

6

The War Powers Resolution "Veto" -- Section 5(c)

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Section 5 Congressional Action

....

(c) Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.¹

This chapter examines §5(c) of the War Powers Resolution (“WPR”) of 1973. This section is often called the “legislative veto” or the “concurrent resolution” section. A concurrent resolution of Congress differs from a joint resolution and from ordinary legislation in that it is never submitted to the president for approval and, therefore, not subject to his veto. The first part of the chapter discusses the legislative origins of §5(c). The second part undertakes a critical analysis of §5(c), focusing on its constitutionality in light of the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*.²

Legislative History and Background

Section 5 is often considered the heart of the WPR.³ Section 5(c) is perhaps the most controversial provision in a controversial act.⁴ The legislative history of the section is sparse but pointed. It provides not only a good basis for understanding congressional intent, but also insight into the issue of constitutionality.

The House Report states that §5(c)

¹ 50 U.S. C. §1544 (1992 (WPR §5(c))).

² 462 U.S. 919 (1983).

³ Patrick D. Robbins, *The War Powers Resolution After Fifteen Years: A Reassessment*, 38 AM. U. L. REV. 141, 157 (1988).

⁴ *Id.*

authorizes the use of a concurrent resolution to “veto” or disapprove of an action of the President committing United States Armed Forces to hostilities. In effect, the joint resolution “endows” this concurrent resolution provision with the binding force of statute. Since the language applies to a situation where there is no Congressional authorization for the President's action it thereby avoids the possibility of a Presidential veto -- and resulting impasse -- which would be possible of a bill or joint resolution.⁵

In essence, Congress wanted a veto-proof method, of demonstrating that it did not wish to exercise its constitutionally-delegated power to declare war.⁶

Critical Analysis

The Decision in INS v. Chadha

On June 23, 1983, The Supreme Court decided *Immigration and Naturalization Service v. Chadha*.⁷ It declared unconstitutional a one-house legislative veto that Congress had reserved to itself to disapprove of immigration decisions.⁸ The Court ruled that actions by Congress which have the effect of "altering the legal rights, duties and relations" of persons outside the legislative branch must meet two requirements: bicameral approval⁹ (action by both houses) and presentment¹⁰ (presentation to the president for his signature or veto). It said that

the prescription for legislative action in Art. I, § 1 -- requiring all legislative powers to be vested in a Congress consisting of a Senate and a House of Representatives -- and §7 --requiring every bill passed by the House and Senate, before becoming law, to be presented to the President, and if he disapproves, to be repassed by two-thirds of the Senate and House -- represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.¹¹

⁵ H. REP. No. 93-287, 93d Cong., 1st Sess. (1973), reprinted in 1973 U.S.C.C.A.N. 2346, 2349.

⁶ Comment, *Congressional Control of Presidential Warmaking Under the War Powers Act: The Status of a Legislative Veto After Chadha*, 132 U. PA. L. REV. 1217, 1225 (1984); Robbins, *supra* note 3, at 158.

⁷ 462 U.S. 919 (1983).

⁸ *Id.* at 959. See also LOUIS FISHER, ONE YEAR AFTER *INS v. CHADHA*: CONGRESSIONAL AND JUDICIAL DEVELOPMENTS I (CRS REPORT TO CONGRESS, JUNE 23, 1984).

⁹ U.S. CONST. art. I, §7, cl. 3.

¹⁰ U.S. CONST. art. I, §7, cl. 2.

¹¹ *Chadha*, 462 U.S. at 921.

Only legislative action triggers these constitutional requirements. The important question is therefore whether or not an action is a “legislative action.” This question turns not on form but on substance: whether the action involves a matter which is properly to be regarded as legislative in its “character and effect.”¹²

The Court continued the argument against legislative vetoes by saying that “Congress must abide by its delegation of authority until the delegation is legislatively altered or revoked [with the presentment and bicameralism requirements met].”¹³ The delegation component of the *Chadha* logic is extremely important.¹⁴ The Court stated that “Congress made a deliberate choice to delegate to the Executive Branch . . . the authority to allow deportable aliens to remain in this country”¹⁵ “[T]his choice to delegate authority is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Article I.”¹⁶

The Court also contrasted “Executive action under legislatively delegated authority that might resemble ‘legislative’ action in some respects,” noting that it is not subject to the approval of both houses of Congress and the president for the reason that the Constitution does not so require. That kind of Executive action is always subject to check by the terms of the legislation that authorized it”¹⁷

The Court's ruling was very broad, and its reasoning appeared to invalidate every variety of legislative veto: one-House, two-House, and committee.¹⁸ Both Justice Powell's concurrence and Justice White's dissent state that the Court's opinion will invalidate all legislative veto provisions.¹⁹ Furthermore, Justice White includes a list of affected legislative veto provisions, which includes §5(c) of the WPR.²⁰

¹² *Id.* at 952; see also RAYMOND J. CELADA, EFFECT OF THE LEGISLATIVE VETO DECISION ON THE TWO-HOUSE DISAPPROVAL MECHANISM TO TERMINATE U.S. INVOLVEMENT IN HOSTILITIES PURSUANT TO UNILATERAL PRESIDENTIAL ACTION 8 (CRS REPORT TO CONGRESS, AUGUST 24, 1983).

¹³ *Chadha*, 462 U.S. at 922.

¹⁴ See Charles Tiefer, *The FAS Proposal: Valid Check or Unconstitutional Veto?*, in FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES? 143, 147-48 (Peter Raven-Hansen ed., 1987).

¹⁵ *Chadha*, 462 U.S. at 954.

¹⁶ *Id.*

¹⁷ *Id.* at 953.

¹⁸ *Id.*

¹⁹ *Id.* at 959, 967.

²⁰ *Id.* at 1003.

The conclusion that all legislative vetoes are invalidated was reinforced by the Court two weeks later when it affirmed two lower court decisions, striking, respectively, a two-House veto of a regulation²¹ and a one-House veto of a regulation.²²

Effect of INS v. Chadha On Section 5(c)

Three concepts control the constitutionality of §5(c) after *Chadha*. These are: 1) the requirements for “legislative action”; 2) the breadth of *Chadha*; and 3) the operative effect of the WPR.

Under the assumption that Congress has exclusive control over war powers and that presidential commitment of troops is unconstitutional unless it falls within the narrow exception relating to repelling sudden attacks,²³ there are two interpretations of the WPR. One is that it has no legislative effect whatsoever and merely sets forth a congressional plan of action to be followed should the executive act in an unconstitutional manner.²⁴ This means that Congress has merely clarified its responses to this usurpation, making its disapproval clear by using a concurrent resolution to the president to cease and desist his unconstitutional actions.²⁵

An alternative interpretation under the same assumption is that the WPR delegates congressional war power to the president.²⁶ Under this interpretation, Congress has authorized the president to wage war for up to sixty days.²⁷

Finally, a third interpretation is possible under a different assumption regarding the division of war powers between the Congress and the president. This assumption is that the war powers are shared between the two with no clear delineation of each branch's power.²⁸ This sharing is perhaps best described by Justice Jackson in his concurring opinion in the *Steel Seizure Case*.²⁹ Jackson stated that “[p]residential powers are not fixed, but fluctuate, depending

²¹ See *United States Senate v. Federal Trade Commission*, 463 U.S. 1216 (1983).

²² See also *Process Gas Consumers Group v. Consumers Energy Council of America*, 463 U.S. 1216 (1983) (affirming judgment on or denying certiorari to eight requests for relief from rulings invalidating legislative vetoes.)

²³ See *supra* Chapter I.

²⁴ FISHER, *supra* note 8, at i.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*; but see WPR §8(d).

²⁸ FISHER, *supra* note 8, at i.

²⁹ *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

on their disjunction or conjunction with those of Congress.”³⁰ He identified three zones of presidential power.³¹ The middle zone is the “zone of twilight,” in which the president and Congress have concurrent authority.³² In this zone, “congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.”³³ By contrast, when the president acts directly contrary to the will of Congress, “his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”³⁴

Under this third interpretation, the WPR is neither a delegation nor a nondelegation of war powers to the president.³⁵ Instead, it is a recognition that these powers are shared and, therefore, fall within Justice Jackson’s “zone of twilight.”³⁶ Therefore, Section 5(c) provides a mechanism by which to shift presidential action from the “zone of twilight” to the third zone, where the president’s power is at its lowest ebb. It does so by placing the action in direct conflict with the will of Congress as expressed in its concurrent WPR.³⁷

These three interpretations form the foundation of many of the arguments for and against the constitutionality of §5(c) after *Chadha*. These are consisted next in turn.

Section 5(c) is Constitutional. The *Chadha* Court was concerned that the principle of separation of powers was undermined by Congress delegating lawmaking authority to the executive branch while maintaining control over the administration of such laws using a legislative veto.³⁸ However, if the WPR neither delegates lawmaking authority to the executive branch nor attempts to interfere with the administration of the laws,³⁹ the concurrent resolution provision does not undermine that principle.⁴⁰

³⁰ *Id.* at 635.

³¹ *Id.* at 635-38.

³² *Id.* at 637.

³³ *Id.*; *See* Comment, *supra* note 6, at 1236.

³⁴ *Youngstown*, 343 U.S. at 638.

³⁵ Comment, *supra* note 6, at 1236.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *See* Cyrus Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 U. PA. L. REV. 79, 86 (1984).

³⁹ *Id.*

⁴⁰ *Id.*

The WPR does not delegate the power to initiate war to the president. In fact, WPR §8(d)(2) specifically disavows any such delegation of power.⁴¹ If the power to declare (initiate) war belongs exclusively to Congress, then the President is precluded from exercising that power even if Congress does nothing to stop him.⁴² Under this analysis, a concurrent resolution issued pursuant to §5(c) directing the president to withdraw troops would not “alter the legal rights, duties and relations of persons . . . outside the legislative branch.”⁴³ The President may not use the troops without congressional authorization, and, after a concurrent resolution under §5(c), he still may not use the troops. In essence, the concurrent resolution provision of §5(c) would not deprive the President of the power to declare war, because he never had it in the first place.⁴⁴ It would simply act as a manifestation of congressional refusal to declare war.⁴⁵

This interpretation was advanced by Representative Clement Zablocki, chief architect of the WPR.⁴⁶ He defended the concurrent resolution mechanism by arguing that when the President commits U.S. forces to hostilities, he usurps part of Congress’ authority to declare war.⁴⁷ Congress, therefore, must have the means to counteract that unconstitutional assumption of authority at any time by concurrent resolution which he cannot veto.⁴⁸

In short, §5(c) should be reread in the context of a total package attempting in concrete terms to approximate the accommodation reached by the Constitution's framers.⁴⁹ The President could act militarily in an emergency, but was obligated to cease and desist in the event Congress did not approve as soon as it had an opportunity to do so.⁵⁰ The scheme fixes sixty days as the

⁴¹ This subsection states that “[n]othing in this joint resolution - shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances, which authority he would not have had in the absence of this joint resolution.”

⁴² Martin Wald, *The Future of the War Powers Resolution*, 36 STAN. L. REV. 1407, 1432 (1984).

⁴³ *Chadha*, 462 U.S. at 989.

⁴⁴ Wald, *supra* note 42, at 1432.

⁴⁵ *Id.*

⁴⁶ Robbins, *supra* note 3, at 158.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See John H. Ely, *Suppose Congress Wanted a War Powers Act that Worked?*, 88 COLUM. L. REV. 1379, 1396 (1988).

⁵⁰ Joseph Biden & John B. Ritch III, *The War Power at a Constitutional Impasse: A "Joint Decision" Solution*, 77 GEO. L.J. 367, 389 (1988).

outer limit of time Congress could reasonably need to make such a decision.⁵¹ If, however, Congress acts more quickly, it can either authorize continued military activity, or indicate under §5(c) that it is unprepared to do so.⁵² This analysis leads to the conclusion that §5(c) bears little resemblance to the “legislative veto” mechanism invalidated in *Chadha*.⁵³

However, this analysis assumes that the WPR makes no delegation to the President. There are, however, two arguments for the constitutionality of §5(c) even if the WPR is construed as a delegation of warmaking authority to the President for sixty or ninety days. They are: 1) that there should be a national security exception to *Chadha*, and 2) that the concurrent resolution mechanism in §5(c) falls into a class of “extraordinary” legislation which does not require presentment to the President.

Some commentators argue that *Chadha* should not be read to extend to war powers or foreign relations because it is not the “kind of Executive action [which] is always subject by check to the terms of the legislation that authorized it.”⁵⁴ This theory is supported by the Supreme Court decision in *United States v. Curtiss-Wright Export Corp.*⁵⁵ There, the Supreme Court considered “the differences between the powers of the Federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.”⁵⁶ The Court acknowledged that it was sustaining a delegation of authority that would have been invalid if confined to internal or domestic affairs.⁵⁷ Therefore, the Court distinguished the foreign affairs sphere from the domestic delegation model.⁵⁸

The Supreme Court has also distinguished between war powers and the domestic delegation model.⁵⁹ *Lichter v. United States*⁶⁰ dealt with a delegation of almost unlimited authority to the Executive to recover “excessive” war profits. The Court upheld the provisions against a nondelegation doctrine challenge. It deemed the provisions to be “well within the

⁵¹ Ely, *supra* note 49, at 1396-97.

⁵² *Id.*

⁵³ *Id.* at 1397.

⁵⁴ See Yonkel Goldstein, *The Failure of Constitutional Controls Over War Powers in the Nuclear Age: The Argument for a Constitutional Amendment*, 49 STAN: L. REV. 1543, 1570 (1988).

⁵⁵ 299 U. S. 304 (1936).

⁵⁶ *Id.* at 315.

⁵⁷ *Id.*

⁵⁸ See Tiefer, *supra* note 14, at 149.

⁵⁹ *Id.* at 150.

⁶⁰ 334 U.S. 742 (1948).

constitutional war powers” insofar as we have a Constitution which “must be read with the realistic purposes of the entire instrument fully in mind.”⁶¹

The nondelegation doctrine is thus arguably relaxed in the foreign affairs and war powers areas. This results in congressional delegation of authority which is not “always subject to check by the terms of the legislation that authorized it.”⁶² The legislative veto is a necessary and practical substitute check. Therefore, *Chadha* should not apply to these areas either, otherwise the executive goes almost unchecked.⁶³ Since the Court's analysis in *Chadha* hinged on the principles of checks and balances, as well as separation of powers, the Court's arguments would apply with equal force to the unchecked authority of the President.⁶⁴

The second argument for sustaining §5(c) in the face of *Chadha* assumes that a concurrent resolution under §5(c) is “extraordinary legislation.” In *Hollingsworth v. Virginia*,⁶⁵ the Supreme Court used this theory to reject a claim that the Eleventh Amendment was invalid because it had not met the presentment requirement of Article I.⁶⁶ Justice Chase explained that “[t]here can, surely, be no necessity to answer this argument. The negative of the president applies only to the ordinary cases of legislation: He has nothing to do with the proposition, or adoption, of amendments to the Constitution.”⁶⁷ This rule, as applied to constitutional amendments, has become firmly entrenched in American jurisprudence⁶⁸ and was even restated by the majority in *Chadha*.⁶⁹ Thus, there is a category of “extraordinary” legislation, such as a constitutional amendment, which does not require presentment.⁷⁰

⁶¹ *Id.* at 782-83.

⁶² *Chadha*, 462 U.S. at 953.

⁶³ Tiefer, *supra* note 14, at 150.

⁶⁴ Susan J. Haas, *The Concurrent Resolution Provision of the War- Powers Resolution: Immigration and Naturalization Service v. Chadha and the Sources of Presidential Warmaking Power*, 45 OHIO ST. L.J. 983, 983-85 (1984).

⁶⁵ 3 U.S. (3 Dall.) 378 (1798).

⁶⁶ *Id.* at 381.

⁶⁷ *Id.*

⁶⁸ See *Hawke v. Smith*, 253 U.S. 221, 229 (1920) (stating that “at an early date this court settled that the submission of a constitutional amendment did not require the action of the President.”)

⁶⁹ *Chadha*, 462 U.S. at 956 (The Court stated that “[a]n exception from the Presentment Clause was ratified in *Hollingsworth v. Virginia* There the Court held presidential approval unnecessary for a constitutional amendment which had passed both Houses of Congress by the requisite two-thirds majority.”)

⁷⁰ *Id.*

The difficulty then lies in showing that a §5(c) resolution is in this category.⁷¹ No court has ever ruled on whether a declaration of war must be presented to the President, giving him the right to veto it.⁷² If the declaration of war need not be presented to the President, then the congressional role in exercising its war powers is arguably similar to its role in exercising its power to propose constitutional amendments.⁷³ The WPR defines a “state of war,” a thing into which the United States may not enter without congressional permission. Therefore, the resolution permitted by §5(c) is simply Congress’ way of indicating whether it wishes to extend that permission.⁷⁴

Section 5(c) is Unconstitutional. The *Chadha* majority clearly required presentation for legislative action which has the “purpose and effect of altering the legal rights, duties and relations of persons, including the Executive Branch . . . outside of the legislative branch.”⁷⁵ Its logic is not context-sensitive and does not differentiate among the subjects or types of legislative veto. Because a §5(c) concurrent resolution arguably has the purpose and effect of altering the legal rights of the President to use troops abroad, it is subject to *Chadha*.⁷⁶

This argument assumes that either the President has acted pursuant to his own war power, or that he is acting under a prior delegation by Congress. The idea is that Congress cannot negative a presidential determination pursuant to lawful authority except by law.⁷⁷ A concurrent resolution unconstitutionally attempts to alter actions lawfully taken by the President as Commander-in-Chief.⁷⁸ It would require the President to cease a military action launched under his independent constitutional authority, or prior statutory authority, without enacting a new statute.

The legislative history for the WPR ironically supports this attack on the constitutionality of §5(c). Recall that the House Report states that §5(c)

⁷¹ See Stephen Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 129-32 (1984) (analogizing a declaration of war to a congressionally proposed constitutional amendment.)

⁷² *Id.* at 131.

⁷³ *Id.*

⁷⁴ *Id.* at 130-31.

⁷⁵ *Chadha*, 462 U.S. at 952; see also Michael J. Glennon, *The War Powers Resolution Ten 1278 Years Later: More Politics Than Law*, 78 AM. J. INT’L L. 571, 573 (1984).

⁷⁶ *Id.*

⁷⁷ CELADA, *supra* note 12, at 10.

⁷⁸ William F. Leahy, *The Fate of the Legislative Veto After Chadha*, 53 GEO. WASH. L. REV. 168, 175 (1984).

authorizes the use of a concurrent resolution to “**veto**” or disapprove of an action of the President committing United States Armed Forces to hostilities. In effect, the joint resolution “endows” this concurrent resolution provision with the **binding force of statute**. Since the language applies to a situation where there is no Congressional authorization for the President’s action it thereby avoids the possibility of a Presidential veto -- and resulting impasse -- which would be possible of a bill or joint resolution.⁷⁹

The House Report's references to §5(c) as a “veto” of presidential action⁸⁰ and to the “binding force of statute”⁸¹ are admissions that §5(c) is a legislative veto invalidated by *Chadha*.

Apparently not content with these statements, the House Report made further reference to the use of a concurrent resolution. It stated that:

Some question has been raised about the constitutionality of the use of a concurrent resolution for this purpose. After careful study of the issues involved the [Foreign Affairs] committee believes that there is ample precedent for the use of the concurrent resolution to “veto” or disapprove a future action of the President, which action was previously authorized by a joint resolution or bill.⁸²

In this statement, the majority not only once again refers to the concurrent resolution mechanism as a “veto,” but also refers to precedents supporting such a mechanism for previously delegated authorization.⁸³ These are the very precedents found constitutionally invalid in *Chadha*.

Chadha's reasoning is extremely broad. *Chadha* is a work of mechanical simplicity that suggests no inclination to distinguish veto provisions that bear little resemblance to that involved in the case.⁸⁴ This reading is buttressed by the sweeping references of the concurrence and dissent.⁸⁵ Justices Powell and White both indicate that they read the Court's opinion as

⁷⁹ H. REP. No. 93-287, *supra* note 5, at 2348 (emphasis added).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 2357.

⁸³ *Id.*

⁸⁴ Ely, *supra* note 49, at 1397.

⁸⁵ *Id.*

invalidating *all* legislative veto provisions.⁸⁶ In fact, Justice White's dissent makes specific reference to §5(c) and concludes that it too falls victim to *Chadha*.⁸⁷

Even if we accept the proponents' argument that there is no delegation in the WPR, some opponents still find §5(c) invalid. Absent a delegation from Congress, they argue that we must accept the argument that the presidential war power in question derives from the Constitution. If Congress is forbidden from attaching the "string" of a legislative veto to a statutorily-delegated power, it is surely prohibited from attaching it to executive power derived directly from the Constitution.⁸⁸

Thus, those seeking to validate §5(c) are confronted with a seemingly insurmountable *Chadha*. If the executive is acting upon its conception of authority, it "presumptively exercise[s] the power the Constitution has delegated to it."⁸⁹ If Congress wishes to exercise its prerogative to alter that presumption, *Chadha* requires it to comply with Article I's presentment and bicameralism requirements.⁹⁰ If the authority instead comes from a delegation by Congress, there is no escaping the dictates of *Chadha*.⁹¹ *Chadha* clearly stands for the proposition that Congress cannot withdraw a delegation without conforming to the requirements of Article I as interpreted in *Chadha*.

Severability

If §5(c) is unconstitutional, does this invalidate the entire WPR? WPR §9 contains a severability clause.⁹² A severability clause creates a "presumption that Congress did not intend the validity of the Act as a whole, or of any part of the Act, to depend upon whether the [challenged provision] was invalid."⁹³ A severability clause, however, does not conclusively resolve the issue of the

⁸⁶ *Chadha*, 462 U.S. at 959, 967.

⁸⁷ *Id.* at 971, 1003.

⁸⁸ Glennon, *supra* note 75, at 577.

⁸⁹ Robbins, *supra* note 3, at 176.

⁹⁰ *Id.*

⁹¹ *Id.* at 179.

⁹² "If any provision of this joint resolution or the application thereof to any person or circumstance is held invalid, the remainder of the joint resolution and the application of such provision to another person or circumstance shall not be affected thereby."

⁹³ *Chadha*, 462 U.S. at 920; *see also* CELADA, *supra* note 12, at 21.

validity of the balance of an act.⁹⁴ It must still be determined whether the act without the unconstitutional provision can operate consistently with the intent of Congress.⁹⁵

Section §5(c) relates exclusively to the concurrent resolution veto provision.⁹⁶ It is thus structurally independent from any delegation to the President and the associated reporting and sunset requirements of §5(a) and §5(b).⁹⁷ Further, since the WPR states that it is not a delegation, and disclaims any intent to “alter constitutional authority,” the answer to the question of whether Congress would have delegated authority without a veto provision appears to be yes, therefore §5(c) is severable.⁹⁸

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 23.

⁹⁷ *Id.*

⁹⁸ *Id.*