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ARTICLES

COMMENT

NOTE

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From the Editors

The articles in this issue deal with various aspects of administrative law that should be of interest to GAO's staff. Ray Wyrsch's article presents an overview of the administrative process of Federal agencies. Rich Cambosos explains the intricacies involved in the ongoing constitutional challenge of one of the legislative veto mechanisms Congress uses in an effort to increase its oversight role of Federal administrative agencies. Finally, Bert Berlin tells why many Federal employees may be "locked out" on October 1 if the Congress fails to provide their agency's appropriations in a timely manner. And in a note, Suzanne Fishell illustrates what happens when a provision in a treaty conflicts with United States domestic law.

You might have noticed in previous issues the ubiquitous farewell notices of departing editors and our greetings to their replacements. This constant changing of editors is not entirely due to the stress of the job. *Adviser* editors are selected from volunteers within OGC. They agree to serve as "lead editors," that is the editor primarily responsible for the preparation of a particular issue, for two issues. Normally, since the "lead editor" position is rotated among the four editors, an editor serves for approximately two years. Thus, since the last issue of the *Adviser*, Bertram J. Berlin and Michael J. Boyle, having completed their terms as editors, have been replaced by J. Lynn Caylor and James H. Roberts.

Finally, beginning with Volume 4, Number 1, October 1979, the Adviser will be published three times a year, rather than the four times per year of the previous volumes.

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ARTICLES

DON'T COME TO WORK ON OCTOBER 1; OR A CLEARLY DEFICIENT SITUATION

Bertram J. Berlin*

The Antideficiency Act prohibits Federal officers or employees from incurring an obligation on behalf of the United States prior to the Congress enacting an appropriation to pay for it. In recent decisions, both the Comptroller General and the Attorney General have interpreted the act as forbidding agencies from allowing their employees to work at the beginning of a fiscal year unless the agency has an appropriation to pay them.

"New Year's eve" for the Federal Government comes at midnight on September 30. At that time, moneys appropriated for the use of the outgoing fiscal year expire and are no longer available for obligation. Thus, on "New Year's Day," October 1, Federal agencies can no longer use their previous year's appropriation to meet their payroll or pay other operating expenses.[1] It is because of this legal fact that the dawn of the fiscal New Year is seldom a time for celebration among Federal managers and employees.

THE CRISIS

In each of the four most recent fiscal years, at least some Federal agencies have been without an appropriation for salaries and expenses on October 1. In perhaps the worst case, at the beginning of fiscal year 1980, the Congress had failed to enact 10 appropriation acts. Nor had it enacted a continuing resolution providing temporary appropriations to enable agencies to continue operating until their regular appropriations were enacted. The result was that most Federal agencies had no money available to pay their employees or to meet operating expenses.

It was a time of great uncertainty. For heads of agencies the question was whether to continue operations or to close the agency until an appropriation was enacted. For employees the question was whether and when they would be paid for the days they were working in October. The uncertainty did not end until October 12, when the President signed into law a continuing resolution appropriating funds for the agencies usually covered by the 10 unenacted appropriation bills.

THE INQUIRY

In response to this fiscal year 1980 crisis and the hardships it brought to Federal employees, several bills were introduced in the Congress to continue the pay of Federal employees during future periods of expired appropriations. In connection with hearings on one of these bills, Representative Gladys Spellman, the Chair of the Subcommittee on Compensation and Employee Benefits, Committee on Post Office and Civil Service, House of Representatives, requested the Comptroller General's opinion whether an agency can lawfully permit its employees to come to work after the expiration of the agency's appropriation for one fiscal year and before the enactment of an appropriation for the agency for the subsequent fiscal year. Representative Spellman asked her question in the context of the so-called Antideficiency Act.[2] The Comptroller General replied that in his opinion:

> "any supervisory officer or employee, including the head of an agency, who directs or permits agency employees to work during any period for which the Congress has not enacted an appropriation for the pay of these employees violates the Antideficiency Act."[3]

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[1] This article concerns only 1-year money; that is, funds that are appropriated for the use of one fiscal year. Under 31 U.S.C. §712a, these funds are available for obligation only during the fiscal year for which they were appropriated. Generally, appropriations for the salaries and expenses of Federal agencies are 1-year moneys. To the extent that an agency may receive an appropriation for a period longer than one year, conclusions reached in this article may not be applicable.

[2] The Antideficiency Act, 31 U.S.C. §665(a) (1976), provides:

> "No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law."

[3] B-197841, March 3, 1980.

COMPTROLLER GENERAL'S DECISION

The Law

As applicable to Representative Spellman's inquiry, the Antideficiency Act prohibits any officer or employee of the United States, unless specifically authorized by statute, from incurring any obligation on the part of the United States to pay money for any purpose prior to the enactment of an appropriation for that purpose.

In his decision, the Comptroller General first determined that there was no statute which authorized Federal agencies to incur obligations for the pay of employees in the absence of an appropriation for that purpose. Therefore, the "unless" clause of the act was not applicable.

The Comptroller General next decided that a Federal employee properly on the payroll,[4] who reports for work under the direction or with the consent of his or her supervisor, is entitled to be paid for the time worked, and the United States is legally bound to pay the employee. The employee's entitlement and the Government's liability exist independently of any appropriation, although without an appropriation funds may not be disbursed to pay the employee.[5]

Based on these determinations the Comptroller General concluded that, in permitting employees to work during a period of expired appropriations, the head of an agency incurs an obligation on behalf of the Government to pay those employees. Moreover, because the Congress has not yet enacted an appropriation to pay the employees, in incurring the obligation the agency head has violated the Antideficiency Act.

The Comptroller General then observed that during a period in which the Congress has not enacted an appropriation to pay employees,

> "the only way the head of an agency can avoid violating the Antideficiency Act is to suspend the operations of the agency and instruct employees not to report to work until an appropriation is enacted."

Congressional Expectation

Having made this observation, the Comptroller General immediately stated his belief that the Congress does not intend that Federal agencies actually close down during periods of expired appropriations. Rather, according to the Comptroller General's decision, the Congress expects Government agencies to continue to operate and incur obligations for salaries even in the absence of appropriations.

In reaching this conclusion, the Comptroller General relied on the favorable comment by the Chairman of the Senate Appropriations Committee concerning a GAO internal memorandum which reached the same conclusion.[6] He also stressed the language in recent continuing resolutions specifically ratifying obligations incurred prior to and in anticipation of their enactment.

OPINION OF THE ATTORNEY GENERAL

On April 25, 1980, the Attorney General issued an opinion to the President on the question whether an agency can lawfully permit its employees to continue working after the expiration of its appropriation for one year and prior to the enactment of an appropriation for the subsequent year. The Attorney General concluded that during periods of expired appropriations, agencies which incurred obligations for any purpose, including the pay of employees, were in violation of the Antideficiency Act.

Further, the Attorney General stated that under the Antideficiency Act, when an agency's appropriation has expired, the head of the agency must take immediate action to terminate the agency's activities in an orderly way. Moreover, he announced that the Department of Justice would, in appropriate cases in the future, begin enforcing the criminal provisions of the Antideficiency Act.[7]

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[4] An employee who has been properly appointed to an authorized position, has taken the oath of office, has entered on duty, and has executed the affidavits concerning loyalty, striking and purchase of office required by statute.

[5] Article 1, section 9, clause 7 of the United States Constitution prohibits drawing any money from the Treasury, "but in Consequence of Appropriations made by Law."

[6] On October 1, 1979, Senator Magnuson cited with approval a memorandum to employees from Richard Brown, GAO's Director of General Services and Controller. Senator Magnuson requested that the memorandum be printed in the *Congressional Record* as a guide to other agencies. 125 Cong. Rec. S13784 (daily ed.) Mr. Brown's memorandum began:

> "Even though Congress has not yet passed an FY 1980 GAO Appropriation or Continuing Resolution, we do not believe that it is the intent of Congress that GAO close down until an appropriate measure has been passed."

[7] 31 U.S.C. § 665(i)(1) provides for a possible fine of up to $5,000, or imprisonment for not more than two years, for a knowing and willful violation of the act.

In the course of his opinion the Attorney General criticized the Comptroller General's March 3 decision as being internally inconsistent and legally insupportable. The Attorney General apparently interpreted the Comptroller General's decision as finding an exception to the Antideficiency Act to permit agencies to continue to operate despite the absence of an appropriation.

The Attorney General has misread the Comptroller General's decision. First, the Comptroller General was not issuing a decision to the head of an agency, but was responding to a congressional inquiry. After interpreting the law, he went on to point out to Representative Spellman that he did not think the Congress actually expected agencies to close down until their appropriations were enacted. Further, he clearly stated that despite what he perceived as the intent of the Congress, agencies that continued to operate after their appropriations expired were in violation of the law. And, as noted above, he stated that only by closing the agency could an agency head conform with the requirements of the act. Finally, because of this discrepancy between the requirements of the law and the apparent intent of the Congress, the Comptroller General stated he was in favor of laws that would enable agencies to continue operating during periods of expired appropriations.

The Comptroller General and the Attorney General are in agreement that head of agencies cannot, under the Antideficiency Act, permit their employees to come to work during periods of expired appropriations. Further, the Attorney General has indicated that the Justice Department will enforce the provisions of the act.

The question of whether there will be another "New Year's" crisis this October 1 must now be answered by the Congress. If the Congress fails to enact a permanent appropriation for pay of employees, a regular appropriation act, or at least a continuing resolution before the new fiscal year begins, agencies without appropriations will be forced to terminate their operations and instruct their employees not to report for work. Unless the Congress improves on its performance in the past few fiscal years, many Federal employees will receive "New Year's cards" saying, "Don't come to work on October 1."

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

—MILLER, Samuel F., *United States* v. *Lee*, 106 U.S. 196, 220 (1882).

THE ADMINISTRATIVE PROCESS: AN OVERVIEW

Raymond A. Wyrsch*

BACKGROUND

In recent years GAO has become increasingly concerned with examining how well Federal administrative agencies are carrying out their statutory responsibilities. To make that determination, one must understand the methods by which administrative agencies perform their duties. This article presents an overview of these methods, collectively referred to as the "administrative process" within agencies.

DEFINITION AND SCOPE OF THE "ADMINISTRATIVE PROCESS"

The term "administrative process" refers to all formal and informal rulemaking and all adjudication of conflicting claims not done by the legislatures or the courts. This includes the planning, investigation, and performance of agency actions. The public becomes aware when that process has a direct impact on their everyday lives. Those agencies have established detailed procedures governing their administrative proceedings for granting licenses,[1] setting rates,[2] and regulating certain other business practices.[3] Executive departments and agencies have similar procedures for regulating business practices,[4] as well as for dispensing economic benefits to certain classes of individuals to further the social and economic welfare of society.[5] However, few people are aware of the different types of administrative proceedings and the minimum statutory and constitutional protections that apply as one moves through the administrative process.

THE ADMINISTRATIVE PROCEDURE ACT

The principal statute governing the administrative processes within Federal agencies is the Administrative Procedure Act (APA) of 1946, as amended.[6] From a historical perspective, the APA is an outgrowth of the tremendous expansion of the Federal Government's regulatory authority during the New Deal. During this period the Congress established such independent regulatory agencies as the Securities and Exchange Commission, the Federal Communications Commission, and the Civil Aeronautics Board. To fully carry out their statutory responsibilities, the Congress provided these agencies with very broad powers and functions which were legislative, executive, and judicial in nature. Enactment of the APA was a response to the widely recognized need for more uniform methods governing the adjudicatory and rulemaking aspects of administrative proceedings.

The APA prescribes the minimum procedural steps an agency must follow in its administrative proceedings. For instance, one of the underlying themes of the APA is that agencies give interested persons fair notice of pending administrative actions and a reasonable opportunity to present their views. Agencies are also required to conduct their proceedings in a fair and impartial manner.

The APA also establishes the general standards under which a court may review the final administrative actions of an agency. Agencies normally elaborate on the APA requirements in their individual procedural rules. An agency's enabling legislation or a particular act which the agency administers may also prescribe certain procedural requirements which may vary somewhat from the APA's general requirements.

DUE PROCESS GUARANTEES

It is important to recognize that the APA constitutes the general minimum *statutory* requirements for agency administrative proceedings. Due process of law, which is guaranteed by the 5th Amendment to

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[1] *E.g.*, the Civil Aeronautics Board granting a license to an airline to operate a certain route; the Federal Communications Commission granting a license to a radio or television broadcaster to operate a station on a certain wavelength.

[2] *E.g.*, the Interstate Commerce Commission setting rates which rail carriers may charge their customers.

[3] *E.g.*, the National Labor Relations Board's regulation of unfair labor practices; the Federal Trade Commission's regulation of unfair trade practices.

[4] *E.g.*, the Department of Health, Education and Welfare's control over food and drugs; the Department of Agriculture's regulation of agricultural production.

[5] *E.g.*, the Department of Health and Human Service's program for social security benefits.

[6] 5 U.S.C. §551 *et seq.*

the Constitution, imposes constraints on Federal administrative agencies regarding the manner in which they render decisions or rulings which affect protected interests. Where a protected property interest exists, due process requires notice and an opportunity to contest any deprivation of that interest. This necessarily requires that individuals be afforded some form of hearing in these situations, and that the hearings be "fundamentally fair" in terms of balancing the governmental and private interests which are at stake.

In recent years the concept of constitutional due process protection has become a significant factor affecting administrative procedures pertaining to economic and social welfare programs. This is attributable to the tremendous expansion by the courts of the concept of what constitutes a protected property interest. At one time most government benefits were characterized as mere "privileges" (as opposed to "rights") which the government could deny in a relatively summary fashion. Today, however, many government benefits (including welfare benefits, disability insurance benefits, unemployment insurance benefits, etc.) are considered protected property interests and therefore cannot be taken away without a fair hearing.

TYPES OF ADMINISTRATIVE PROCEEDINGS

The two principal methods by which administrative agencies carry out their statutory responsibilities are through rulemaking and adjudicative proceedings. Depending upon the circumstances, the agencies may conduct these proceedings through either formal or informal means. Rulemaking refers to an agency's process for formulating, amending, or repealing a rule (*e.g.*, a regulation) in the future. Adjudication refers to an agency's application of an established rule, law or procedure to a set of particular facts and results in the issuance of an order (*e.g.*, a decision) affecting a particular party. These procedures are distinguishable in that rulemaking resembles the enactment of a statute and is prospective in nature, while adjudication resembles the rendering of a court decision and concerns past actions of a particular party.

RULEMAKING PROCEEDINGS

Types of Rules

Rules may fall into three general categories: procedural, interpretative, and substantive. Procedural rules prescribe the various internal practices and procedures which the agency as well as other interested persons must follow during the course of an administrative proceeding (e.g., the filing of an application or report). Interpretative rules are designed to establish an agency's interpretation of a particular statute for the purpose of providing guidance to both its staff and interested persons. Substantive rules are those rules which an agency may establish under the authority of a statute granting the agency general power to make rules having the force of law. For example, the Federal Trade Commission has issued many substantive rules covering specific segments of private industry under its general authority to regulate unfair trade practices.

Proceedings

An administrative agency usually formulates a proposed rule on its own initiative. Interested persons may also petition an agency to establish or amend a rule.

An administrative agency commences a rulemaking proceeding by publishing a notice of proposed rulemaking in the *Federal Register*. This notice usually includes:

—the proposed rule;
—a brief statement of why the rule is being proposed;
—the legal authority under which the rule is proposed;
—an invitation to all interested persons to submit written comments on any relevant issue of fact, law, or policy concerning the proposed rule; and
—a statement of the time, place, and nature of public rulemaking procedures.

Administrative agencies must give interested persons a reasonable period of time to prepare and submit their comments, usually from 30 to 60 days. These comments may consist of written data, views, or arguments concerning the proposed rule. While there is generally no requirement that agencies hold hearings in rulemaking proceedings, interested persons may be given an opportunity to make an oral presentation.

Once the comment period ends, the agency evaluates the comments, makes appropriate changes to the proposed rule, and then proceeds to issue the final rule. The final rule is published in the *Federal Register*, which generally includes a statement of its basis and purpose as well as the agency's analysis of the

pertinent issues raised in the public's comments.

There are certain exceptions to the requirement that an administrative agency provide interested persons ample notice of a proposed rule. Notice is not required in the case of agency internal procedural rules which do not directly affect persons outside of the agency, or when notice and public proceedings are impracticable or unnecessary.

ADJUDICATIVE PROCEEDINGS

Administrative adjudication is the process of resolving disputes or other specific matters, usually between an administrative agency and a private party. This process can begin in a variety of ways and may take many forms, depending upon the nature and gravity of the dispute. Agency-initiated adjudications are usually enforcement actions in which the agency issues a complaint stating the reasons why a private party is in apparent violation of a statute or regulation. Adjudicative proceedings may also result from such private party initiatives as filing a claim against the Government or applying for a license.

Many disputes are resolved through informal means, with the administrative agency and the private party reaching an agreement or settlement. Most disputes of a substantive nature are resolved through formal proceedings under which administrative agencies must afford interested parties some form of hearing. These proceedings are normally heard by an Administrative Law Judge (ALJ), an employee of the agency concerned who is required to conduct the administrative proceedings in an independent and objective manner. The role of the ALJ is that of an adjudicator—not an advocate or an adversary—and is analogous in many ways to the role of a presiding judge in the judicial system. To preclude an agency from improperly influencing the ALJ during administrative proceedings, the APA prohibits the ALJ from consulting other agency employees on any factual or legal issue unless all interested parties are notified and allowed to participate.

In presiding over a hearing, an ALJ's primary goal is to obtain the necessary evidence upon which he may render an initial decision. The administrative procedures used to gather such evidence closely resemble those of a court trial. Prehearing conferences may be held to establish the ground rules for the proceedings and to define the legal issues of the dispute. In the usual case, both the administrative agency and the private party are represented by legal counsel. These lawyers gather evidence (during the discovery phase) and present the evidence (during the trial stage) in either written or oral form in support of their respective positions. The parties may raise objections to the opposing side's presentation of evidence which the ALJ will sustain or overrule. Each party may submit final arguments and a proposed decision for consideration.

Following the conclusion of the above proceedings the ALJ issues his initial decision, which is based on the record and the applicable law. This decision must contain:

—a statement of findings and conclusion;
—a statement of the reasons and basis for the decision; and
—a rule, order, sanction, grant or denial of relief.

If neither party objects to the ALJ's initial decision, it becomes the final decision of the administrative agency concerned. However, each party has the right to appeal that decision to a higher level (at the Commissioner or Secretary level) within that agency. In such a case, the higher level will review the decision in the manner of an appellate court through the submission of briefs and oral argument by both parties. The higher level will render its own decision either affirming or overruling the initial decision.

REVIEW OF AGENCY ADMINISTRATIVE ACTIONS

Judicial Review

The final action of administrative agencies, either in a rulemaking or an adjudicative context, are subject to review by the courts. The function of judicial review is to ensure that an agency's action is within its authority and is reasonable. Specifically, judicial review examines whether the administrative agency in taking its action (a) has exceeded its constitutional or statutory authority, (b) has properly interpreted the applicable law, (c) has conducted a fair proceeding or (d) has otherwise acted in a fair and reasonable manner.

Generally speaking, in reviewing an agency's actions, the court will not begin an entirely new proceeding in terms of requesting comments, gathering evidence, conducting a full hearing, etc. Rather, the court bases its judgment on (1) the record as formulated during the agency's proceedings, and (2) the arguments presented by the private party and the agency as to the propriety of the agency's action. If the court deter-

mines that the agency has failed to comply with any one of the above requirements, it may set aside the agency's action or order the agency to take other appropriate action.

Legislative Oversight

One of the fundamental concepts of our form of government is that the legislature, as representatives of the people, will maintain a degree of supervision over the administration of governmental affairs. While the final adjudicative and rulemaking actions of administrative agencies are normally not subject to final approval or review by the Congress, there are various means by which it may directly or indirectly participate in administering the law and in evaluating administrative choices and decisions.

First, the Congress can amend or repeal the statute which formed the basis of an agency's action. Second, through the appropriation process, the Congress may impose limitations on an agency's spending authority. Third, congressional committees can conduct investigations or oversight hearings through which they may influence an agency concerning a controversial or questionable administrative action. Finally, in recent years the Congress has sought to retain control over an agency by including within a statute a provision that any administrative action taken pursuant to that statute may be overridden by a resolution passed by either the House of Representatives or the Senate. Such congressional action is referred to as a legislative veto.[7]

Executive Review

Final adjudicative and rulemaking actions of agencies are generally not subject to formal approval or review by the President or another executive agency. Still, under his general powers, the President can exert considerable control over, and in some cases directly intervene in, the administrative actions of most agencies.[8] Examples of such powers include the power to appoint or remove officials from office; the power to reorganize administrative agencies; and the power of overall direction as the Chief Executive. Also, the President can control through the Office of Management and Budget most agencies' requests to the Congress for changes in legislation or for appropriations to carry out certain programs or responsibilities.

RECENT DEVELOPMENTS

Included in current regulatory reform efforts are proposals for reforming the administrative processes within agencies. Critics of the present processes contend that due to the growing complexities of federal law and the proliferation of administrative proceedings, the administrative process will soon collapse from its own weight. One of the concerns of many critics is the tremendous length of time it now takes for an administrative proceeding, either rulemaking or adjudicatory in nature, to run its course.

A recent congressional study cited the following causes of excess delay:[9]

- —Agency procedures are excessively judicial in nature; thus, there is far too much emphasis on trial-type procedures.
- —Planning, priority-setting, and leadership by top agency management are often inadequate.
- —Agencies have made too little effort in setting deadlines for various stages of proceedings, and too little effort at enforcing deadlines.
- —Many agencies, either by statute or regulation, provide extra and unnecessary layers of review before agency action becomes final.
- —Agencies fail to make sufficient use of incentives and sanctions to encourage participants to speed up regulatory proceedings.

The Committee made the following recommendations, some of which are included in current bills before the Congress, designed to cut down and possibly eliminate excessive delay: (1) agencies should make greater use of informal rulemaking procedures; (2) agencies should have more flexible adjudicatory procedures; (3) agencies should eliminate unnecessary stages of internal review; and (4) agencies should establish deadlines for various stages of proceedings.

CONCLUSION

The overall framework of the administrative process has arisen in response to demands for better government, yet critics continue to point to the need for more effective procedures. Refinement and improvement of the administrative process must continue. If it does not, critics fear that the entire system may collapse. We at GAO have a unique responsibility

[7]See R. Camboso's article "Congressional Oversight and Legislative Veto" in this issue of the *Adviser*.
[8]The President's power over independent regulatory commissions and boards is very limited.
[9]Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess., Study on Federal Regulation, vol. IV: "Delay in the Regulatory Process." (Comm. Print 1977).

and opportunity to suggest improvements as we review the effectiveness of the various administrative agencies. Ours is a challenge for creativity in exploring procedures and mechanisms which will enhance the effectiveness of administrative agencies.

He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.
—JACKSON, Robert H. in *Brown* v. *Allen*, 344 U.S. 443, 537 (1953).

CONGRESSIONAL OVERSIGHT AND THE LEGISLATIVE VETO

Richard R. Cambosos*

INTRODUCTION

Recently, *The Washington Post* reported that the Department of Education, acting on the advice of the Attorney General, had decided to ignore a congressional veto of four of its regulations.[1] According to the *Post*, President Carter advised the Congress in June 1978 that such legislative vetos were unconstitutional in that they upset the constitutional balance between the separate branches of Government. The *Post* reported:

> " 'Such intrusive devices infringe on the executive's constitutional duty to faithfully execute the law,' Carter said.'They also authorize congressional action that has the effect of legislation while denying the President the opportunity to exercise his veto.'
> "The way for Congress to express displeasure with department regulations is to amend the laws, the President argued. In the meantime, pending a court decision, the executive branch will give congressional vetoes serious consideration but will not consider them legally binding."

According to the *Post*, both sides agreed that the matter will likely end up in court.

This story illustrates a situation which will occur increasingly until the so-called legislative veto issue is finally resolved by the judicial branch.

What is a legislative veto? What is its purpose? Why have past Presidents traditionally opposed them, and on what grounds?

BACKGROUND

Increasingly, the Congress has enacted legislation providing for continued congressional control over the subject matter of legislation after its enactment. The legislative veto is one method on which the Congress relies to achieve this purpose.

Generally, the legislative veto requires the President or other executive branch official to present actions proposed pursuant to a law to either or both Houses of the Congress or to specified committees before the proposed action becomes effective. Depending on the particular law, congressional action may involve approval or disapproval by concurrent resolutions of the Congress, by simple resolution of either House of Congress, or merely by specified committees.

For instance, the legislation providing for annual comparability adjustments in the salary of Federal General Schedule workers states that the President's alternate pay proposal will become effective on October 1 of the applicable year unless either House adopts a resolution disapproving that plan.[2] A mechanism such as this is said to be justified as necessary to permit the Congress to exercise oversight control over the executive at a time when the complexity of the objects of legislation requires that the Congress delegate more and more power to the executive. One group estimates that 200 statutes, most of them enacted in the 1970's, already contain some kind of legislative veto provision.[3]

These provisions have generally been opposed as unconstitutional by most Presidents since Woodrow Wilson, their Attorneys General and by many legal commentators. However, their constitutionality has seldom been tested in court.

This article will look at one form of the legislative veto—the one-House veto. This particular form requires action by either House of the Congress to disapprove a proposed executive action. Although the primary emphasis of this article is on the one-House veto, the discussion also applies to other forms of the legislative veto. The major constitutional issues surrounding the use of the one-House veto are discussed below, followed by a discussion of one Supreme Court Justice's views and a Court of Claims case which addressed these issues.

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[1] Babcock "Executive Branch Decrees Its Disregard of Congressional Veto," *The Washington Post*, June 7, 1980, at A7, col. 1.

[2] 5 U.S.C. §5305(c)(2) (1976).

[3] "Administrative Law," National Law Journal, May 12, 1980, p. 24.

CONSTITUTIONAL ISSUES

The constitutional challenge of the legislative veto is usually based on four provisions of the Constitution. These are usually referred to by the terms separation of powers, presentment, bicameralism, and incompatibility. The arguments are, as is the case with most constitutional matters, quite technical and highly complex. However, the following is an attempt to reduce these arguments to their most basic terms.

Separation of Powers

Perhaps the most often recited but least specific of all the claims of unconstitutionality is that the legislative veto violates the principle of separation of powers embodied in the Constitution. Generally, this argument looks to Article I, section 1, of the Constitution, vesting all legislative powers in the Congress; Article II, section 1, clause 1, and section 3, vesting power in the President to see that the laws are faithfully executed; and Article III of the Constitution, vesting the judicial power in the Supreme Court and in such other courts as the Congress may establish. Together, these are said to prevent the concentration of power in a single branch of Government, thus preventing one branch from exercising a power vested in another.

However, while a strict interpretation of this doctrine once might have entertained judicial favor, it is clearly no longer the case. In *Nixon* v. *Administrator of General Services,*[4] the Supreme Court held that "the separate powers [of the three co-equal branches] were not intended to operate with absolute independence."

The Court's rationale was that the Constitution did not require "three air tight departments of government." Rather, the Court said that in determining whether an act disrupts the proper balance between the coordinate branches, one should look to the extent to which the disruption "prevents the Executive Branch from accomplishing its constitutionally assigned functions." Then, if disruption is found, a determination must be made as to whether the impact is justified by an overriding need to promote objectives within the constitutional authority of the Congress.

Admittedly, legislative veto provisions further the purpose of congressional oversight—a cooperative executive and legislative enterprise—and are a natural result of the Congress' having to delegate more complex functions to the executive. Thus, it appears that under the court's decision, unless legislative veto provisions prevent the executive from accomplishing a constitutionally assigned function, separation of powers alone will not bar their use.

Presentment Clause

> Article I, section 7, of the Constitution provides that:
>
> "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill."

It has been argued that this provision was added for the express purpose of preventing congressional evasion of the President's veto, and thusrequires the President's participation in the exercise of legislative power by the Congress. Thus, a matter which is properly regarded as legislative must be presented to the President for his consideration and possible veto. It is argued by the opponents of the legislative veto that since the policy decisions and legal consequences of many of the forms of legislative veto are indistinguishable from the policy decisions and legal consequences of legislation, they may only be exercised as set forth in the Constitution; that is, the President must have the opportunity to exercise his veto authority.

However, these arguments are countered by the proponents of the legislative veto who contend that since the Supreme Court ruled that the exercise of statutory authority can be made contingent upon the findings of fact by an executive officer[5] or a favorable vote of the persons to be affected by proposed government action[6] then why can't the effectiveness be made contingent on a vote of either or both Houses of Congress? Furthermore, the Congress is not acting without authority, but pursuant to statute enacted under the Constitution. Finally, allowing a

[4] 433 U.S. 425 (1977).

[5] *Marshall Fields and Co.*, v. *Clark,* 143 U.S. 649 (1892).

[6] *Currin* v. *Wallace,* 306 U.S. 1 (1939).

proposed action, rule, or regulation to take effect if approved by both Houses of Congress or if not disapproved by either House merely constitutes a reversal of the normal legislative process and as such is not violative of this provision.

Bicameralism

Under Article I, section I of the Constitution, *both* Houses of Congress must approve a bill before it can become a law. Opponents of the legislative veto maintain that while one can argue that both Houses agree when a proposal is approved by concurrent resolution of the Congress or disapproved by simple resolution of one House, where the mechanism is the one House or committee approval or disapproval by concurrent resolution, a change in law can take place without both Houses agreeing to the change. Thus, it is argued that the compromises and refinements in lawmaking which result from the two Houses representing differing constituencies is sacrificed.

Proponents of the legislative veto argue that the powers of the Congress which are not expressly granted in the Constitution, but which follow incidently from the power to legislate, can be delegated to one House or its committees.

The Incompatibility Clause

Article I, section 6, clause 2 of the Constitution provides that:

> "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

It has been argued that attempts to delegate administrative tasks to one House or a committee of either or both Houses of Congress violates this clause as such functions are executive in nature and must be performed by officers of the United States. This being the case, by naming a committee to approve or disapprove a particular action in effect makes the members of the committee officers of the United States, which the clause precludes. The same argument has been said to preclude the one-House veto.

Proponents of the legislative veto argue that the Congress is not performing any constitutionally protected executive power by approving or disapproving regulations. Rather, it is argued that these mechanisms are merely an aid to legislation.

JUDICIAL COMMENTS AND DECISIONS

Although the constitutionality of the legislative veto has often been questioned, few of the mechanisms have actually been challenged in court. However, some of the legislative veto mechanisms have received support from the judicial branch.

At least one member of the Supreme Court feels that procedures allowing either House of Congress to disapprove proposed regulations are not an impermissible change in the relationship between the President and the Congress under the Constitution. In a concurring opinion, Justice White stated:

> "I am also of the view that the otherwise valid regulatory power of a properly created independent agency is not rendered constitutionally infirm, as violative of the President's veto power, by a statutory provision subjecting agency regulations to disapproval by either House of Congress."[7]

He equates regulations that become effective by *nonaction* with regulations not required to be laid before the Congress. In his view, the power to disapprove is *not* equivalent to legislation under the presentment clause.

In a recent case, *Atkins* v. *United States,*[8] the Court of Claims held constitutional the one-House veto provision in the Federal Salary Act of 1967.[9] The court made it clear that it was examining only the constitutionality of the specific one-House veto clause contained in that act and not the constitutionality of the one-House veto in general. It ruled that the device neither conflicted with the constitutional powers and obligations of the Congress as a whole acting through both Houses, nor invalidly intruded on the constitutional sphere of the President.

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[7] *Buckley* v. *Valeo,* 424 U.S. 1, 284 (1975) (White, J., concurring).

[8] 556 F.2d 1028 (Ct. Cl., 1977), *cert. denied,* 434 U.S. 1009 (1978).

[9] Pub. L. No. 90-206, Title II, §225(i) (Dec. 16, 1967) 81 stat. 644, *as amended* 2 U.S.C. 359(1) (1970).

CONGRESSIONAL OVERSIGHT AND THE LEGISLATIVE VETO

Richard R. Cambosos*

INTRODUCTION

Recently, *The Washington Post* reported that the Department of Education, acting on the advice of the Attorney General, had decided to ignore a congressional veto of four of its regulations.[1] According to the *Post*, President Carter advised the Congress in June 1978 that such legislative vetos were unconstitutional in that they upset the constitutional balance between the separate branches of Government. The *Post* reported:

> " 'Such intrusive devices infringe on the executive's constitutional duty to faithfully execute the law,' Carter said.'They also authorize congressional action that has the effect of legislation while denying the President the opportunity to exercise his veto.'
> "The way for Congress to express displeasure with department regulations is to amend the laws, the President argued. In the meantime, pending a court decision, the executive branch will give congressional vetoes serious consideration but will not consider them legally binding."

According to the *Post*, both sides agreed that the matter will likely end up in court.

This story illustrates a situation which will occur increasingly until the so-called legislative veto issue is finally resolved by the judicial branch.

What is a legislative veto? What is its purpose? Why have past Presidents traditionally opposed them, and on what grounds?

BACKGROUND

Increasingly, the Congress has enacted legislation providing for continued congressional control over the subject matter of legislation after its enactment. The legislative veto is one method on which the Congress relies to achieve this purpose.

Generally, the legislative veto requires the President or other executive branch official to present actions proposed pursuant to a law to either or both Houses of the Congress or to specified committees before the proposed action becomes effective. Depending on the particular law, congressional action may involve approval or disapproval by concurrent resolutions of the Congress, by simple resolution of either House of Congress, or merely by specified committees.

For instance, the legislation providing for annual comparability adjustments in the salary of Federal General Schedule workers states that the President's alternate pay proposal will become effective on October 1 of the applicable year unless either House adopts a resolution disapproving that plan.[2] A mechanism such as this is said to be justified as necessary to permit the Congress to exercise oversight control over the executive at a time when the complexity of the objects of legislation requires that the Congress delegate more and more power to the executive. One group estimates that 200 statutes, most of them enacted in the 1970's, already contain some kind of legislative veto provision.[3]

These provisions have generally been opposed as unconstitutional by most Presidents since Woodrow Wilson, their Attorneys General and by many legal commentators. However, their constitutionality has seldom been tested in court.

This article will look at one form of the legislative veto—the one-House veto. This particular form requires action by either House of the Congress to disapprove a proposed executive action. Although the primary emphasis of this article is on the one-House veto, the discussion also applies to other forms of the legislative veto. The major constitutional issues surrounding the use of the one-House veto are discussed below, followed by a discussion of one Supreme Court Justice's views and a Court of Claims case which addressed these issues.

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[1] Babcock "Executive Branch Decrees Its Disregard of Congressional Veto," *The Washington Post*, June 7, 1980, at A7, col. 1.

[2] 5 U.S.C. §5305(c)(2) (1976).

[3] "Administrative Law," National Law Journal, May 12, 1980, p. 24.

COMMENT

"WE'RE YOUR LAWYERS"

Charles F. Roney*

When I was chosen as an editor of the *Adviser* almost two years ago, one of the first things I did was to look over the back issues of the *Adviser* to see exactly what it was about.

After studying the subject matter of the articles, comments and notes of all the previous issues, I was as much in the dark as when I was chosen to become an editor. The material covered almost every conceivable topic, from "The GAO Auditor in Court"[1] to "Doing Legal Research."[2] Even one of Aesop's Fables was reprinted.[3]

It wasn't until I read the first "From the Editors" that I discovered what I believe to be the "mandate" of the *Adviser*. In that first issue over four years ago, Ralph Lotkin and Donald Mirisch wrote:

> **"We're Your Lawyers"**
> * * * * *
>
> "Let us state at the outset that this publication, 'The OGC Adviser,' is unique. It is a legal journal for the GAO community, lawyer and non-lawyer, with the goal of providing legal viewpoints on matters of interest and use of GAO's professional staff. Many of the questions we are asked require individual attention, and the answers are relevant only to the work of the division or office making the request. However, a significant number of legal problems are common to GAO, and their solutions can be helpful to us all.
>
> "It is our hope in this and future issues of the 'Adviser' to present legal issues in a lively, non-technical, and readable format; to answer frequently-asked questions; to anticipate questions; and generally to advise on matters that we consider of importance and interest to GAO. In return, your comments, suggestions, and advice will be appreciated."

However, it is difficult to determine how well the *Adviser* is fulfilling its mandate without feedback from the GAO community. In order to perform its function, the *Adviser* needs your comments, suggestions and advice, and not just on material appearing in past issues. We want to know what you would like to read in future issues of the *Adviser*.

As we said in the first issue, "we're your lawyers" and it's your journal. We would certainly appreciate comments on how well the *Adviser* is serving its purpose and any suggestions on where it should go from here.

---

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[1] Vol. 1 No. 1, October 1976.

[2] Vol. 2 No. 2, January 1978.

[3] *Id.*

NOTE

HUMAN RIGHTS TREATIES: WHY DON'T WE SIGN?

Suzanne M. Fishell*

The Constitution specifically provides in Article II, section 2 for treaty-making. Essentially, the process is that the President negotiates the treaty and sends it to the Senate for its advice and consent. If two-thirds of the Senators present consent, the President can ratify, that is "make," the treaty. The following illustrates what options the Senate has when the treaty presented to it may conflict with existing United States law or policy.

On February 23, 1978, four multilateral treaties concerning basic human rights were sent to the Senate for its necessary advice and consent to ratification by the President. All four previously had been signed on behalf of the United States, one more than a decade ago. Three were negotiated at the United Nations. None of them, however, has been ratified by the United States. The treaties are:

- —The International Convention on the Elimination of All Forms of Racial Discrimination, signed on behalf of the United States on September 28, 1966.
- —The International Covenant on Economic, Special and Cultural Rights, signed on behalf of the United States on October 5, 1977.
- —The International Covenant on Civil and Political Rights, signed on behalf of the United States on October 5, 1977.
- —The American Convention on Human Rights signed on behalf of the United States on June 1, 1977. (This treaty is open for adoption only by members of the Organization of American States.)

Although the United States is a leader in protecting human rights and has played a central role in the formulation of these treaties, it is one of the few major nations that has not formally become a party to them. Since the great majority of the treaties' substantive provisions are consistent with the letter and spirit of the United States Constitution and laws, one may ask why the Senate has not consented to ratification by the President.

One answer is that certain provisions of the treaties appear to conflict with United States domestic law. For example, the right of free speech as protected by our Constitution seems to conflict with the following provisions of the treaties:

> "State Parties * * *
>
> [S]hall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred * * *" (Article 4(a), Convention on Racial Discrimination.)
>
> "State Parties * * *
>
> [S]hall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law." (Article 4(b), Convention on Racial Discrimination.)
>
> "Any propaganda for war shall be prohibited by law." (Article 20 of the Covenant on Civil and Political Rights.)

While these concepts may be commendable, the criminal penalties proposed by these treaties could conflict with the freedom of speech guaranteed by the 1st amendment to the United States Constitution. Thus, to harmonize these treaties' provisions with the rights granted under the 1st amendment, the Senate may consent to the treaties with a reservation, *i.e.*, a new condition or term which limits or varies the application of certain treaty provisions.

A reservation may simply be a statement that nothing in the treaty shall be deemed to require or to authorize legislation or other action by the United States which would restrict the right of free speech protected by the Constitution, laws, and practice of the United States. A reservation, however, is really a proposal for a treaty different from that agreed on. If the reservation is not accepted by the other nations concerned, it amounts to a rejection of the revised treaty. At the

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very least, the treaty will not come into force between the reserving state and those which do not accept the reservation since any condition imposed by the United States upon its consent to a treaty gives rise to a right of rejection by other signatories who have agreed only to the version they signed.

Another way to harmonize the treaties with United States domestic law would be for the Senate to declare that the treaties are not self-executing. With such declarations, the treaties' substantive provisions would not, of themselves, become effective as United States domestic law until a law was passed adopting them. Without such statements, the terms of the treaties might be considered as directly enforceable law on a par with congressional statutes.

A final example of a provision in one of the human rights treaties that may not be not in accord with the United States law and policy occurs in Article 4 of the American Convention of Human Rights, concerning the matter of the right to life. Article 4 deals with the right of life generally and protects life from the moment of conception:

> "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception * * *."
> (Article 4, American Convention on Human Rights.)

In other words, Article 4 of this treaty raises the abortion issue. Since any treaty ratified by the United States supersedes all prior inconsistent domestic laws, ratification of the treaty with this provision without a reservation would be controversial because United States law and policy on this issue is, at the least, unsettled. In this instance, the Senate may wish to enter the following reservation recommended by the State Department:

> "United States adherence to Article 4 is subject to the Constitution and other laws of the United States." (Department of State letter of submittal to the President, December 17, 1977, in Four Treaties Pertaining to Human Rights, S. Exec. Doc. No. 29-118, 95th Cong., 2 Sess. XVIII (1978)).

This year may well be the year that the Senate consents to the President's ratification of the human rights treaties, thus giving a legal and international expression to human rights that are, for the most part, already accepted in United States law and practice. It will be interesting to see how and to what extent the Senate will accommodate those provisions of the treaties that conflict with existing domestic laws.

YOURS OF THE 10TH RECEIVED. First of all, he has a wife and a baby; together they ought to be worth $500,000 to any man. Secondly, he has an office in which there is a table worth $1.50 and three chairs worth, say, $1. Last of all, there is in one corner a large rat-hole, which will bear looking into.

Respectfully,
A. LINCOLN

—**LINCOLN, Abraham,** Letter to a New York firm inquiring for recommendations, in Lang, H. Jack, *The Wit and Wisdom of Abraham Lincoln* (Cleveland: The World Publishing Company, 1943), p. 65.

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