

drk 05/19/83

File

To: Mr. Justice Powell

From: Rives

*Helpful
memo -
with which
I largely
agree.*

Re: Justice White's dissent in No. 80-1832, INS v. Chadha

The dissent is well written and focuses on its strongest points: Congress' need to delegate authority to the agencies; the corresponding need to retain control through a legislative veto; and the sweeping effect of the Court's opinion. It articulates these policy concerns well. ^{also} There are, however, policy considerations counseling in favor of the Court's opinion. They are well-expressed in David Martin's article in the Virginia Law Review, The Legislative Veto and the Responsible Exercise of Congressional Power, 68 Va. L. Rev. 253 (1982). Essentially, the point he makes on the other side is that the legislative veto allows Congress to delegate all the hard questions to agencies, thereby avoiding its responsibility to face and decide difficult issues.

With respect to the Presentment Clause, the main argument advanced by the dissent is that the structure of the Government has changed. Agencies are given almost standardless mandates, and they effectively exercise legislative power. The dissent reasons that if an agency may exercise legislative power without complying with the formal requirements of the Presentment Clause, why should Congress have to do so when it exercises the legislative veto. The response,

I believe, lies in who takes the action--i.e., whether it is Congress or an agency. Agency action is subject to other checks, such as a higher standard of judicial review than congressional action. And Congress retains the power to pass a bill changing either the rule promulgated by the agency or more basically the grant of power to the agency. There is no similar restraint on Congress' power. Thus, the formal requirements of the Presentment Clause may be more necessary when Congress acts.

The dissent seems most vulnerable when it refutes the argument that Congress' veto "works a change in the status quo." and therefore must comply with the Presentment Clause. It argues that "the executive's action is simply a recommendation that Congress finalize the suspension--in itself, it works no legal change." I do not see why, however, the dissent bothers with refuting this argument. If it really believes that some forms of legislative action (agency action and the legislative veto) do not need to comply with the Presentment Clause, it does not matter whether the exercise of the veto works a change in anyone's status. Making this argument, however, exposes a weakness in the dissent's position. The executive's action may be, as the dissent argues, only a recommendation that Chadha should not be deported. But if Congress fails to act, the recommended suspension will take place. If the recommendation itself did not change Chadha's status, it is unclear why congressional inaction would do so.

Nevertheless, I think Justice White's dissent gives the most convincing explanation for upholding the legislative veto and

it seems to me that one could join the discussion of the Presentment Clause with no problem.

I do have, however, greater problems with his discussion of separation of powers. He frames the discussion solely in terms of whether the Congress' exercise of power interferes with the Executive's or the Judicial Branch's exercise of their power. This certainly is one way in which separation of power principles can be violated. They also can be violated when one branch assumes a power that is best left to the other branch. That is the kind of violation presented by this case. Congress has acted as an adjudicative body and determined the rights of one individual. This is particularly unfair since Chadha had no opportunity to present his side of the case, no right of review and Congress did not explain its reasons. In short, Chadha was denied all the procedural protections that inhere when a Court or an administrative agency adjudicates a person's rights. It is precisely because Congress lacks these restraints that it violates principles of separation of powers for Congress to act like a court. In so doing, Congress exercises power for which there is no effective check.

If you agree with me, one possibility would be to concur in the judgment on the separation of power ground, but indicate that you agree with Justice White on the Presentment Clause issue.

yes

Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
THE CHIEF JUSTICE

May 27, 1983

Re: Nos. 80-1832, 80-2170, 80-2171, INS v. Chadha

Dear Bill, Thurgood, Harry, Lewis, John and Sandra:

Byron has a forceful dissent in this case. However I believe his valid points were all anticipated. I see no need to respond except to add:

1. At page 24, following the indented quote from Senator Abourezk:

See also Appendix 1 to JUSTICE WHITE's dissent, post at ____.

JUSTICE WHITE undertakes to make a case for the proposition that the one-House veto is a useful "political invention," post at ____, and we need not challenge that assertion. We can even concede this utilitarian argument although the long range political wisdom of this "invention" is arguable. It has been vigorously debated and it is instructive to compare the views of the protagonists. See e.g., Javits & Klein, Congressional Oversight and the Legislative Veto: A Constitutional Analysis, 52 N.Y.U. L. Rev. 455 (1977), and Martin, The Legislative Veto and the Responsible Exercise of Congressional Power, 68 Va. L. Rev. 253 (1982). But policy arguments supporting even useful "political inventions" are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised.

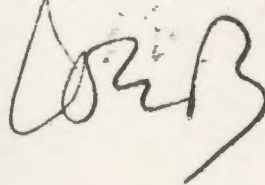
2. At footnote 16, page 31, add the following just before the final sentence of the footnote:

Executive action under legislatively delegated authority that might resemble "legislative" action in some respects 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, and if that authority is exceeded it is open to judicial review independent of the power of Congress to revoke the authority entirely. Congressional action such as the one-House veto which is clearly legislative in both character and effect is not so checked. The need for the check supplied by Art. I, §1, 7 is therefore clear.

3. At footnote 21, page 36, add the following paragraph:

JUSTICE WHITE suggests that the Attorney General's action under §244(c)(1) suspending deportation is equivalent to a proposal for legislation and that because Congressional approval is indicated "by failure to veto, the one-House veto satisfies the requirement of bicameral approval." Post, at _____. However, as the Court of Appeals noted, that approach "would analogize the effect of the one house disapproval to the failure of one house to vote affirmatively on a private bill." 634 F. 2d, at 435. Even if it were clear that Congress entertained such an arcane theory when it enacted §244(c)(2), which JUSTICE WHITE does not suggest, this would amount to nothing less than an amending of Art. I. The legislative steps outlined in Art. I are not empty formalities; they were designed to assure that both Houses of Congress and the President participate in the exercise of lawmaking authority. This does not mean that legislation must always be preceded by debate; on the contrary, we have said that it is not necessary for a legislative body to "articulate its reasons for enacting a statute." United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 179 (1980). But the steps required by Art. I, §1, 7 make certain that there is an opportunity for deliberation and debate. A scheme under which Congress could evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Art. I.

Regards,



Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

P.S. I do not contemplate changing
Sub-part "H" as Harry suggests. That
is purely a matter of style and for
better or worse - probably the latter! -
I prefer my own style. WB

June 1, 1983

80-1832 INS v. Chadha

Dear Chief:

I am circulating an opinion concurring in your judgment.

It has taken me a long time to make a decision. You may recall my doubt that prompted me to join you in carrying this case over from last Term. At Conference, my vote to affirm was tentative. I have been concerned about the consequences of the judicial branch invalidating an arrangement that - despite recurring criticism - has existed since the 1903s.

You have written a strong and persuasive opinion, and you have a Court of six Justices. After a good deal of reflection, I have decided against joining either of the dissenting opinions. I prefer to decide the case on separation of powers grounds rather than the broader Presentment Clauses.

In any event, the issue is now settled.

Sincerely,

The Chief Justice

lfp/ss