates that every order, resolution, or vote to which the concurrence of each House may be necessary must be presented to the President for approval or disapproval. This constitutional clause is not applicable because the concurrence of both Houses is not necessary to disapprove a presidential recommendation.

The doctrine of separation of powers, specifically Art. II, Sec. 1, which vests executive power in a President, is not infringed by this congressional veto because the pay-setting function is basically legislative. The delegation of authority to the President to recommend adjustments makes him an agent of Congress for this purpose. The device permits either House to supervise his exercise of this delegated authority.

Three dissenting judges rejected each of these findings, holding that the congressional veto violates the principle of bicameralism, the "Presentation" clause, and the doctrine of separation of powers.

McCorkle v. United States, 559 F.2d 1258 (4th Cir. 1978), affirmed a district court dismissal of a suit brought by a high level civil servant on behalf of Federal employees in grades 15 through 18 of the General Schedule. The appellants had been denied a salary increase recommended by the President because the Senate in March 1974 exercised a legislative veto. McCorkle asked the court to declare unconstitutional the "one House" veto provision, 2 U.S.C. 359, (1)(B), of the Federal Salary Act of 1967 on the ground that it abridged bicameralism, separation of powers, and the presidential veto. He also asked the court to declare that the General Schedule employees were entitled to damages based on the salary increase they would have received if the recommendation had become effective.

The court refused to reach the question of constitutionality of the provision because it found that Congress would not have passed the Act without retaining authority to veto presidential recommendations. "Voiding the one-house veto as unconstitutional while leaving presidential authority

intact would increase the President's power over salaries far beyond the intention of Congress." (McCorkle, p. 1262.) The court concluded that the "one-House" veto was inseparable from parts of the statute which empowered the President to make potentially binding recommendations and that provisions for the recommendations to become effective could not stand in isolation. Accordingly, McCorkle and the other employees were not entitled to damages based on the recommendation.

As noted previously, the Supreme Court denied petitions to review both cases on Jan. 9, 1978 (Atkins v. United States (434 U.S. 1009), and McCorkle v. United States (434 U.S. 1011)). The effect of this denial was to let stand the lower court dispositions.

On Dec. 22, 1980, a 3-judge panel of the Court of Appeals for the Ninth Circuit unanimously voided as unconstitutional section 244(c)(2) of the Immigration and Nationality Act (8 U.S.C. sec. 1254(c)(2)). See Chadha v. Immigration and Naturalization Service, 634 F. 2d 408 (9th Cir., 1980). Under this provision, either House could disapprove a decision of the Attorney General to suspend deportation that would cause of hardship to an alien. The House had disapproved suspension of deportation of an alien whose race would have made his return to his native country extremely difficult, if not impossible.

The court found that the statutory scheme violated the doctrine of separation of powers. The congressional veto following administrative proceedings to suspend deportation was deemed to be an impermissible intrusion on functions constitutionally granted to the executive and judicial branches. The twin purposes of separation of powers are to prevent concentrations of power and to promote governmental efficiency by assigning many functions to designated authorities. The court defined a violation of this doctrine as an assumption by one branch of powers that are central or essential to the operation of a coordinate branch, provided also that the assumption disrupts the coordinate branch in the performance of its duties and is unnecessary to implement a legitimate governmental policy.

The congressional veto of a suspension of deportation could be viewed: (1) as a correction of judicial or executive misapplication of the Immigration and Nationality Act; (2) as a means for sharing the administration of the statute with the executive branch on an ongoing basis; or (3) as an exercise of a residual legislative power to define substantive rights under the law, an exercise that falls short of statutory amendment. By performing a corrective function, Congress would encroach upon an ordinarily judicial or internal administrative function that would in effect render judicial interpretations impermissible advisory opinions. Sharing administration of a statute by addition of more precise statutory criteria on an accretive, case-by case basis is impermissible because it is law enforcement, a function the Constitution assigns to the executive branch. To alter the alien's right not to be deported, his status following a decision to suspend deportation, would require action by both Houses of Congress and presentation to the President; disapproval of suspension by a single House is not sufficient under the Constitution.

The court concluded that the single House disapproval scheme rendered meaningless the executive's duty to faithfully execute the law and rendered equally nugatory the role of judicial review in determining the procedural or substantive fairness of administrative action.

Despite its rejection of this particular congressional veto, the court

limited the applicability of its opinion. The decision noted that the court was not analyzing a situation in which the "unforeseeability of future circumstances or the broad scope and complexity of the subject matter of an agency's rulemaking authority preclude the articulation of specific criteria in the governing statute itself." Such factors may dictate a different result.

On Oct. 5, 1981, the Supreme Court granted a petition to review the opinion of the Ninth Circuit in Immigration and Naturalization Service (INS) v. Chadha, No. 1832, House of Representatives v. INS, No. 2170, and Senate v. INS, No. 2171.

Oral arguments were heard on Feb. 22, 1982, but a decision was not issued. The case has been scheduled for reargument on Dec. 7, 1982.

In Pacific Legal Foundation v. Watt, 50 U.S.L.W. 2394 (Jan. 12, 1982), the U.S. District Court for Montana reviewed section 204(e) of the Federal Land Policy and Management Act (43 U.S.C. sec. 1714(e)) in light of the ruling of the Ninth Circuit in Chadha. This section provides that the Secretary of the Interior shall immediately withdraw public lands from leasing activities when he determines or the House or Senate committee with jurisdiction over interior matters notifies him that an emergency exists and that extraordinary measures must be taken to preserve values that would otherwise be lost. The Secretary made the withdrawal of lands in certain wilderness areas in Montana because a resolution adopted by the House Committee on Interior and Insular Affairs directed him to do so.

Both the plaintiffs, who were applicants for oil and gas leases, and the Secretary alleged that the congressional directive was unconstitutional as a violation of the doctrine of separation of powers. The court agreed under certain interpretations of the committee's authority. If the provision were interpreted as a device for correcting executive misapplication of a statute, the committee would be performing a role that is ordinarily a judicial or internal administrative responsibility. If it were viewed as a means for sharing the administration of wilderness and public lands statutes with the executive branch on an ongoing basis, the committee would be performing an executive function. Finally, an unrestricted emergency withdrawal could be seen as an exercise of a residual legislative power that would be subject to the requirements of bicameralism. To avoid these constitutional infirmities, the court interpreted the provision to authorize the Secretary rather than the committee to establish the scope and duration of an emergency withdrawal.

On Jan. 29, 1982, a three-judge panel of the Court of Appeals for the District of Columbia Circuit, in a broadly written opinion, unanimously held unconstitutional section 202(c) of the National Gas Policy Act (15 U.S.C. sec. 3342(c)). See, Consumer Energy Council of America v. Federal Energy Commission, 673 F. 2d 425 (1982). This section provides that natural gas pricing rules would become effective only if neither House within 30 days adopted a resolution disapproving the rule. The House had disapproved a rule that would have extended incremental pricing of natural gas to all nonexempt industrial users of natural gas as a boiler fuel.

The court held that the one-House veto of agency rules abridges the constitutional process for lawmaking in Article I, Section 7 and the doctrine of separation of powers. The court asked whether disapproval of agency rules was a form of lawmaking action and, if so, whether there was any reason to conclude that it did not need to conform to the traditional requirements for

lawmaking, the principle of bicameralism and presentation to the President for approval or disapproval. Rejecting the contention that the rule was a mere proposal, the court held that it changed the law with respect to incremental pricing; disapproval of it, therefore, must meet the requirements for lawmaking. The court also held that the veto violated the principle of separation of powers because it permitted intrusion into administrative decisionmaking; and that the function of agency rulemaking, once properly delegated, is essentially one of administering and enforcing the law. A one-House veto represents an unconstitutional attempt by Congress to retain direct control over delegated administrative power and insert one of its houses as an effective decisionmaker. Exercise of the veto was also found to be an unconstitutional intrusion on exercise of judicial power to review agency action. A petition for review by the Supreme Court has been filed. U.S. Senate v. Consumer Energy Council of America and U.S. House of Representatives v. Consumer Energy Council of America, 51 U.S.L.W. 3212 (nos. 82-177 and 82-209) (Aug. 2 and 6, 1982).

On Oct. 22, 1982, the full Court of Appeals for the District of Columbia Circuit unanimously held unconstitutional section 21(a) of the Federal Trade Commission Improvements Act of 1980 (15 U.S.C. sec. 2881(c)). See, Consumers Union of the United States, Inc., et al. v. Federal Trade Commission, et al., (D.C. Civ. Action No. 82-1737). This provision provides that final rules promulgated by the Federal Trade Commission would become effective after 90 days of continuous session unless both Houses of Congress adopt a concurrent resolution disapproving it. In May of 1982, the House and Senate disapproved a rule relating to representations of warranty coverage and disclosures of accurate information in connection with the sale of used automobiles. Stating only that it was basing its decision on reasons given in the Consumers Energy Council case, the court held that section 21(a) violated the principles of separation of powers established in Articles I, II, and III of the Constitution and procedures established by Article I for the exercise of legislative powers. The court also declined to express an opinion as to whether the section and S.Con.Res. 60, the resolution disapproving it, improperly delegated administrative power to Congress without any standards for the exercise of that power.

Some state legislative veto provisions have been declared unconstitutional. In State of Alaska v. A.L.I.V.E. Voluntary, Inc., 606 P.2d 769 (1980), the Supreme Court of Alaska by a three to two vote held that a provision allowing both Houses of the legislature to annul regulations by concurrent resolution violated the Constitution of Alaska. Focusing on the fact that the provisions allowed annulment of effective as well as proposed rules and regulations, the majority held that it did not comply with the procedure for enactment of laws explicitly outlined in the state constitution. The Atkins case was distinguished on three grounds: first, that the Court of Claims had limited its holding to a provision involving the narrow role of establishing judicial salaries; second, the fact that the procedure for legislative action is not as explicit in the United States Constitution as the Alaska Constitution; and finally, that a disapproval in Atkins did not change existing law.

In Barker v. Manchin, 50 Law Week 2008 (June 15, 1981), the Supreme Court of West Virginia declared a committee veto statute unconstitutional. The statute provided that no agency rule or regulation could become effective unless it had been presented to and approved by the joint legislative rulemaking review committee within six months after transmittal. The joint committee, comprised of six members of each House of the legislature, was empowered to approve or disapprove, in whole or in part, proposed agency

rules and regulations. The court conceded that the legislature could void or amend administrative rules and regulations when it follows the constitutionally prescribed procedures for enactment of legislation. This committee veto provision, however, was held to violate the doctrine of separation of powers, because it permitted the legislature to control actions of the executive branch without following that procedure.

In a statement (see H.Doc. 95-357 or the Congressional Record [daily ed.] v. 124, June 21, 1978: H5879-H5880), President Carter alleged that congressional vetoes which inject Congress into the details of administering substantive programs and laws are unconstitutional because they infringe on the President's duty to faithfully execute the laws and deny the Chief Executive the opportunity to exercise his role to veto legislation. This device, the President maintained, is also objectionable for policy reasons because it delays the implementation of regulations and prolongs the uncertainty over their effect. The statement announced that congressional vetoes of this type in existing legislation would be treated as "report and wait" provisions and that congressional resolutions to veto executive actions would not be considered legally binding.

On Mar. 18, 1981, Attorney General William French Smith stated that the Reagan Administration views as unconstitutional all congressional veto devices that intrude on the power of the President to manage the executive branch. Specific pieces of legislation will be considered on an individual basis. Department of Justice Press Release, "Statement of Attorney General William French Smith in Response to New York Times Inquiries," Mar. 18, 1981.

LEGISLATION

Several proposals to subject administrative rules to review by Congress have been introduced in the 97th Congress. These proposals include the following:

H.R. 1776 (Levitas)

Procedures for Congressional Review of Agency Rules. Provides that any covered rule or regulation must be transmitted to Congress and can be disapproved by the adoption of a concurrent resolution of disapproval. Such rules or regulations may be disapproved by adoption of a concurrent resolution of disapproval either by (1) both Houses within 90 calendar days of continuous session or by (2) one House within 60 calendar days of continuous session that is not then disapproved by the other House within 30 calendar days. If no committee in either House reports or is discharged from such a disapproval resolution by the end of 60 calendar days of continuous session, and if neither House within that time adopts such a resolution, the rule or regulation can go into effect immediately thereafter. However, if a committee reports or if either House adopts such a resolution within 60 calendar days, the rule or regulation cannot become effective until after 90 calendar days of continuous session. Special rules of procedure are also provided to expedite consideration of a disapproval resolution.

H.R. 1 (Moakley)

Regulation Reform Act of 1981. Provides that agency rules may be disapproved within 60 days after transmittal to Congress by adoption of a joint resolution that requires action by both Houses and signature by the President or override of his veto.

H.R. 97 (Ashbrook), H.R. 314 (Hansen), H.R. 383 (Moorhead), and H.R. 458 (Robinson)

Uniform Procedure for Congressional Review of Agency Rules. Permits either House to disapprove agency rules, except emergency rules, within 60 legislative days after transmittal to Congress.

H.R. 945 (White), H.R. 1128 (Lagomarsino)

To Prevent Adoption of Rules Contrary to Law or Inconsistent with Congressional Intent. Permits either House to disapprove proposed agency rules within 60 legislative days after transmittal to Congress; however, such a rule may be given immediate effect as soon as both Houses adopt a concurrent resolution approving it.

H.R. 3740 (Lott)

Regulatory Control Act of 1981. Requires each agency semiannually to submit to the Secretary of the Senate and Clerk of the House an agenda listing all subject areas in which the agency intends to propose major or significant rules within the next year. No major or significant rule could become effective for specified time periods after transmittal to Congress. During this period, any major or significant rule proposed by an executive agency would be subject to disapproval by concurrent resolution adopted by both Houses if an appropriate committee determines that it is contrary to law, inconsistent with legislative intent, or exceeds jurisdictional authority. Any such rule would be subject to disapproval by joint resolution adopted by both Houses and signed by the President for any other reason. Any major or significant rule proposed by an independent agency would be subject to disapproval by concurrent resolution regardless of the reason.

S. 341 (Levin)

Agency Accountability Act of 1981. Provides that an agenda describing all rules under development must be transmitted semi-annually to the chairmen of appropriate Senate and House legislative committees. Final rules proposed by an agency must be sent to the appropriate committees and will not become effective for at least 20 days. During the 20-day deferral period, any such committee may report out or be discharged from a joint resolution disapproving the rule, in which case it will not become effective until after: (1) 60 additional calendar days of continuous session; or (2) 30 additional calendar days of continuous session if the House to which the committee reported or was discharged from consideration should reject a joint resolution of disapproval or bill modifying the rule. If such a joint resolution or bill were adopted by one House, or if it were still pending in the other House, the rule could not become effective until the end of the 60 day period.

S. 382 (Schmitt)

Regulatory Reduction and Congressional Control Act. Provides that proposed rules and regulations must be transmitted to Congress. They will not become effective if either House within 60 days adopts a resolution of disapproval and the other House does not disapprove the resolution of the first House within 30 days thereafter. Requires that proposed and existing rules be reviewed by appropriate committees to determine whether they comply with a number of specific criteria. A resolution for reconsideration of

existing rules may be adopted by either House and will go into effect unless the other House within 30 days adopts a resolution disapproving the action of the first House. A rule for which a resolution of reconsideration has been adopted will lapse in 180 days unless it is recommended again by the agency, in which case it can be subject to congressional review as a proposed rule.

NOTE: For a comprehensive listing of bills considered the 97th Congress, see IB81138 -- Congressional Veto Legislation: 97th Congress.

HEARINGS

U.S. Congress. House. Committee on the Judiciary. Subcommittee on Administrative Law and Governmental Relations. Congressional review of administrative rulemaking. Hearings, 94th Congress, 1st session. Washington, U.S. Govt. Print. Off., 1975.
"Serial no. 30"

REPORTS AND CONGRESSIONAL DOCUMENTS

Constitutionality of the committee veto. In remarks of Sam Ervin. Congressional record [daily ed.] v. 113, Oct. 11, 1967: 28578-28587.

Dry, Murray. The congressional veto, the Constitution, and administrative oversight. In remarks of Lee H. Hamilton. Congressional record [daily ed.] v. 124, Apr. 6, 1978: H2587-H2594.

U.S. Congress. House. Committee on Government Operations. Extension of reorganization authority of the President. [Washington, U.S. Govt. Print. Off.] 1977. (95th Congress, 1st session. House. Report no. 95-105)

U.S. Congress. House. Committee on the Judiciary. Administrative Rulemaking Reform Act of 1976. Washington, U.S. Govt. Print. Off., 1976. (94th Congress, 2d session. House. Report no. 94-1014)

U.S. Congress. House. Select Committee on Government Operations. Reorganization Bill of 1939. [Washington, U.S. Govt. Print. Off.] 1939. (76th Congress, 1st session. House. Report no. 120)

U.S. Congress. Senate. Committee on Expenditures in the Executive Departments. Reorganization Act of 1949. [Washington, U.S. Govt. Print. Off.] 1949. (81st Congress, 1st session. Senate. Report no. 232)

U.S. Congress. Senate. Committee on Governmental Affairs. Reorganization Act of 1977. [Washington, U.S. Govt. Print. Off.] 1977 (95th Congress, 1st session. Senate. Report no. 95-32)

ADDITIONAL REFERENCE SOURCES

Abourezk, James. The congressional veto: A contemporary response to executive encroachment on legislative prerogative.

Indiana law journal, v. 52, no. 2, winter 1977: 323-344.

Bolton, John R. The legislative veto: Unseparating the powers. Washington, American Enterprise Institute for Public Policy Research, 1977.

Bruff, Harold, and Ernest Gellhorn. Congressional control of administrative regulation: A study of legislative vetoes. Harvard law review, v. 90, no. 7, May 1977: 1369-1440.

Cohen, Richard E. Junior Members seek approval for wider use of the legislative veto. Washington, National journal, Aug. 6, 1977: 1228-1232.

Congressional veto bill being pushed in House but faces major hurdles. Washington, Congressional quarterly, Mar. 4, 1978: 575-576.

Congressional veto of administrative action: The probable response to a congressional challenge. (Note.) Duke law journal, May 1976: 285-300.

Cooper, Joseph and Ann. The legislative veto and the Constitution. George Washington law review, v. 30, March 1962: 467-516.

Dixon, Robert G., Jr. The congressional veto and separation of powers: The Executive on a leash. North Carolina law review, v. 56, January 1978: 423-496.

Fisher, Louis. A political context for legislative vetoes. Political science quarterly, v. 93, Summer 1978: 241-254.

----- The Constitution between friends. New York, St. Martin's Press, 1978. 274 p.

Ginnane, Robert W. The control of Federal administration by congressional resolutions and committees. Harvard law review, v. 66, February 1953: 569-611.

Harris, Joseph P. Congressional control of administration. Brookings Institution. [1964] p. 217-248.

Javits, Jacob K., and Klein, Gary J. Congressional oversight and the legislative veto: A constitutional analysis. New York University law review, v. 52, no. 3, June 1977: 455-497.

McGowan, Carl. Congress, court, and control of delegated power. Columbia law review, v. 77, no. 8, December 1977: 1119-1174.

Miller, Arthur S., and George M. Knapp. The congressional veto: Preserving the constitutional framework. Indiana law journal, v. 52, no. 2, winter 1977: 367-396.

Nathanson, Nathaniel L. Separation of powers and administrative law: delegation, the legislative veto, and the "independent" agencies. Northwestern University law review, v. 75,

Feb. 1981: 1064-1111.

Opinions of the Attorneys General, v. 6 (1854) p. 680; v. 37 (1933) p. 56.

Record of the Association of the Bar of the City of New York. Committee on Federal Legislation. The legislative veto. v. 34, no. 3, Mar. 1979: 208-218.

Rosenberg, Morton. Congressional review of administrative action. Federal bar news, v. 28, no. 3, March 1981: 29-30, 36.

Stewart, Geoffrey S. Constitutionality of the legislative veto. Harvard journal on legislation, v. 13, no. 3, April 1976: 593-619.

U.S. Library of Congress. Congressional Research Service. Congressional review, deferral and disapproval of Executive actions: A summary and an inventory of statutory authority [by] Clark F. Norton. Apr. 30, 1976. Washington, 1976. 127 p.
Multilith 76-88G

----- Congressional veto provisions and amendments: 96th Congress [by] Clark F. Norton. [Washington] (Updated regularly)
Issue Brief 79044

----- The committee veto: Its current use and appraisals of its validity [by] Norman J. Small. Jan. 16, 1967. Washington, 1967. 102 p.

Watson, H. Lee. Congress steps out; a look at congressional control of the Executive. California law review, v. 63, July 1975: 983-1094.

Weekly Compilation of Presidential Documents. Office of the Federal Register, v. 11, no. 22 (May 26, 1975); v. 11, no. 33 (Aug. 11, 1975); v. 12, no. 19 (May 7, 1976); v. 12, no. 20 (May 11, 1976).