



Memorandum

March 27, 2006

TO: Rep. Edward Markey
Attention: Jeff Duncan

FROM: Todd B. Tatelman
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SUBJECT: Legal Analysis of Issues Related to *INS v. Chadha* and the Atomic Energy Act

This memorandum is in response to your request for a legal analysis of legislation proposed by the Bush Administration that would appear to create an exception for India from certain sections of the Atomic Energy Act (AEA). Given that both proposed versions of legislation¹ provide express waivers of sections of the AEA containing Congressional approval or disapproval provisions, an analysis of these provisions in light of the Supreme Court's decision in *INS v. Chadha*² appears relevant in evaluating the impact that enactment of such legislation might have. A separate CRS memorandum prepared by Sharon Squassoni from our Foreign Affairs, Defense, and Trade Division addresses additional concerns and questions raised by this proposed legislation.

In *Chadha*, the Supreme Court analyzed §244(c)(2) of the Immigration and Nationality Act, which granted to Congress the power to exercise a legislative veto over decisions made by the Attorney General under the Act. Specifically, §244(c)(2) enabled Congress to overrule deportation decisions by the passage of an appropriate resolution by one House of Congress.³ The Court noted that a legislative veto constituted an exercise of legislative power, as its use has "the purpose and effect of altering the legal rights, duties, and relations of persons...outside the legislative branch."⁴ As such, the Court concluded that a legislative veto could only be exercised in comportment with the bicameralism and presentment requirements of Article I.⁵ Given that the statute authorized either House of Congress to

¹ See H.R. 4974, 108th Cong. (2d. Sess.) (2006); see also S. 2429, 108th Cong. (2d Sess.) (2006).

² 462 U.S. 919 (1983).

³ See *id.* at 923

⁴ *Id.* at 952.

⁵ *Id.* at 954-955. The Constitution at Article I, § 7 states that "Every Order, Resolution, or Vote to (continued...)"

execute a legislative veto, the Court determined that the provision was an unconstitutional violation of the separation of powers doctrine.⁶ With its decision in *Chadha*, the Supreme Court established that Congress may exercise its legislative authority only “in accord with a single, finely wrought and exhaustively considered procedure,” namely bicameral passage and presentment to the President.⁷

The maxims delineated in *Chadha* are fully applicable to each of the AEA provisions referenced in the proposed legislation; however, the outcomes may be different depending on which specific provision is the subject of discussion. For example, section 123(d) contains two separate clauses that permit the adoption of congressional resolutions. The first provision, arguably a “joint resolution of disapproval,” applies in cases where the President’s submission complies with all of the requirements of section 123(a), and states that such a “proposed agreement for cooperation shall not become effective if during such sixty-day period the Congress adopts, and there is enacted, a *joint resolution* stating in substance that the Congress does not favor the proposed agreement for cooperation.”⁸ The second provision, arguably a “joint resolution of approval,” applies in situations where the proposed agreement has been exempted by the President from any of the conditions of section 123(a), and states that it “shall not become effective unless the Congress adopts, and there is enacted, a *joint resolution* stating that the Congress does favor such agreement.”⁹ Each of these provisions would appear to be consistent with the Court’s decision in *Chadha* as joint resolutions, whether of approval or disapproval, require passage in both Houses of Congress and must be presented to the President for his signature or veto.

Conversely, the provisions contained in sections 128 and 129 of the AEA potentially present *Chadha* problems. Specifically, section 128(b)(1) requires only that Congress adopt “a *concurrent resolution* stating in substance that the Congress does not favor the proposed export.”¹⁰ Similarly, section 128(b)(2) states that the President’s determination is only effective if Congress “does not adopt a *concurrent resolution* stating in substance that it disagrees with the President’s determination.”¹¹ Moreover, section 129 also states that “any such determination shall not become effective if during such sixty-day period the Congress

⁵ (...continued)

which the Concurrence of the Senate and the House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President ... according to the Rules and Limitations prescribed in the Case of a Bill.”

⁶ *Id.* at 954-955. Shortly after its decision in *Chadha*, the Court without opinion and with one dissent summarily affirmed lower court opinions that had struck down a two-House legislative veto provision of the Federal Trade Commission Improvements Act, 15 U.S.C. § 57a-1. *See United States Senate v. Federal Trade Commission*, 463 U.S. 1216 (1983); *United States House of Representatives v. Federal Trade Commission*, 463 U.S. 1216 (1983).

⁷ *Id.* at 951.

⁸ *See* Pub. L. No. 99-64, § 301(a)(1), 99 Stat. 159, 160 (1985) (codified as amended at 42 U.S.C. § 2153(d) (2000)) (emphasis added).

⁹ *Id.* at §301(b)(2) (emphasis added).

¹⁰ Atomic Energy Act of 1947, ch. 724, § 128 (1947) (codified as amended at 42 U.S.C. § 2157(b)(1) (2000)) (emphasis added).

¹¹ *Id.* (codified as amended at 42 U.S.C. § 2157(b)(1) (2000)) (emphasis added).

adopts a *concurrent resolution* stating in substance that it does not favor the determination.”¹² Unlike joint resolutions, concurrent resolutions do not require presentment to the President and, therefore, are arguably inconsistent with the Supreme Court’s decision in *Chadha*. While Congress, of course, remains free to adopt concurrent resolutions pursuant to this statute, it is unlikely that they would have the legal force and effect originally intended. In other words, it is unlikely that a concurrent resolution would survive judicial review and, thus, would not appear to be an effective means of nullifying presidential action. It should also be noted that section 128(b)(3) also provides for a resolution of disapproval, however, it does so using only the generic word “resolution” without any additional specification.¹³ In light of the Court’s decision in *Chadha*, it would appear that the only permissible interpretation of this statute would be for Congress to invoke the provision of 128(b)(3) by use of a joint resolution. Any other available resolution would appear to violate the presentment requirements of Article I and, therefore, would likely be considered unconstitutional by a reviewing court.

Given the varying wording of the congressional review provisions of the AEA, it appears possible to argue that Congress’s power with respect to approval and/or disapproval of presidential decisions is much more limited than may have been originally intended when the AEA was initially adopted. Thus, when considering the impact of the proposed legislation it appears possible to argue that the language in proposed sections (a)(2) and (a)(3) may not have as broad an effect as it may appear. If in fact the portions of sections 128 and 129 that specify the use of concurrent resolutions are unconstitutional as inconsistent with *Chadha*, then new legislation waiving their application with respect to India arguably has limited effect. That said, *Chadha* arguably only applies to congressional review provisions. Thus, to the extent that any of the above-cited sections contain other substantive legal provisions, such as requiring an automatic delay on the exportation of certain materials for a period of time, it would appear to be possible to argue that those provisions are severable and, therefore, would be binding unless subsequent legislation waives their application, which the proposals appear to do.¹⁴

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¹² *Id.* at § 129 (codified as amended at 42 U.S.C. § 2158 (2000)) (emphasis added).

¹³ *See id.* at 128(b)(3) (codified as amended at 42 U.S.C. § 2157(b)(3) (2000)).

¹⁴ The Court in *Chadha* held that the legislative veto provision at §244(c)(2) of the Immigration and Nationality Act was severable for similar reasons, stating in the syllabus of the opinion: “Section 244(c)(2) is severable from the remainder of 244. Section 406 of the Act provides that if any particular provision of the Act is held invalid, the remainder of the Act shall not be affected. This gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or any part thereof, to depend upon whether the veto clause of 244(c)(2) was invalid. This presumption is supported by 244’s legislative history. Moreover, a provision is further presumed severable if what remains after severance is fully operative as a law. Here, 244 can survive as a ‘fully operative’ and workable administrative mechanism without the one-House veto.” *Chadha*, 462 U.S. at 920.