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STATEMENT OF LOUIS FISHER

CONGRESSIONAL RESEARCH SERVICE

BEFORE THE

HOUSE COMMITTEE ON RULES

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Chairman Pepper and Members of the Committee:

Thank you for the opportunity to appear today to discuss the legislative veto. The Supreme Court's decision in INS v. Chadha has left Members of Congress somewhat off balance. They are now in the process of rethinking what alternatives should be used to control the executive branch.

Hearings have already been held to explore Chadha's effect on foreign affairs, rulemaking, foreign trade, and other issues. Many actions have been taken in committee and on the floor to create substitutes for the legislative veto. Your hearings are important because they examine the Court's decision and these initial legislative actions in a broader context, studying them in terms of the institutional responsibilities of Congress.

You have placed the issue of the legislative veto in the broadest possible framework. You ask not merely for alternatives to the legislative veto, but alternatives best suited to fulfill the purpose of Congress and to satisfy its constitutional duties.

I think it is to credit of Congress that its reaction to Chadha has been measured and thoughtful. The Court rejected an accommodation that had met the needs of the political branches for almost half a century. It will take time to fill this vacuum. In the search for substitutes, Congress needs to keep a clear focus on its institutional objectives and the relationship it should maintain with the executive and judicial branches.

First, it seems inadvisable to "doctor" existing laws simply by deleting one-House and two-House vetoes and inserting joint resolutions in their place. This approach will be necessary in some cases. It is not a cure-all, however, and can create difficulties for Congress if overused.

For example, it is possible to replace the one-House veto in executive reorganization statutes with a joint resolution to take care of constitutional defects. But why delegate this power in the first place? Why not let the President submit reorganization proposals in bill form, subject to the normal legislative process? This was the practice before 1932 and has been the only only option since April 1981 when the President's reorganization authority expired.

In other words, it may not be necessary to continue delegating some functions and then search for legislative veto substitutes. If a President's reorganization proposal is noncontroversial, why not assume that Coogress will consider it promptly? That was the experience in 1981 when the Reagan

administration proposed to transfer the Maritime Administration from the Commerce Department to the Transportation Department. A reorganization bill was introduced on July 6, passed both Houses that month, and was signed by the President on August 6. The regular process worked.

In some cases Congress may want to take the Supreme Court's decision a step further and insist on the full legislative process: not just action by both Houses and presentation to the President, but placing upon the President the burden of presenting a bill and developing a consensus in each House for its passage. I am not proposing that every executive action survive this process, but it could be relied on more frequently in the future.

Second, before Congress automatically inserts joint resolutions in place of one-House and two-House vetoes, it should review the original reasons for the delegation. As you know, reorganization authority was the forerunner for hundreds of other legislative vetoes. When it was first proposed in 1932, the supporters of this process had an essentially negative view of Congress. The legislative history strongly suggests that Members of Congress were viewed as irresponsible and would not support sensible cost-cutting proposals submitted by the executive branch. The fast-track mechanism would circumvent congressional delays, allowing plans to take effect unless one House vetoed them. Members were restricted to a Yes-or-No vote, without opportunity for amendment. Alteration of executive proposals, it was assumed, would inevitably frustrate retrenchment efforts.

Despite these arguments for "economy and efficiency," reorganization plans have been used only rarely to cut costs. Economy usually results when government functions are eliminated, not when they are reorganized. As I have noted, noncontroversial reorganizations can be enacted through the regular process. If they are controversial — raising important questions of legislative policy — it would seem even more prudent to use the regular process to consider and amend administration proposals.

Third, there is something ironic about combining joint resolutions with fast-track mechanisms. The legislative veto accommodation gave the President a fast track: expedited procedures for bringing resolutions out of committee, time limits for floor debate, and prohibitions on amendments. This was something that all proponents of executive power had longed for. Proposals by the President or executive agencies gained priority over other bills, becoming law unless one or both Houses mobilized the necessary opposition within a specific number of days.

In return for this extraordinary grant of power, Congress retained for itself a legislative veto, allowing it to disapprove presidential initiatives by simple majority vote of both Houses or a single House. The legislative veto avoided the problem of a presidential veto and the need for an override vote by Congress. Even so, advocates of presidential power were pleased by the quid pro quo. The forces of inertia and indecision clearly favored the President. Congress, in effect, let the President set the legislative agenda.

Without access to the legislative veto, why should Members of Congress want to grant a fast-track process to the President? Why should Congress, as a legislative and policymaking body, have to vote up or down on an agency proposal without opportunity for full deliberation and amendment? There are times when Congress is ill-served by forcing measures from committee and giving them expedited treatment on the floor. Slowness, even inaction, can be a virtue in any branch of government. As Justice Brandeis once remarked about the work of the Supreme Court, "The most important thing we do is not doing." A main trend over the past half century has been to make the Court's caseload less mandatory and more discretionary.

Congress appears to be going in the opposite direction. Fast-track mechanisms distort its system for setting priorities. Measures with expedited treatment come to the floor; those without such features may not. The temptation, of course, will be to give more and more bills expedited handling. This tendency is even somewhat evident today. The danger is we may eliminate the discretion, deliberation, selectivity, and judgment that are the qualities of a healthy legislative body.

Fourth, there is substantial risk when Congress tries to be excessively "systematic" and "comprehensive" without the hierarchical structure of an executive agency or a corporation. It is difficult to defend a process that is decentralized and "piecemeal," but the strength of Congress lies very much with the incremental development of law and policy and with the expertise and experience of its standing committees.

Congressional committees have developed working understandings with the agencies they review. Much of the effective work of Congress is done at this level, where problems are manageable and tractable. Of course there are dangers of subgovernments and "iron triangles," but it is impracticable to treat everything at the top level. At some point the quest for being

comprehensive makes everything incomprehensible. Congress must delegate to its committees and subcommittees, just as Presidents must delegate to their departments and agencies. Congress needs methods of coordinating and controlling the activities of committees, but that is different from acting comprehensively.

Widespread use of the joint resolution may needlessly delay many routine agency regulations. If an agency steps out of line, annual review of its rules may be appropriate. But why demand the same treatment — across-the-board — for every regulation of every agency? Most agencies maintain good relations with their oversight committees and adhere relatively closely to congressional intent. Exceptions exist, but they can be treated as exceptions.

Fifth, Congress will use informal methods of exercising control over executive agencies. With or without the blessing of the Supreme Court, congressional committees and subcommittees will insist on a veto power over some agency actions. And agencies will be willing to comply because in return for this level of congressional control they receive important discretionary power and flexibility.

It may come as a surprise to some observers in town that Congress has continued to enact legislative vetoes after the Chadha decision. Are they unconstitutional? By the Court's definition they are. Will this change the behavior between committees and agencies? Probably not. An agency may say to the committee: "As you know, the requirement in this law for committee prior-approval is unconstitutional under the Court's test." Perhaps agency and committee staff will nod their heads in agreement, after which the agency will seek the prior approval of the committee.

Statutes in the future may rely more heavily on "notification" to committees before an agency acts. Here notification does not raise a constitutional issue, since it falls within the report-and-wait category already sanctioned by prior court rulings, but notifications can become a code word for committee prior-approval. Agencies know that harsh penalities can await them if they ignore committee preferences.

Certainly we see this pattern over the last three to four decades with regard to reprogramming. As an informal accommodation between the branches, agencies receive a certain latitude to move funds within an appropriation account, provided they secure committee approval on major shifts. Initially the review was by the Appropriations Subcommittees,

but in recent years the authorizing committees have joined the review process. Since this agreement is informal and nonstatutory, agencies are at liberty to spend the funds as they wish. The cost of offending committees, however, is severe: line-itemization the next year, program cutbacks, and withdrawal of discretionary authority. Chadha does not touch these nonstatutory legislative vetoes. They existed in the past and will persist in the future, perhaps in even greater number because of what the Court decided.

The Court treated a complex issue in simple terms. The unfortunate effect is to convey to the country an impression of government that does not exist in practice. The Court propounded a theory substantially at variance with the operations worked out over decades by both branches of government. As a consequence, we must now look at government at two levels: the way the Court said it is supposed to work, and the way we know it operates to function effectively.

All of this is to say that we should not be too surprised or disconcerted if, after the Court closed the door to the legislative veto, we hear a number of windows being raised and perhaps new doors being constructed, making the executive-legislative structure as accommodating as before for shared power. It may not be a house of aesthetic quality, and certainly does not resemble the model envisioned by the Supreme Court, but is will go a long way in meeting the basic needs of executive agencies and congressional committees. For government to operate smoothly, it requires at least a minimum level of comity and cooperation between the branches. Part of this will depend on "legislative vetoes" in one form or another.