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Whither Implication: An Analysis of the Implication Doctrine, Abrams v. Baylor College of Medicine

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THE ARMS EXPORT CONTROL ACT AND CONGRESSIONAL CODETERMINATION OVER ARMS SALES

INTRODUCTION

The recent amendment[1] of the International Security Assistance and Arms Export Control Act of 1976 (AECA)[2] marks the end of an era. Throughout the 1970's Congress battled the President for a coequal role in managing American foreign policy.[3] After the Supreme Court ruled that the legislative veto was unconstitutional in *Immigration and Naturalization Service v. Chadha*,[4] however, Congress reappraised its achievements. Accordingly, Congress accepted a more modest role in the area of arms sales. Moreover, Congress' amendment of the AECA finally reaffirms the wisdom of wide unconditional delegations to the executive in foreign affairs.

As originally enacted, the AECA reflected congressional distrust of a strong executive. This distrust emerged after Vietnam when the United States witnessed an unprecedented period of renewed congressional assertiveness in the realm of foreign relations.[5] Traditionally, Congress

1. Amendment to the International Security Assistance and Arms Export Control Act, Pub. L. No. 99-247 (Feb. 12, 1986).

2. International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 729 (1976) (codified as amended at 22 U.S.C. § 2751-2796 (1982) (amended 1986).

3. *See generally* T. FRANCK & E. WEISBAND, FOREIGN POLICY BY CONGRESS (1979) [hereinafter cited as T. FRANCK & E. WEISBAND] (describing battle for control of American foreign policy during the 1970's).

4. *See* Immigration and Nationalization v. Chada, 462 U.S. 919 (1983) (declaring the legislative veto unconstitutional).

5. *See* T. FRANCK & E. WEISBAND, *supra* note 3, at 62 (noting that after Vietnam and Watergate Congress firmly established itself as a player in foreign policy decision-making). Franck asserts that during the period after World War II and prior to Vietnam and Watergate, American foreign policy operated under the bipartisan assumption that "politics stopped at the water's edge." This assumption vested the executive with almost complete control over international affairs. *Id.* Both Watergate and Vietnam caused Congress to challenge this assumption. *Id.* Since those two events Congress, through the legislative process, has asserted itself in the foreign policy domain. *See* SENATE COMMITTEE ON FOREIGN RELATIONS, INTERNATIONAL SECURITY ASSISTANCE AND ARMS EXPORT CONTROL ACT OF 1976, REPORT ON S. 2662, S. REP. NO. 605, 94th Cong. 2d Sess. 5 (1976) [hereinafter cited as SENATE REPORT ON S. 2662] (providing an example of Congress' expression of this assertive attitude); D. ABSHIRE & R. NURNBERGER, THE GROWING POWER OF CONGRESS (1981) (assessing the growth of Congress' power in the 1970's); J. ROURKE, CONGRESS AND THE PRESIDENCY IN U.S. FOREIGN POLICYMAKING (1983) (tracing the historical power relationships between the legislative and the executive branch and arguing that the congressional activism in the 1970's was a brief cyclical phenomenon); Tower, *Congress versus the President*, 60 FOREIGN AFF. 229 (1981-82) (arguing that Congress is ill-suited to the activist foreign policy role assumed during the 1970's and should willingly relinquish legislatively acquired influence in order to restore clear presidential preeminence in foreign policy).

limited itself to rebuffing the President in individual policy confrontations.[6] During the 1970's, however, Congress adopted a new strategy.[7] Rather than merely reacting to presidential decisions, Congress began to participate in the early stages of the decision-making process, establishing "framework legislation."[8] Framework legislation established a general procedural structure in which Congress received information through reporting requirements and compelled consultation through legislative vetoes.[9] As a result, Congress hoped to enter a new era of foreign policy codetermination with the Executive.[10]

As part of this trend,[11] Congress promulgated the AECA to establish a framework for executive-legislative codetermination in the important foreign policy sphere of arms sales. Parts I and II of this Comment review the AECA's legislative history and Part III details the effects of the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*[12] on arms sales legislation in light of the severability question and the President's and Congress' substantive constitutional authority in the area. Part IV delineates the alternatives Congress faced after the Supreme Court declared the legislative veto, an important component of framework legislation, unconstitutional. Part V examines the AECA's historical operation and Part VI assesses Congress' ultimate response to the legislative veto's demise. This comment concludes that because framework legislation never produced foreign policy codetermination as Congress originally envisioned, Congress' decision to amend the AECA to regrant a broad delegation to the President while retaining ordinary oversight procedures was the best possible solution.

I. THE ORIGINS OF THE ARMS EXPORT CONTROL ACT

A. CONGRESS FLEXES ITS MUSCLES ON ARMS

Under the Foreign Military Sales Act of 1968,[13] Congress granted

6. *See* T. FRANCK & E. WEISBAND, *supra* note 3, at 62 (giving examples of congressional rebuffs of presidential action).

7. *See id.* (observing that the congressional role in United States foreign policy became a part of an institutional procedure of joint decision-making).

8. *See id.* at 68 (describing the new legislative trend as creating a decision-making framework). The author christened this new legal framework, "framework legislation." *Id.*

9. *Id.* at 69.

10. *Id.* at 62.

11. *See* The War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1982) (representing the most significant expression of this trend).

12. Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983).

13. Foreign Military Sales Act of 1968, Pub. L. No. 90-629, 82 Stat. 1320, 1326

the President wide discretion over arms sales, while retaining authority over financing.[14] Congress' overall influence in the arms sale area remained limited[15] until President Nixon secretly decided to sell Iran, Saudi Arabia, and Kuwait sophisticated weaponry.[16] After these sales became public, some members of Congress began to fear that these secret sales would escalate to involve the United States in more unwanted foreign commitments like Vietnam.[17] Senator Gaylord Nelson, for example, attacked American arms policy[18] in response to President Nixon's failure to consult either Congress or the American people in crucial foreign policy decisions.[19] Nelson's efforts to focus congressional concern into concerted action prompted a series of legislative actions.[20]

(1968) (current version at 22 U.S.C. § 2776 (1982) (amended 1986)).

14. *See id.* at § 31 (setting the aggregate ceiling of foreign military sales credit).

15. *Id.* at §§ 33, 36. Outside of requiring a semi-annual report on "significant" arms sales and regional ceilings limiting transfers to Africa and Latin America, Congress allowed the President a free hand. *Id.*

16. *Legislative Veto: Arms Export Control Act, Hearings on S. 1050, Before the Senate Committee on Foreign Relations*, 98th Cong., 1st Sess. 45 (1983) [hereinafter cited as *Hearings on S. 1050*] (statement of Albert Lakeland, Jr., former Minority Staff director for Committee), *reproduced in* Celada, Effect of the Legislative Veto Decision on the Two-House Disapproval Mechanism Applicable to the Sale, Transfer and Lease or Loan of Arms (unpublished CRS Report) (Aug. 5, 1983).

17. *See* 120 CONG. REC. 38074-77 (1974) (providing Senator Gaylord Nelson's views on United States arms sale policy). Because arms transfers necessitated large complements of American technical support staff, Senator Nelson viewed introducing sophisticated hardware into world trouble spots as the first step to new overseas commitments. *Id.* Summing up this viewpoint in a Senate floor speech, Nelson observed: "Foreign military sales constitute major foreign policy decisions involving the United States in military activities without sufficient deliberation. This has gotten us into trouble in the past and could easily do so again." *Id.* at 38074.

18. *Hearings on S. 1050, supra* note 16, at 45.

19. *Id.* Nelson expressed his indignation in the same Senate floor speech:

> Despite the serious policy issues raised by this tremendous increase in government arms sales, these transactions are made with little regard for congressional or public opinion . . . The lack of required reporting to Congress, coupled with the traditional secrecy surrounding international arms transactions, frequently results in Congress learning about arms sales only as a result of the diligent efforts of the press. Thus, ironically, the American public learned of the 1973 arms sales to the Persian Gulf countries only after the American media picked up an Agence France-Presse report and pressed the State Department's spokesman to officially confirm the fact that we had an agreement in principle to sell Phantoms to Saudi Arabia and that we were negotiating a giant deal for arms to Kuwait.

Id. at 38074.

20. T. FRANCK & E. WEISBAND, *supra* note 3, at 99. In 1973, Senator Nelson proposed a floor amendment featuring a one-house veto of arms sales when no committee sponsor could be found. *Id.* The amendment passed forty-four to forty-three. *Id.* In the House, Representative Jonathan Bingham of New York offered a similar floor amendment that was defeated. *Id.* During the 1973 Yom Kippur War arms airlift to Israel, the House-Senate conferees met and decided against restraining the President. *Id.* In 1974, Nelson submitted a revamped version of the legislation featuring a two-

By 1974, Senator Nelson and Representative Bingham of New York successfully sponsored framework legislation[21] that laid the groundwork for the AECA. The Nelson-Bingham proposal required the President to provide Congress with detailed information concerning upcoming government-sponsored arms sales[22] in excess of $25 million.[23] Once notified, Congress had twenty calendar days to veto the sale by concurrent resolution.[24] The sale could be accomplished without congressional approval only if the President certified the existence of a national emergency.[25]

Nelson-Bingham's first major test highlighted both the legislation's shortcomings and potential advantages. In May 1975, the Ford Administration seriously miscalculated its planned sale of a Hawk air defense system to Jordan.[26] Instead of consulting with Congress as an equal

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house veto that passed both houses despite a lack of support from the congressional leadership and threat of presidential veto. *Id.*

21. Foreign Assistance Act of 1974 (Nelson-Bingham Amendment), Pub. L. No. 93-559, 88 Stat. 1795, 1814 (1974) (codified as amended at 22 U.S.C. § 2776 (1982) (amended 1986)).

22. *Id.* Foreign countries can buy arms directly from manufacturers or may use the Department of Defense as a purchasing agent. *Foreign Assistance Authorization: Arms Sales Issues Hearings on S. 795, S. 854, S. 1816, S. 2662, and S. Cong. Res. 21 Before the Subcomm. on Foreign Assistance of the Senate Comm. on Foreign Relations*, 94th Cong., 1st Sess. 14-15 (1975) (Staff Memorandum) [hereinafter cited as *Arms Sales Issues*]. These latter government-to-government sales make up the bulk of all arms transfers. *Id.* at 14. According to the Senate Foreign Relations Committee staff:

> As a general rule, foreign governments prefer to buy arms through the U.S. government rather than commercial channels for a number of reasons. They believe that the Department of Defense will get the best deal possible for them; that the deal will be honest without payoffs; that the U.S. government involvement will insure better contract compliance; and that the U.S. is more closely tied to their defense efforts than would be the case if commercial channels were used.

Id. at 15.

23. Foreign Assistance Act of 1974 (Nelson-Bingham Amendment), Pub. L. No. 93-559, 88 Stat. 1795, 1814 (1974) (codified as amended at 22 U.S.C. § 2776 (1982) (amended 1986)). Nelson set the reporting tripwire at $25 million because it represented the price of one squadron of F5E's, a popular export fighter. T. FRANCK & E. WEISBAND, *supra* note 3, at 99.

24. Foreign Assistance Act of 1974 (Nelson-Bingham Amendment), Pub. L. No. 93-559, 88 Stat. 1795, 1814 (1974) (codified as amended at 22 U.S.C. § 2776 (1982) (amended 1986)).

25. *Id.* The President's determination that a national emergency exists must be justified in detail with a description of the emergency circumstances that necessitate the immediate issuance of the export license. *Id.*

26. T. FRANCK & E. WEISBAND, *supra* note 3, at 100-03. *See generally* R. Grimmet, The Legislative Veto and U.S. Arms Sales 4-7 (Sept. 24, 1979) (unpublished CRS Report) (describing the events in Congress leading up to the eventual compromise on the missile system package); *Congress Weighs New Controls on Arms Sales*, 1975 CONG. Q. ALMANAC 358-59 (1976) (highlighting the Jordanian Hawk air defense missile sales in the context of a broader explanation of United States military sales).

decision-making body, the President stonewalled congressional demands for information and planned formal sale notification just before Congress' summer recess. Congress, therefore, was left with insufficient time to counter President Ford's action.[27] Ford's tactic infuriated an already assertive Congress, transforming the issue of whether the United States should sell arms to Jordan into an issue of whether Congress would allow President Ford to subvert the law.[28] Congress' subsequent and significant opposition to President Ford's tactics forced the President to modify extensively the Jordanian sale[29] and caused a thorough reconsideration of the roles of Congress and the President in arms sales legislation.

B. THE BATTLE OVER S. 2662

After codetermining the arms sale to Jordan, legislators found the Nelson-Bingham proposal deficient in several respects. First, the executive was allowed to keep a significant number of arms sale notifications classified.[30] This practice effectively defeated the primary purpose behind the proposal's reporting requirements, as Congress had insufficient time to debate the arms sales.[31] Second, the twenty calendar day review period proved inadequate given Congress' busy schedule.[32] Moreover, this short review period allowed the President to submit a proposed sale immediately before Congress recessed.[33] Third, the $25 million tripwire proved too high as a number of small sales escaped scrutiny.[34] Fourth, Congress' entrance into the arms sale process was too late. Because sales were virtually complete before Congress could intervene, legislative modification became more difficult.[35] Finally, Nelson-Bingham's scope was too limited as the legislation only included government-to-government sales while omitting other types of arms transfers with similar foreign policy implications.[36]

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27. T. FRANCK & E. WEISBAND, *supra* note 3, at 100-01.
28. *Id.*
29. *Id.* at 102.
30. *See Arms Sales Issues*, *supra* note 22, at 55-60 (noting that classifying reports defeated the primary purpose of reporting requirements).
31. *Id.* at 55.
32. *Id.* at 56.
33. *Id.*
34. *Id.*
35. *Id.*
36. *See id.* at 54 (discussing the role of Congress in considering the foreign policy implications of arms transfers). In a prepared announcement, Senator Nelson stated:

> Whether a weapon is given to a foreign country, sold on credit, or sold on cash terms to the country in question has no relevance to the foreign policy implications of the arms transfer. The fact remains that the vast amount of foreign

In 1976, Congress shaped a growing consensus for change through comprehensive arms export control legislation, S. 2662.[37] The Senate Foreign Relations Committee Report on S. 2662 summarized Congress' assertive mood:

> [The arms sales] program was not the product of a careful and deliberate policy arrived at through joint action by Congress and the Executive Branch; [rather,] it developed through its own momentum . . . [t]he basic statutory framework is outdated . . . [i]t is an anachronism of an era when Congress chose to leave major foreign policy matters to the President.[38]

Congress intended S. 2662 to open up the arms export decision-making process and thus address the anachronistic legislative framework.[39] The sponsors of S. 2662 criticized the secretive executive branch dominated system of the past.[40] They believed that "shining the public spotlight" on arms sales would result in a "more rational, publicly acceptable policy."[41] Once adequately informed, Congress, influenced by

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> military sales which the United States Government is engaged in has foreign policy implications just as vast. Regardless of how arms transfers are accomplished, Congress should be in a position to consider the foreign policy implications of arms transfers in advance and in a comprehensive manner.

Id.

37. S. 2662, 94th Cong., 2d Sess. (1976).

38. SENATE REPORT ON S. 2662, *supra* note 5, at 5.

39. *Id.* at 6.

40. *Id.* at 5-6.

41. *Id.* at 7. *But see* HOUSE COMM. ON INTERNATIONAL RELATIONS, INTERNATIONAL SECURITY ASSISTANCE ACT OF 1976, REPORT ON H.R. 11963, H. REP. NO. 848, 94th Cong., 2d Sess. 11, 12 (1976) (quoting Secretary of State Henry Kissinger's opinion that the Executive should maintain a preeminent role in negotiating arms sales). Dr. Kissinger stated that the United States already had a rational arms sale policy based on an analysis of the following factors:

> There are many factors which must be considered in a foreign transfer of American defense services and equipment, whether by cash, credit, or grant. Each arms transfer case must be assessed on its own merits, but there are a number of basic questions which must be answered in all cases: What is the nature and extent of the threat to the security of the recipient nation? Do we agree on the nature of the threat? Involved here is the role that country plays in the region and world; its capacity to maintain its stability, and its will to defend its own interests. What is the U.S. interest in helping to preserve that security? What interests does the recipient have in common with us, and where do our interests diverge? What potential influence for restraint or positive conduct is involved? What other nations are involved in military transfers to the recipient — now or potentially? What options has the recipient? Will a refusal lead it to turn to another source of supply, perhaps altering a presently desirable international relationship? And what are the consequences for us if we fail to respond? What are the disadvantages of refusing to sell to a government with which we enjoy good relations? Will regional or global military balances be affected? What will be the impact on our readiness?

Id. In response, the Committee commented, "While these questions go to the point and need to be asked, they are no substitute for consultation with Congress." *Id.* at 12.

public opinion, would guarantee that arms sales policy reflected American values.[42] As a result, it was hoped the United States would assume a leadership role in controlling arms exports and, consequently, abandon the previous policy of encouraging arms sales.[43]

To effectuate these goals, S. 2662 heavily relied on the legislative veto and reporting requirements. S. 2662 expanded and strengthened Nelson-Bingham's legislative veto over government-to-government sales by requiring the use of government channels in all sales of major defense equipment[44] valued at $25 million or more.[45] Under S. 2662, Congress gave itself thirty calendar days to review government sales of major defense equipment worth $7 million, as well as defense weapons or services worth at least $25 million.[46] Congress also granted the President the right to waive congressional review if he certified that an emergency existed.[47]

In addition to strengthening congressional regulation over government sales, S. 2662 expanded Congress' veto power to include commercial sales[48] and third country transfers.[49] Under S. 2662, Congress retained a similar thirty calendar day review period to disapprove commercial arms export licenses worth $7 million or more[50] or transfers of United States Government-supplied military assistance from one foreign country to another.[51] While the commercial sales veto included a presidential waiver in emergencies,[52] the provision dealing with third country transfers did not provide a similar waiver provision.[53]

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42. SENATE REPORT ON S. 2662, *supra* note 5, at 7-8.
43. *Id.* at 6, 8.
44. S. 2662, 94th Cong., 2d Sess. § 216(6) (1976) (defining "major defense equipment as any item of significant combat equipment on the United States Munitions List having a nonrecurring research and development cost of more than $50,000,000 or a total production cost of more than $200,000,000; . . .").
45. *Id.* at § 211.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at § 204.
50. *Id.* at § 211.
51. *Id.* at § 204.
52. *Id.* at § 211.
53. *Id.* at § 204. S. 2662 also included a number of more particularized legislative vetoes ranging from barring arms aid to nations abetting terrorism to Chile. *Id.* at §§ 304, 306. The most important provision, however, related to human rights. Under S. 2662, Congress could require the Secretary of State to prepare a report detailing the human rights situation in a country receiving United States security assistance. *Id.* at § 301(9). Upon receipt of the report, Congress had ninety working days to adopt a concurrent resolution terminating assistance. *Id.*

The human rights reports required by S. 2662 represented only one facet of an extensive reporting system geared to keep Congress informed. In addition to detailed information accompanying each transfer, S. 2662 also required annual and quarterly re-

S. 2662 fully addressed the Nelson-Bingham Amendment's apparent deficiencies in that Congress (1) received more declassified information and an extended review period;[54] (2) lowered the legislative veto's tripwire;[55] (3) received annual and quarterly reports to become involved in the arms sale decision-making process at an earlier juncture;[56] (4) extended controls of commercial sales and third country transfers to involve the legislative branch in most aspects of arms sale policy;[57] (5) terminated military grants[58] and military assistance advisory groups[59] to end arms giveaways and to scale back commitments; and (6) placed an annual $9 billion ceiling on government and commercial sales to produce real reductions.[60]

Despite a threatened presidential veto, both Houses approved the conference report on S. 2662.[61] On May 7, 1976, President Ford vetoed S. 2662 citing both public policy and the unconstitutionality of the legislative veto as reasons for his decision.[62] According to the President, S. 2662 represented legislation at its worst[63] by proposing simplistic and

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ports that were to be declassified to the greatest extent possible. *Id.* at §§ 204, 209, 211. Moreover, S. 2662 required the President to file supplementary reports on a variety of issues. Furthermore, S. 2662 contemplated Congress receiving reports on arms transfers' effects on United States readiness in § 206, recipient country violations of arms sale agreements in § 303, and foreign discrimination against U.S. citizens in § 302. These reporting requirements complemented the legislative veto, theoretically giving Congress sufficient information to exercise its power properly.

54. *Id.* at §§ 209, 211.

55. *Id.* at § 211.

56. *Id.* at §§ 209, 211.

57. *Id.* at §§ 204, 211.

58. *Id.* at § 105.

59. *Id.* at § 104.

60. *Id.* at § 213.

61. *Congress Passes Compromise Military Aid Bill*, 32 CONG. Q. ALMANAC 213, 225 (1976). The Senate voted fifty-one to thirty-five in favor of S. 2662, seven votes short of the two-thirds majority necessary to override the presidential veto. *Id.* The House approved the legislation by a margin of 215-185, fifty-two votes short of the two-thirds vote necessary. An attempt to send the final version back to the Conference Committee failed by a vote of 185-214. *Id.*

62. Ford, *Veto of the Foreign Assistance Bill*, 1976-77 PUB. PAPERS 1481 (May 7, 1976) [hereinafter cited as *Veto*]. The President's constitutional objections centered on the bill's numerous legislative veto provisions. In particular, the President argued that the legislative veto violated both the presentment clause and the doctrine of separation of powers. *Id.* at 1482. As a result, Ford concluded that such legislation threatened our system of government and undermined the President's ability to carry out United States foreign relations. *Id.* at 1483.

Aside from these asserted constitutional defects, Ford generally attacked S. 2662 as "faulty legislation". *Id.* The provisions related to arms sales reserved for special criticism included those dealing with terminations of military grants and military advisory groups, those setting an annual arms ceiling, and those relating to discrimination and human rights. *Id.* at 1483-85.

63. *Id.* at 1483-85.

counterproductive solutions to complex issues.

II. THE ARMS EXPORT CONTROL ACT

A. THE ARMS EXPORT CONTROL ACT FRAMEWORK

Because an informal vote count indicated an attempt to override President Ford's veto would be futile,[64] on May 11, 1976,[65] both the Senate Foreign Relations Committee and House International Relations Committee completed drafting new versions of the legislation. On July 1, 1976, President Ford signed the resulting compromise into law as the International Security Assistance and Arms Export Control Act of 1976 (AECA).[66]

1. Title I: Military Assistance Program

Like S. 2662, the AECA terminated military grant assistance programs[67] and the United States military advisory groups[68] that supported the programs. The AECA's provisions effectively required the President to request specific authority to continue any such programs,[69] thus granting Congress ultimate control over arms sales to foreign nations.

2. Title II: Arms Export Controls

a. Policy Statement

Section 202 of Title II proclaimed Congress' intent to modify United States policy.[70] To effect this modification, Congress called for negotiations aimed at reducing international arms trade.[71] Title II also com-

64. *See Congress Passes a Compromise Military Aid Bill, supra* note 61, at 225 (stating that neither chambers would have attained the requisite two-thirds majority necessary to override a presidential veto).

65. *Id.*

66. Ford, *Statement on Signing the International Security Assistance and Arms Export Control Act of 1976*, 1976-77 PUB. PAPERS 1937 (July 1, 1976) [hereinafter cited as *Signing*].

67. International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 105, 90 Stat. 729, 732 (1976) (codified as amended at 22 U.S.C. §§ 2751-2796 (1982) (amended 1986)).

68. *Id.* Pub. L. No. 94-329, § 104, 90 Stat. 729, 731 (1976) (current version at 22 U.S.C. § 2321 (i) (1982)).

69. *Congress Passes Compromise Military Aid Bill, supra* note 61, at 214.

70. International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 202, 90 Stat. 729, 734-35 (1976) (current version at 22 U.S.C. § 2751 (1982) (amended 1986)).

71. *Id.* at 90 Stat. 734.

municated Congress' intent to limit the aggregate value of yearly sales to current levels.[72] This provision replaced S. 2662's annual monetary ceiling.[73]

b. Annual Estimate

Section 209 of Title II implemented S. 2662's requirement[74] that the President submit an annual estimate and impact statement relating to anticipated sales.[75] These annual statements provided Congress with the opportunity to express its intent on a proposed arms sale before the completion of arms negotiations. Another provision compelled the President to "make every effort" to submit the information to Congress in an unclassified form.[76]

c. Reports on Commercial and Governmental Military Exports: The Legislative Veto

Section 211 of Title II represented the heart of the AECA. It included the Act's major reporting requirements and the legislative veto. Section 211 directed the President to submit unclassified quarterly reports[77] and certifications detailing individual government-to-government sales.[78] The quarterly reports listed all government-to-government letters of offer and all commercial "licenses and approvals" of "any major defense equipment" greater than or equal to $1 million.[79] Before issuing government-to-government letters of offer to sell defense articles or services worth at least $25 million or major defense equipment worth at least $7 million, the ACEA required the President to submit detailed certifications analyzing the sale.[80] Congress then had thirty

72. *Id.* at 90 Stat. 734-35.

73. *See* COMM. OF CONFERENCE, CONFERENCE REPORT ON INTERNATIONAL SECURITY ASSISTANCE AND ARMS EXPORT CONTROL ACT OF 1976, H. REP. NO. 1272, 94th Cong., 2d Sess. 50 (1976) (indicating that Congress included this proposal as a face-saving measure after its fruitless attempt to place specific, annual ceilings on yearly arms sales).

74. S. 2662, 94th Cong., 2d Sess. § 209 (1976).

75. International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 209, 90 Stat. 729, 739-40 (1976) (current version at 22 U.S.C. § 2751 (1982) (amended 1986)).

76. *Id.*

77. *Id.* at 90 Stat. 729, 740-41.

78. *Id.* at 90 Stat. 741-43.

79. *Id.* at 90 Stat. 740-41.

80. *Id.* at 90 Stat. 741-43. The analysis presented to Congress includes: information pertaining to weapon capability, the sales impact on the foreign country, United States readiness, the number of Americans needed to service the weapons, and other pertinent information. *Id.* at 90 Stat. 742.

calendar days to veto the sale unless the President certified that an emergency existed.[81] Similar reporting provisions governed commercial sales involving identical tripwire amounts, but no legislative veto applied.[82]

d. Commercial Sales Prohibited

Section 212 of Title II strengthened the old Nelson-Bingham Amendment, requiring the sale of all major defense equipment valued in excess of $25 million on a government-to-government basis.[83] This section, however, excluded NATO countries.[84]

B. CODETERMINATION ACHIEVED

Congress compromised with President Ford to preserve a framework for congressional participation in arms sales decisions.[85] Unlike S.

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81. *Id.* at 90 Stat. 743. In addition to the statutory review period, Congress, under a "gentlemen's agreement," receives pre-notification 20 days before a sale is formally submitted. T. FRANCK & E. WEISBAND, *supra* note 3, at 103-04.

82. International Security and Arms Control Export Act of 1976, Pub. L. No. 94-329, § 212, 90 Stat. 729, 743-44 (current version at 22 U.S.C. § 2778 (1982) (amended 1986)).

83. *Id.* at 90 Stat. 744-45.

84. *Id.* at 90 Stat. 745. Although Title III of the AECA, is somewhat beyond the scope of this comment, it included provisions reflecting the depth of Congress' intention to limit executive discretion in the arms sales area:

a) *Human Rights*: Section 301 retained S. 2662's reporting requirements, but made any cutoff of security assistance contingent upon a joint resolution rather than concurrent resolution. *Id.* at 90 Stat. 749-50.

b) *Discrimination*: Section 302 required the President to report foreign countries receiving arms that discriminate against Americans on the basis of "race, religion, national origin or sex." *Id.* at 90 Stat. 751-53. Upon receipt of the report, Congress reserved the right to pass a joint resolution terminating security assistance. *Id.* at 90 Stat. 753.

c) *Terrorist Countries*: Section 303 required the President to terminate assistance to countries abetting terrorism unless the certified national security requires continued aid. *Id.* at 90 Stat. 753-54.

d) *Ineligibility*: Section 304 required nations breaking an arms agreement to be considered ineligible for assistance. *Id.* at 90 Stat. 745-55. Breaches of arms agreements included: (1) unauthorized use of arms; (2) transfer to third parties without the consent of the United States; and (3) failure to keep weapons secure. *Id.*

e) *Proliferation*: Section 305 prohibited military or economic assistance to nations violating international nuclear weapons agreements. *Id.* at 90 Stat. 755-56. *See generally supra* note 53 and accompanying text (describing the general limitations under S. 2662).

85. *See* SENATE COMM. ON FOREIGN RELATIONS, INTERNATIONAL SECURITY ASSISTANCE AND ARMS EXPORT CONTROL ACT OF 1976-77, S. REP. NO. 876, 94th Cong., 2d Sess. 13 (1976) (stating that despite the compromises made under the AECA, congressional reformers insisted that the revolution to codetermine arms sales policy was not betrayed).

2662, the President grudgingly accepted the AECA,[86] finding that Congress' exclusion of the annual arms ceiling[87] and dilution of the language relating to discrimination[88] and human rights[89] outweighed the termination of military grants[90] and advisory groups.[91] More importantly, the new bill deleted all but one of the objectionable legislative veto provisions.[92] The sole exception was the retention of an expanded Nelson-Bingham Amendment relating to government-to-government sales.[93]

Although subsequent amendments to the AECA strengthened reporting requirements, the most notable revisions dealt with new legislative veto provisions. By 1981, Congress regained and perhaps surpassed the level of legislative veto authority it lost when President Ford vetoed S. 2662. On the eve of *Chadha*,[94] Congress reserved the right to veto: (1) third country transfers of United States Government and commercially supplied arms;[95] (2) commercial sales;[96] and (3) leases of defense

86. *See Signing*, *supra* note 66, at 1937 (noting that President Ford believed that the unacceptable features of the earlier bill were either dropped or modified).

87. International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, §105, 90 Stat. 729, 732 (1976) (current version at 22 U.S.C. § 2321 (1982) (amended 1986)).

88. *Id.* at 90 Stat. 731.

89. *See* S. 2662, 94th Cong., 2d Sess. § 213 (1976) (incorporating a $9 billion arms sales ceiling).

90. International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 302, 90 Stat. 729, 751 (1976) (current version at 22 U.S.C. § 2314 (1982) (amended 1986)).

91. *Id.* at 90 Stat. 748.

92. *See Signing*, *supra* note 66, at 1937 (expressing President Ford's approval of Congress' efforts to eliminate S. 2662's constitutionally suspect features).

93. International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 211, 90 Stat. 729, 740-44 (1976) (current version at 22 U.S.C. § 2776 (1982) (amended 1986)). Although President Ford accepted the inclusion of Nelson Bingham's government-to-government sales provision, he "reserved (his) position on its constitutionality if the provision should ever become operative." *Signing*, *supra* note 66, at 1937-38. Ford also expressed concern that premature termination of military assistance would adversely affect our relations with ally nations who are not able to bear their defense burdens independently. *Id.*

94. Immigration and Nationalization Service v. Chadha, 462 U.S. 919 (1983).

95. International Security Assistance Act of 1977, Pub. L. No. 95-92 § 16, 91 Stat. 614, 622 (1977) (current version at 22 U.S.C. § 2753(d) (1982) (amended 1986)). Under the 1977 amendment, Congress had 30 days to review proposed transfers. *Id.*

A 1980 amendment set the reporting tripwire at $7 million for major defense equipment and $25 million for other defense articles or services. International Security and Development Cooperation Act of 1980, Pub. L. No. 96-533, § 101, 94 Stat. 3131 (1980) (current version at 22 U.S.C. § 2753 (1982) (amended 1986)).

A 1981 amendment reset one reporting tripwire at $14 million or more for other defense articles and services. International Security and Development Act of 1981, Pub. L. No. 97-113, § 101, 95 Stat. 1519 (1981) (current version at 22 U.S.C. § 2753 (1982) (amended 1986)). The same amendment reduced the review period from thirty to fifteen calendar days for NATO countries, Japan, Australia, and New Zealand. *Id.*

equipment.[97] Congress' additional veto power, added to the amended provisions of Nelson-Bingham, resulted in the achievement of Congress' original objective: comprehensive legislation guaranteeing congressional codetermination over United States arms sales policy.[98]

III. *CHADHA* AND ITS AFTERMATH

A. THE CONTINUING EXECUTIVE-LEGISLATIVE CONFLICT

The adoption of the AECA failed to resolve the continuing executive-legislative dispute over the legislative veto. Although President Ford signed the AECA into law, he reserved his position on the constitutionality of the Act's legislative veto provision.[99] President Ford's successors concurred with this position, echoing both Ford's constitutional objections,[100] and his public policy criticisms.[101] In particular, both

96. International Security and Development Cooperation Act of 1980, Pub. L. No. 96-533, § 107, 94 Stat. 3131, 3136-37 (1980) (current version at 22 U.S.C. § 2776 (1982) (amended 1986)). The 1980 amendment provided Congress with thirty days to review commercial sales totalling $7 million in major defense equipment or $25 million in other defense articles and services. *Id.* A 1981 amendment increased the certification requirements to $14 million and $50 million respectively and prescribed a fifteen calendar day period for review of NATO and Pacific allies' sales. *Id.* at 95 Stat. 1519-21.

97. *Id.* at 95 Stat. 1524-26. Under the 1981 amendment Congress has thirty calendar days to review leases for major defense equipment exceeding $14 million or other defense articles exceeding $50 million. *Id.* The same amendment exempted NATO countries and our Pacific allies, Japan, Australia, and New Zealand. *Id.*

98. International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 211, 92 Stat. 729, 740-44 (1976) (current version at 22 U.S.C. § 1776 (1982) (amended 1986)).

A 1980 amendment required certification with respect to sales of design and construction services for $200 million or more. International Security and Cooperation Act of 1980, Pub. L. No. 96-533, § 105(d), 94 Stat. 3131, 3133-35 (1980) (current version at 22 U.S.C. § 2776 (1982) (amended 1986)).

A 1981 amendment increased certification requirements to $14 million for major defense equipment and $50 million for other defense equipment or services. International Security and Development Act of 1981, Pub. L. No. 97-113, § 101, 95 Stat. 1519, 1519-20 (1981) (current version at 22 U.S.C. § 2776 (1982)(amended 1986)).

99. *See supra* note 93 (discussing Ford's reservations regarding AECA's legislative veto provisions).

100. *Veto, supra* note 62, at 1482-83. President Ford was concerned that the legislative veto involved congressional encroachment on executive powers. *Id.* Ford maintained that the veto violated the separation of powers principle and that the President would be unable to function effectively, either in domestic or in foreign affairs, if his decisions could be reversed by a bare majority of Congress. *Id.* While President Carter initially backed the veto, he soon withdrew his support. T. FRANCK & E. WEISBAND, *supra* note 3, at 5. President Carter publicly complained of the restraints on his foreign relations discretion imposed by congressional restrictions. *Id.* In a message to Congress on the subject, Carter argued that the legislative veto violated both the presentment clause and the separation of powers principle. Carter, *Legislative Vetoes, Message to Congress*, 1978 PUB. PAPERS 1147 (June 21, 1978) [hereinafter cited as *Legislative Veto Message*]. Although President-elect Reagan initially supported the legislative

President Carter and President Reagan emphasized the legislative veto's debilitating effect on the President's ability to carry out a coherent American foreign policy.[102]

In response to the Executive's Constitutional arguments, the Senate Foreign Relations Committee supported its continued use of the legislative veto on three bases. First, the Committee argued[103] that the legislative veto power did not violate the presentment clause[104] because of the President's inherent power to veto the enabling act.[105] Second, the Committee argued that the legislative veto did not violate separation of powers.[106] Third, after noting the Supreme Court's refusal to draw abstract analytical lines of separation among the departments of govern-

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veto, he also withdrew his backing once he took office. Witt, *Legislative Veto Struck Down, Congress Moves to Review Dozens of Existing Statutes* 41 CONG. Q. WEEKLY REP. 1314 (1983) (adding that after the Supreme Court's decision in *Chada*, White House spokesman and Attorney General William French Smith praised the Court for declaring the legislative veto unconstitutional).

101. *Veto, supra* note 62, at 1483, 1485. In his veto message, President Ford anticipated his successor's positions by stating:

> In disapproving this bill, I act as any President would, and must, to retain the ability to function as the foreign policy leader and spokesman of the Nation. In world affairs today, America can only have one foreign policy. Moreover, that foreign policy must be certain, clear and consistent. Foreign governments must know that they can deal with the President on foreign policy matters, and that when he speaks within his authority, they can rely on his words.

Id. at 1485.

102. *See Legislative Veto Message, supra* note 100, at 1148 (providing Carter's view that excessive use of legislative vetoes could impede the United States' ability to respond quickly to changing world conditions, and as such, the inclusion or omission of such a provision in a bill would be an important factor in his decision to sign or veto that bill); *see also* Reagan, *Remarks and Question and Answer Session at a Working Luncheon with Out-of-Town Editors*, 1981 PUB. PAPERS 958 (Oct. 16, 1981) (establishing President Reagan's opinion that, without unconditional discretion, negotiation with foreign powers becomes difficult).

103. *See* SENATE REPORT ON S. 2662, *supra* note 5, at 10-16 (citing various constitutional arguments that support the legislative veto).

104. *See Veto, supra* note 62, at 1482 (expressing Ford's concern that the provisions were incompatible with the express provision in the Constitution that a resolution having the force and effect of law must be presented to the President and, if disapproved, repassed by a two-thirds majority in both the Senate and House of Representatives).

105. SENATE REPORT ON S. 2662, *supra* note 5, at 11. The Committee argued that under the presentment clause "[t]he President will, if the bill passes each House, have an opportunity to veto it; if the bill is enacted, any resolution subsequently adopted pursuant to that statute will derive force not from itself, but from the enabling act in which it is incorporated." *Id.* Thus, resolutions of disapproval enacted under the AECA were not legislation, but congressional action pursuant to legislation. *See also* Volz, *The Legislative Veto in the Arms Export Control Act of 1976*, 9 LAW & POL'Y INT'L BUS. 1029, 1033 (1977) (discussing Congress' arguments for the legislative veto but arguing against the imposition of "novel" conditions upon the Executive's perogatives).

106. SENATE REPORT ON S. 2662, *supra* note 5, at 11-14.

ment,[107] the Committee asserted that the AECA's legislative veto did not impinge on plenary presidential prerogatives or involve Congress in overseeing the finest details of day-to-day administration.[108] Rather, provided Congress did not disapprove, the Committee believed that the legislative veto granted the President wide authority to act.[109] Moreover, the Committee viewed the legislative veto as buttressing the separation of powers' goal of precluding the arbitrary exercise of executive power.[110] The legislative veto achieved this goal in that it provided a check on absolute delegations to the President.[111] Finally, adopting a form of argumentation usually associated with the executive branch, the Committee asserted that custom tended to validate existing congressional practice embodied in the legislative veto.[112]

B. THE SUPREME COURT DECIDES THE LEGISLATIVE VETO'S FATE

In *Immigration and Naturalization Service v. Chadha*,[113] the Supreme Court declared the legislative veto unconstitutional.[114] In reaching its decision, the Court focused on the constitutional requirements of presentment and bicameralism, two elements essential to the separation of powers.[115] The Court held that failure to meet the Constitution's presentment and bicameralism requirements rendered the legislative veto unconstitutional.[116]

Thus, although the AECA's two-house legislative vetoes were not

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107. *Id.* at 12 (quoting FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 78 (1930)).

108. *Id.* at 14.

109. *Id.* at 12.

110. *Id.* at 14.

111. *Id.*

112. *Id.* at 15 (noting Congress' frequent use of the legislative veto over the past forty-five years).

113. Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983).

114. *Id.* at 959.

115. Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 946 (1983). Interestingly, President Ford conceived Article I, § 7 and the separation of powers doctrine as separate grounds for attacking the legislative veto. *Veto, supra* note 62, at 1482-83. The Court, however, treated the two as inexorably intertwined. Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 944-59 (1983). Although the majority opinion only briefly addresses the arguments made in the Senate Foreign Relations Committee Report on S. 2662 by holding that Congress may only delegate completely, Justice White emphasized these points in his dissent. *Id.* at 979-80. Specifically, Justice White echoed Congress' plea that a veto incorporated into legislation met the procedural requirements of Art. I, § 7. *Id.* He further argued that the veto was constitutionally acceptable if made dependent upon an extrinsic event. *Id.* at 987. Finally, he viewed the legislative veto as buttressing the separation of powers goals because it acted as a congressional defense mechanism. *Id.* at 974.

116. *Id.* at 944-59.

challenged, the vetoes were presumably unconstitutional because the vetoes failed to meet the Constitution's presentment requirement.[117]

C. SEVERABILITY

The AECA's recent amendment confirmed the statute's relevance. Although this confirmation mooted the issue of severability of the legislative veto provision from the AECA, the severability issue remains important because of its ramifications to the separation of powers. If the legislative veto was severable from the AECA, Congress' delegation to the President remained intact. If the legislative veto was inseverable, the President's ability to sell arms depended on the extent of his independent constitutional authority.

The *Chadha* Court held that a legislative veto is severable from a statute when Congress would not have enacted the statute without the provision.[118] The Court suggested a three-pronged test to determine severability. First, Congress' inclusion of a severability clause in the legislation indicates Congress' intent to make the legislative veto severable from the statute.[119] Second, the Court suggested that tribunals glean additional clues to Congress' original intent by reviewing the

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117. *See* Consumer Energy Council v. F.E.R.C., 673 F.2d 425 (D.C. Cir. 1982) (broadening the Court's holding in *Chadha* by affirming a lower court decision invalidating a two-house veto that met *Chadha's* bicameralism requirement but not its presentment requirement), *aff'd sub nom.* United States House of Representatives v. F.T.C., 463 U.S. 1216 (1983).

Under *Chadha*, if Congress validly delegates power to the President, it cannot seek to alter legal rights, duties, and relations of persons outside the legislative branch through the use of the legislative veto. To do so would represent an attempt to legislate without following the presentment requirement. Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 952 (1983). For cases recognizing that Congress properly delegated power to the President to sell arms see United States v. Da Chuan Zheng, No. 84-64 (D.N.J. May 23, 1984) (available on Lexis, Genfed Library, Dist. File), *modified*, 590 F. Supp. 274 (D.N.J. 1984) (holding that under the AECA Congress validly delegated to the President the power to prosecute conspiracy crimes in regard to the People's Republic of China), *vacated and remanded on other grounds*, 786 F.2d 518 (3d Cir. 1985). *See generally* United States v. Gurrola-Garcia, 547 F.2d 1075 (9th Cir. 1976) (upholding the Mutual Security Act of 1954 as a constitutional delegation to the executive empowering him to criminalize the export of certain ammunition); United States v. Stone, 452 F.2d 42, 46-47 (8th Cir. 1971) (upholding the same statute in a trial for conspiracy to export arms, munitions, and war implements to a foreign country without obtaining proper licenses or approval); Samora v. United States, 406 F.2d 1095, 1098 (5th Cir. 1969) (upholding delegation under the same statute in the context of a prosecution for attempting to export four pistols without obtaining an import license). *See Hearings on S. 1050, supra* note 16, at 52-56 (providing an elaborate overview of *Chadha* as applied to the AECA).

118. Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 931-32 (1983) (citing Buckley v. Valeo, 424 U.S. 1, 108 (1976)).

119. *Id.*

Act's legislative history.[120] Finally, the Court presumes that a legislative veto is severable if what remains after severance is "fully operative as law."[121]

Based on the Immigration and Naturalization Act's broad severability clause, the Court in *Chadha* found the legislative veto provision of the Act severable from the body of the statute.[122] The Court determined that the Act's legislative history,[123] coupled with the Act's continued viability as an administrative mechanism without the veto,[124] made the veto clause severable from the remainder of the Act.

In contrast to the Immigration and Naturalization Act, the AECA does not contain a severability clause. Although the clause's absence implies nonseverability, its nonexistence is not dispositive.[125] Rather, it merely indicates that the Court must inquire into the Act's legislative history.[126] Such an inquiry is somewhat elusive, however, in that legislative history often equally supports arguments in favor of severability[127] and inseverability.[128]

The intent of Senator Nelson and the other congressional reformers largely supported the argument for inseverability.[129] The legislative histories of Nelson-Bingham and S. 2662 are replete with actions and statements indicating that some members of Congress considered the legislative veto a *quid pro quo* for continued congressional delegation in the arms sales area.[130] The Senate Foreign Relations Committee's strong defense of the legislative veto in its report on S. 2662 supported this conclusion.[131] In addition, Congress strengthened the Nelson-Bing-

120. *Id.*

121. *Id.* at 934 (quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932)).

122. Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 931-35 (1983).

123. *Id.*

124. *Id.* at 934-35.

125. *See* Consumer Energy Council v. F.E.R.C., 673 F.2d 425 (D.C. Cir. 1982) (finding an offending legislative veto severable even without a severability clause), *aff'd sub nom.* United States House of Representatives v. F.T.C., 463 U.S. 1216 (1983).

126. Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 931-32 (1983).

127. *See* Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 931-35 (1983) (noting that both majority and dissenting opinions in *Chadha* purport to review the same legislative history, but reach opposite conclusions on legislative intent and ultimately on the issue of severability).

128. *Id.*

129. *See supra* notes 21-98 and accompanying text (discussing Congress' intentions to control the Executive Branch with the use of more careful oversight and legislative vetoes).

130. *Hearings on S. 1050, supra* note 16, at 59.

131. *Legislative Veto and the Chadha Decision: Hearing Before the Senate Sub-*

ham provision in the AECA despite President Ford's veto of S. 2662.[132] Finally, through amendment, Congress gradually incorporated additional legislative vetoes into the AECA.[133] All of these actions tended to argue in favor of nonseverability.

Although the AECA's legislative history indicated a strong preference for the veto, a review of Congress' intent may also support an argument for severability. The wide powers over arms sales delegated to the President since 1795[134] suggested that the rhetoric accompanying the veto's incorporation was overstated.[135] Congress never reserved for itself a complete check on the Executive's actions under the AECA. Not only was the veto inoperative under certain tripwire amounts,[136] but the President retained the authority to bypass congressional review during an emergency.[137] It is inconceivable that Congress would leave the President without authority to provide for the defense needs of the allies of the United States.[138] In fact, President Ford vetoed Congress' closest attempt to limit such aid, a $9 billion arms ceiling under S. 2662.[139]

While the legislative history is unclear, the AECA certainly meets *Chadha's* requirement that after severance the remaining provisions of the statute remain "fully operative as law." The statute allows Congress to act on a particular arms sale that is complete because Congress

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comm. on Administrative Practice and Procedure of the Committee on the Judiciary, 98th Cong., 1st Sess. 59-60 (1983) [hereinafter cited as *Senate Judiciary Chadha Hearing*].

132. *Id.*

133. *See Hearings on S. 1050, supra* note 16, at 73-74 (listing the growing number of legislative vetoes).

134. The Act of March 3, 1795, ch. 53, 1 Stat. 444 (1795). The Act stated:

> *Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled*, That in cases connected with the security of the commercial interest of the United States, and for public purposes only, the President of the United States be, and hereby is, authorized to permit the exportation of arms, cannon and military stores, the law prohibiting the exportation of the same to the contrary notwithstanding. Approved, March 3, 1795.

Id.

135. *See Hearings on S. 1050, supra* note 16, at 75 (noting that recently Congress added legislative vetoes to many laws).

136. International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 211, 90 Stat. 729, 740-44 (1976) (current version at 22 U.S.C. § 2776 (1982) (amended 1986)).

137. *Id.*

138. *Hearings on S. 1050, supra* note 16, at 74-77.

139. *Veto, supra* note 62, at 1483; *see also Senate Judiciary Chadha Hearing, supra* note 131, at 60 (Memorandum to Subcommittee on Administrative Practice and Procedure by Michael Davidson, Office of Senate Legal Counsel) (stating that Congress' failure to incorporate an arms sales ceiling into the AECA argued for severability).

continues to receive arms sale information even absent the legislative veto provision of the AECA.[140] Accordingly, the legislation was fully operative as law.

Assuming the legislative veto was severable, *Chadha* converted the AECA into a "report and wait" provision. Under a "report and wait" provision, the Executive "reports" a proposed action to Congress and "waits" for a specified period before putting it into effect.[141] This waiting period allows the President and Congress to work out disagreements and gives Congress an opportunity to pass legislation, subject to the President's veto, blocking or changing the Executive action.[142] On the other hand, if the legislative veto were inseverable, the analysis is more complicated. Assuming congressional power regarding arms sales is plenary, the President has no authority to continue arms sales absent renewed congressional delegation. If, however, the President had plenary or at least concurrent power in this area, his constitutional authority would continue despite the absence of a statutory grant.

D. THE COMPETING CLAIMS FOR POWER

1. Congress

Congress has at least concurrent power with the President regarding arms sales. Congress' power to sell arms derives from the enumerated constitutional powers; the commerce power authorizes Congress to sell arms.[143] In addition, government-to-government sales, wherein foreign nations purchase weapons from the Department of Defense, fall under Congress' power to dispose of United States property.[144]

When combined with the Constitution's necessary and proper clause,[145] Congress' power to sell arms may derive from other congressional powers. For example, the power to declare war implies the power to prepare for war by selling arms to allies.[146] Additionally, the power to raise armies[147] and provide and maintain a navy may include arming

140. *Senate Judiciary Chadha Hearing, supra* note 131, at 60-61 (noting the importance of the AECA's reporting requirements); *see also Hearings on S.1050, supra* note 16, at 77 (stating that the continued vitality of the AECA's reporting requirements argued for severability).

141. *See Legislative Veto Message, supra* note 100, at 1149 (explaining that President Carter advocated report and wait provisions as a replacement for the legislative veto).

142. *Id.*

143. U.S. CONST. art. I, § 8, cl. 3.

144. U.S. CONST. art. IV, § 3, cl. 2.

145. U.S. CONST. art. I, § 8, cl. 18.

146. U.S. CONST. art. I, § 8, cl. 11.

147. U.S. CONST. art. I, § 8, cl. 12.

foreign armies and navies to support United States forces.[148] Finally, the "spending power" to provide for the "common defense and general welfare of the United States"[149] can tie to providing arms for allies aligned with our country.

Congress' power to regulate arms sales may also derive from its general powers over foreign affairs.[150] In *United States v. Curtiss-Wright Export Corp.*,[151] Justice Sutherland maintained that the United States derives additional power from American sovereignty.[152] Provided Congress could use its general power over foreign affairs to delegate authority to preclude arms sales,[153] Congress could also presumably use this power to regulate arms sales.[154]

2. *The President*

Unlike Congress, the President's power to regulate arms sales is not clearly derived from specifically enumerated constitutional powers. The President, therefore, must base his power to sell arms on the more general "powers of the President." These powers include: the President's executive power,[155] the President's foreign relations power,[156] the President's commander-in-chief power,[157] and the take-care-clause power,[158] either individually or in some combined manifestation such as the emergency power,[159] or the executive agreements power.[160]

The power to sell arms conceivably fits into a broad reading of the executive power. Alexander Hamilton insisted that the executive power encompassed all authority over foreign relations.[161] Analyzing the con-

148. U.S. CONST. art. I, § 8, cl. 13.
149. U.S. CONST. art. I, § 8, cl. 1.
150. *See* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 74-76 (1972) (discussing Congress' general power over foreign affairs).
151. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).
152. *Id.* at 316 (holding that the powers of external sovereignty passed from the British Crown to the United States, not to the several colonies).
153. *See id.* at 314 (holding that joint resolution of May 28, 1934, delegating to President authority to ban arms sales is constitutional).
154. *See supra* note 118 (citing case law upholding congressional delegations to the President regulating arms sales).
155. U.S. CONST. art. II, § 1, cl. 1.
156. U.S. CONST. art. II, § 2, cl. 2.
157. U.S. CONST. art. II, § 2, cl. 1.
158. U.S. CONST. art. II, § 3.
159. *See* THE FEDERALIST No. 70, at 424 (A. Hamilton) (Signet ed. 1961). The President's "emergency" power derives from the Executive's capacity for "[d]ecision, activity, secrecy, and dispatch." *Id.* The "emergency" power does not derive from any specific grant. *Id.*
160. *See* L. HENKIN, *supra* note 150, at 173-88 (asserting that the Executive may enter congressional-executive or sole executive agreements absent Senate approval).
161. A. HAMILTON, WORKS 76, 81 (Hamilton ed. 1851), *noted in* L. HENKIN,

stitutional text, Hamilton noted that although Article I delegates to Congress "all legislative powers herein granted," Article II begins, "The Executive Power shall be vested in a President of the United States of America."[162]

According to Hamilton, therefore, the President could theoretically act without limitation,[163] and thus presumably sell arms pursuant to his Executive authority over foreign relations independent of congressional delegation. The Supreme Court, however, does not support such a broad reading of the President's Executive power. Although originally supporting Hamilton's conception of the executive power in *Meyers v. United States*,[164] the Court more recently repudiated this theory in *Youngstown Sheet & Tube Co. v. Sawyer*.[165] As a result, the President must probably derive independent power to sell arms.

The power to sell arms may also derive from the President's foreign relations power.[166] This power rests on the President's authority to make treaties and appoint and receive ambassadors.[167] Narrowly construed, the President's authority only grants him the right to monopolize intergovernmental channels of communication.[168] Since President Washington's neutrality proclamation, however, many Presidents have contended that the foreign relations power also includes the right to make foreign policy.[169]

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supra note 150, at 42-43. In his "Pacificus" letter, Hamilton publicly asserted Washington's power to declare neutrality. *Id.*; *see also* E. CORWIN, THE PRESIDENT: OFFICES AND POWERS 208-11 (1984) (reproducing the Hamilton-Madison executive powers debate).

162. A. HAMILTON, *supra* note 161, at 76, 81.

163. *Id.*

164. Meyers v. United States, 252 U.S. 52, 128 (1928). In *Meyers*, the Supreme Court held that the President had the power to remove the postmaster pursuant to the executive power clause in the Constitution despite an Act of Congress that required the Senate's consent for such a removal. *Id. See generally* L. HENKIN, *supra* note 150, at 43 (discussing *Meyers* in the context of the President's foreign affairs powers).

165. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Justice Jackson, an ex-Attorney General and formerly a strong advocate of presidential power, stated in his *Youngstown* concurrence: "I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated." *Id.* at 641. *See also* L. HENKIN, *supra* note 150, at 43-44 (discussing holding of *Youngstown* and its effect on the Court's holding in *Meyers*).

166. *See generally* L. HENKIN, *supra* note 150, at 45 (discussing President's foreign relations power).

167. U.S. CONST. art. II, § 2, cl. 2.

168. L. HENKIN, *supra* note 150, at 45; *see also* E. CORWIN, *supra* note 161, at 208 (discussing the President's authority under the foreign relations power in light of President Washington's neutrality proclamation).

169. L. HENKIN, *supra* note 150, at 47-50; *see also* E. CORWIN, *supra* note 161, at 208-11 (discussing the debate between Hamilton and Madison regarding the issue of whether or not a President, under the foreign relations power, has the right to make

Assuming the President retains inherent authority to make foreign policy, barring arms sales through a neutrality proclamation, the President, by negative inference, may also have an affirmative right to authorize or regulate arms sales. This right, however, remains speculative given the neutrality debate's ultimate historical outcome. Since President Washington proclaimed neutrality independently from his Congress, Congress has arguably preempted the field, leaving Presidents to act pursuant to neutrality legislation.[170]

The neutrality proclamation's uncertain historical precedent explains in part the failure of the Court in *Curtiss-Wright* to clarify the extent of the President's foreign affairs power. In *Curtiss-Wright*, the Court upheld the constitutionality of a presidential neutrality proclamation made pursuant to congressional statute.[171] Whether the Court also approved broad inherent presidential foreign affairs powers, however, is arguable. Nevertheless, proponents of a strong president have seized upon language in the opinion to buttress their claims.[172]

The President's critics, however, argue that the Court's decision in *Curtiss-Wright* remains susceptible to an alternate interpretation. These critics argue that a closer reading of *Curtiss-Wright* fails to support granting the President foreign affairs powers outside those enumerated in the Constitution, while conceding that the Court's opinion emphasizes the President's institutional advantages in conducting foreign relations.[173] Moreover, the President's critics argue *Curtiss-Wright* merely approves wide congressional delegations to the President in

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foreign policy decisions).

170. *See* L. HENKIN, *supra* note 150, at 48 (discussing Congress' preemption in this field).

171. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 314 (1936).

172. *See* 39 Op. Att'y Gen. 484 (1941) (providing then Attorney General Jackson's legal opinion on the 1940 Destroyers for Bases deal with Great Britain). Jackson relied on the following language in *Curtiss-Wright* to support his arguments for a strong President:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

Id. at 486-87 (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936)).

173. *See* T. FRANCK, *supra* note 5, at 156 (discussing the President's power as interpreted in the *Curtiss-Wright* case and arguing that as a whole, the Court's opinion does not give the President greater authority than exists in the enunciated delegations in the Constitution).

those areas that require secrecy, dispatch, and flexibility.[174] Accordingly, under this view, the President retains no power to proclaim neutrality or sell arms independent of congressional delegation.

Despite the lack of textual support,[175] presidents have claimed substantial "policy-making" authority from the Commander-in-Chief clause of the Constitution.[176] Louis Henkin notes that pursuant to the Commander-in-Chief clause, presidents have asserted special authority in the area of procurement, notwithstanding the Constitution's express grant to Congress "to raise and support Armies [and] to provide and maintain a Navy."[177] Under this clause, then, the President may also supply war materials to allies of the United States once he establishes a nexus between the sale and United States defense interests.[178] It remains conceivable, therefore, that the President possesses concurrent power to sell arms.

During hearings directed towards assessing *Chadha's* effect on foreign affairs legislation, including the AECA, congressmen and senators attacked the constitutionality of an independent presidential power to sell arms based on the Commander-in-Chief clause, despite the established trend toward leaving this power in the hands of the President.[179] Thus, concurrent authority derived from the Commander-in-Chief clause remains textually and historically in doubt.

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174. *See id.* at 159-62 (discussing when Congressional action is inappropriate).

175. *See* THE FEDERALIST No. 69, at 418 (A. Hamilton) (Signet ed. 1961) (providing Alexander Hamilton's views on the significance of the commander-in-chief power). Even Hamilton maintained that the commander-in-chief power:

> Amount[s] to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy; while that of the British king extends to the declaring of war *and the raising and regulating of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature.*

Id. (emphasis added); *see also* L. HENKIN, *supra* note 150, at 51 (providing a complete historical overview of the commander-in-chief power).

Id.

176. *See* L. HENKIN, *supra* note 150, at 51-54 (tracing historical gradations in the President's policy-making authority based on commander-in-chief clause).

177. *Id.* at 111 (quoting U.S. CONST. art. I, § 8, cl. 12, 13).

178. *See* 39 Op. Att'y Gen. 484 (1941) (providing then Attorney General Jackson's legal opinion on the 1940 Destroyers for Bases deal with Great Britain). In his opinion, Jackson defended the transfer of fifty over-aged destroyers to Great Britain before America's official entrance into World War II. *Id.* Although the Attorney General approved part of the transaction on the basis of a statutory grant, he also apparently relied on the President's independent power as Commander-in-Chief. *Id.* at 489.

179. *See Hearings on S. 1050, supra* note 16, at 11 (prepared statement of Sen. Byrd attacking the commander-in-chief rationale); *see also The U.S. Supreme Court Decision Concerning the Legislative Veto, Hearings Before the House Comm. on Foreign Affairs*, 98th Cong., 1st Sess. 229, 245 (1983) [hereinafter cited as *Foreign Relations Legislative Veto Hearing*] (questioning of Mr. Brand on the ability of the President to sell arms based on his commander-in-chief power).

Despite apparent congressional opposition to concurrent executive power, the explicit constitutional basis for independent Presidential authority ironically derives from Congress. According to Henkin, the President can invoke the take-care clause to support presidential initiatives[180] such as pursuit of general policies established by treaty.[181] The take-care clause may or may not contemplate such initiatives, but it is not questionable that the President has such authority.[182] Thus, the President may argue the take-care clause dictates that he arm allies of the United States to give effect to United States defense treaties such as NATO. On the other hand, because these allies could presumably procure arms elsewhere, a link between the take-care clause and the power to sell arms in such a situation remains tenuous.

In addition to the President's enumerated powers, his authority to sell arms conceivably arises from two other sources. First, the AECA's emergency waiver provision[183] may imply congressional recognition of inherent presidential emergency authority in the arms sales area. Both *Youngstown*[184] and *Dames & Moore v. Regan*,[185] however, do not support this proposition. Both cases hold that presidential emergency powers unrelated to the President's enumerated powers are only viable to the extent Congress delegated or acquiesced that power to the President.[186] The AECA's waiver provision cannot, therefore, form a sole basis for presidential powers to sell arms.

The second source of the President's arms sale power may derive from linking independent arms sales authority to the President's power to enter into executive agreements. While this issue of Executive power remains unresolved,[187] Presidents and foreign states unequivocally un-

180. L. HENKIN, *supra* note 150, at 56.
181. *Id.*
182. *Id.*
183. International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 202, 90 Stat. 729, 740-44 (1976) (current version at 22 U.S.C. § 2751 (1982) (amended 1986)).
184. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
185. Dames & Moore v. Regan, 453 U.S. 654 (1981).
186. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) (Black, J.) (commenting that "[t]he President's power, if any, to issue the order to seize steel mills must stem either from an act of Congress or from the Constitution itself"); *see also* Dames & Moore v. Regan, 453 U.S. 654, 688 (1981). In *Dames & Moore*, the Court refused to decide whether the President had plenary power to settle claims, but upheld a settlement upon a finding that Congress had acquiesced to the President's actions. *Id. But cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635, 637 (Jackson, J., concurring) (arguing that because Presidential powers are not fixed but fluctuate, congressional inertia, indifference, or quiesence might invite independent Presidential action based on the imperatives of events rather than abstract theories of law).
187. L. HENKIN, *supra* note 150, at 176-87.

derstand that committing American financial resources depends upon congressional appropriation.[188] Therefore, at least to the extent foreign arms sales rely on United States financing, the exercise of Presidential action may risk a congressional veto.

3. *Assessing Competing Claims for Power*

The President's difficulties in asserting independent power to sell arms are well documented. While Congress can easily trace its authority to a single constitutional grant, the President can only rely on more general powers. Thus, even assuming that the President has independent power to declare arms sales, it is difficult to conceive how he could effectuate his plans independently of Congress.[189]

These constitutional and practical difficulties, combined with Congress' traditional willingness to delegate, make it conceivable that the President will not actually claim an independent power to sell arms. Although this proposition admittedly has no definitive support, two facts support this view. First, President Ford vetoed S. 2662 because of the bill's restrictions on the President's general authority to conduct foreign relations not because he claimed an independent authority to sell arms.[190] Second, a high-ranking Reagan Administration official has renounced any such presidential claims in the arms sale area.[191] Deputy Secretary of State Kenneth W. Dam, during hearings conducted to assess *Chadha*'s effects on foreign affairs legislation, denied the President retained independent arms sales authority.[192] The Deputy Secretary may have been acting "diplomatically" before Congress in this instance but his concession remains important nonetheless as it supports the view that the President lacks independent power to sell arms.

If the President does lack an independent power, an inseverable legislative veto potentially could disrupt United States arms sales policies.[193] This danger, however, existed exclusively on an intellectual

188. *Id.* at 183.

189. *See* U.S. CONST. art. I, § 8, cl. 1 (denoting Congress' power of the purse). The President's task would be difficult because financing arms sales requires congressional appropriation. *Id.* Moreover, Congress is required to approve disposal of United States property that would come into play in government-to-government sales. U.S. CONST. art. IV, § 3, cl. 2. Finally, only Congress can prescribe criminal penalties for violations of the law. U.S. CONST. art. I.

190. *See Veto*, *supra* note 62 (detailing President Ford's reasons for vetoing S. 2662).

191. *Hearings on S. 1050*, *supra* note 16, at 24-25; *Foreign Affairs Legislative Veto Hearing*, *supra* note 181, at 100 (statements of Deputy Secretary of State Kenneth W. Dam).

192. *Foreign Affairs Legislative Veto Hearing*, *supra* note 179, at 100.

193. *See id.* (stating that the President lacks an independent power to sell arms). If

level; politics intervened to ameliorate the situation as both Congress and the President treated the legistive veto as severable even before the AECA's recent amendment.[194] Congress, however, was still left with the task of developing a permanent legislative response to *Chadha*.

IV. CONGRESS' ALTERNATIVES

The legislative veto's demise left Congress with three major alternatives. First, Congress could have retained its wide delegation to the President. Second, Congress could have rescinded its delegated authority. Third, Congress could have delegated narrowly.

A. WIDE DELEGATION

Congress ultimately chose to work within already established procedures when it passed the AECA's recent amendment.[195] As a result of *Chadha*, Congress treated the AECA as a report and wait provision, relying on vigorous congressional oversight to replace the veto.[196] The recent amendment to the AECA merely formalizes the report and wait process.[197] Under the report and wait system, Congress' delegation to the President remains intact. Should Congress wish to block an arms sale, it must pass a joint resolution of disapproval subject to a presiden-

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the legislative veto were inseverable and the President retained no independent authority to sell arms, sales would not have been precluded. Rather, such sales would have been unregulated except where other laws applied. *Id.*

194. *See infra* notes 229-56 and accompanying text (discussing the abortive 1985 sale of aircraft and other equipment to Jordan and Saudi Arabia as an example of Congressional strategy in the post-*Chadha* period).

195. Amendment to the Arms Export Control Act, Pub. L. No. 99-247 (Feb. 12, 1986); *see also Arms Sales: Jordan Deal Off; Future Veto Procedure Clears*, 44 CONG. Q. WEEKLY REP. 266 (1986) (reporting passage of S. 1831, which became Pub. L. No. 99-247).

196. *See infra* notes 229-56 and accompanying text (discussing the abortive 1985 sale of aircraft and other equipment to Jordan and Saudi Arabia as an example of Congressional strategy in the post-*Chadha* period).

197. *See* 132 CONG. REC. H244 (daily ed. Feb. 3, 1986) (statement of Congressman Fascell) (summarizing the report and wait provisions of S. 1831). Congressman Fascell observed:

> S. 1831 is a technical measure which provides for joint rather than concurrent resolutions of disapproval for third-country arms transfers, government-to-government and commercial arms sales, and leases of defense articles required to be notified to Congress under the Arms Export Control Act. This action has become necessary in light of the Supreme Court decision Chadha versus INS [sic], which struck down the constitionality [sic] of legislative vetoes.
>
> S. 1831 also applies the expedited procedure provisions of existing law for consideration in the Senate to joint rather than concurrent resolutions of disapproval for arms sales.

Id.; *see also* 131 CONG. REC. S18161-62 (daily ed. Dec. 19, 1985) (providing an additional explanation of S. 1831).

tial veto. In the alternative, Congress simply may express its concern through a nonbinding resolution.

B. NO DELEGATION

Instead of adopting the report and wait process, Congress could have maintained the leverage it had with the legislative veto and rescinded the President's authority to sell arms.[198] Under such a scheme, Congress could have approved all arms sales by affirmative vote. Under a less drastic proposal, Congress could have only intervened in arms sales exceeding a certain amount.[199]

On a theoretical level, such joint resolutions of approval offered Congress the advantage of approximating the force of a one-house veto.[200] On a practical level, however, this proposal was difficult to enact. The President enjoyed a wide congressional delegation because the AECA's legislative veto was presumably severable.[201] Accordingly, any attempt by Congress to strip the President's power to sell arms would have been vetoed by the President. Moreover, had Congress attempted to override the veto, the President may have asserted the independent power to sell arms. Such an atmosphere could have created a constitutional crisis.

C. NARROW DELEGATION

To avoid a constitutional crisis, Congress also could have delegated arms sales power to the President on a narrow basis. This alternative would have combined the wide and narrow delegation options by varying the vote necessary for approval according to the transaction and country involved.[202] A narrow delegation scheme would have required affirmative congressional votes on most sales, but the President would have retained discretion to make sales to United States allies subject to a joint resolution of disapproval.[203] Congress could have then concen-

198. *See* H.R. 5018, 98th Cong., 2d Sess. (1984) (incorporating this proposal); *see also Hearings on S. 1050*, *supra* note 15 (discussing this alternative).

199. S. 1050, 98th Cong., 1st Sess. (1983). *See also Hearings on S. 1050*, *supra* note 15, at 27 (questioning of Kenneth W. Dam, Deputy Secretary of State, on this proposal).

200. One house could have blocked the measure by not affirmatively voting for a given arms sale.

201. *See supra* notes 118-42 and accompanying text (discussing the severability of AECA's legislative veto).

202. *See* H.R. 5759, 98th Cong., 2d Sess. (1984) (incorporating the narrow delegation proposal); *see also Foreign Relations Legislative Veto Hearing*, *supra* note 179, at 96 (questioning of Kenneth W. Dam, Deputy Secretary of State, on the proposal).

203. H.R. 5759, 98th Cong., 2d Sess. (1984) (exempting NATO and ANZUS countries as well as Japan and Israel).

trated its energies on those sales most likely to produce controversy.

Despite the apparent advantages and disadvantages of each proposal, appraising Congress' ultimate response to this problem should depend upon an assessment of the AECA's performance both before and after *Chadha*. If congressional codetermination through framework legislation resulted in a "more rational, publicly acceptable policy" as the AECA's sponsors contemplated,[204] then Congress should have favored preempting the field by refusing to delegate. If, on the other hand, events indicated Congress was unable to make a truly positive contribution to arms sales decision-making, then Congress correctly continued its broad delegation subject to regular oversight procedures.

V. CASE STUDIES IN THE AECA

To determine the soundness of Congress' decision requires highlighting two arms sales proposals under the AECA. The first proposal, the 1978 Middle East fighter package, demonstrates how the AECA operated before *Chadha*. The second proposal, the 1985 plan to sell advanced weapons to Saudi Arabia and Jordan, elucidates post-*Chadha* realities.

A. CASE STUDY I: THE 1978 MIDDLE EAST FIGHTER PACKAGE DEAL: DOGFIGHT OVER CAPITOL HILL

Under the 1978 Middle East fighter package deal,[205] President Carter offered Egypt fifty F-5 export fighters, as a reward, to President Sadat for peace overtures made to Israel and for his courage in evicting the Soviets from Egypt.[206] Initially, Israel was to receive twenty-five F-15s and seventy-five F-16s as part of the second Sinai disengagement agreement.[207] In the end, however, President Carter also promised Saudi Arabia sixty F-15s, thereby honoring President Ford's promise to Saudi Arabia to buy any aircraft it chose.[208]

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204. *Senate Report on S. 2662*, *supra* note 5, at 7.

205. *See Congress Backs Jet Sales to Arabs*, 34 CONG. Q. ALMANAC 405 (1979) (detailing the Senate's forty-four to fifty-five vote against a resolution disapproving a $4.8 billion aircraft sale to Israel, Saudi Arabia, and Egypt). On May 15, 1978, President Carter prevailed in one of the most hotly contested foreign policy disputes ever fought under the AECA. *Id.* The controversial aircraft sale stemmed from earlier commitments made during the Ford administration. N.Y. Times, Feb. 17, 1978, at A3, col. 1 (dispatch by Terrence Smith). According to one administration official the sale represented, "Henry Kissinger's chickens . . . coming home to roost on Jimmy Carter's doorstep." *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

The AECA's legislative veto governed President Carter's strategy in securing the deal. Mindful of Congress' deep support for Israel, President Carter sought victory by linking the popular sale of aircraft to Israel to the unpopular sale of jets to Egypt and Saudi Arabia.[209] Creating this arrangement nearly backfired[210] as Congress complained that he broke the spirit, if not the letter, of the AECA.[211] In this case, however, a mere change in terminology sufficed to mollify Congress.[212] The President repudiated the package concept, but reserved the right to review the surviving sales should any be defeated.[213]

Thereafter, the battle reverted to the arms sale's merits. Unfortunately, purely detached decision-making proved impossible given the intense lobbying efforts of both sides. The American Israel Public Affairs Committee (AIPAC) led the campaign against the sales.[214] Besides pressuring individual congressmen and senators, AIPAC members participated in the congressional caucus organized to oppose the sale, drafted the sale disapproval resolution, and prepared questions for committee hearings.[215]

Saudi Arabia, Egypt, and Israel also joined the dispute over the arms sale. Saudi Arabia, lacking a strong domestic constituency, relied on personal diplomacy and professional lobbyists to persuade Congress.[216] The most successful lobbyist, however, was Egyptian President Anwar Sadat.[217] His 1977 and 1978 visits to the House and Senate Foreign Relations Committees created a very favorable atmosphere, making it difficult for Congress to deny Egypt the F-5s.[218] Israel actively lobbied against the arms sale to Saudi Arabia.[219] In April 1978, Moshe Dayan met with Senate Foreign Relations Committee members to discuss sales strategy.[220]

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209. *See* T. FRANCK & E. WEISBAND, *supra* note 3, at 107 (discussing Carter's strategy).

210. *Id.*

211. *Id.* Many Congressmen feared such a precedent would "inevitably encourage the executive branch to link up other major sale transactions so that the power of Congress to reject such transactions [would] become [meaningless]." 124 CONG. REC. 7427 (1978) (statement of Sen. Allen).

212. T. FRANCK & E. WEISBAND, *supra* note 3, at 107.

213. *Id.*

214. *Id.* at 190.

215. *Id.*

216. *Id.* at 184-85, 190. Princes Bandor Bin Suttan, Turki Faisal, and Saud, for example, conducted extensive lobbying efforts among Congressional offices. *Id.*

217. *Id.* at 185.

218. *Id.*

219. *Id.*

220. *Id.* One participant described the meeting as a "private rump session of the Senate Foreign Relations Committee." *Id.*

Despite this heavy lobbying by foreign governments and their domestic proxies, the ultimate responsibility for the outcome rested with President Carter. The President evolved a four-pronged strategy to combat his opponents. First, President Carter arranged bipartisan endorsements for the sales from prominent political figures.[221] Second, the President pressured the Saudis into accepting a number of restrictions on the use of their sophisticated F-15s;[222] these restrictions rendered the advanced fighters less of an offensive threat to Israel.[223] Third, the President agreed to sell Israel twenty additional F-15s, thereby giving it the same total number promised to Saudi Arabia.[224] Fourth, Carter intensely and personally lobbied members of Congress.[225]

The disapproval resolution met with concerted opposition in the Senate Foreign Relations Committee[226] and went without recommendation to the full Senate.[227] The resolution was structured so as to repackage the sale, leaving the senators with only one choice, to accept or reject the entire deal.[228] Given this condition, the Senate defeated the resolution of disapproval.[229]

The 1978 fighter package sale provides insights on how the AECA operated before *Chadha*. First, although Congress jealously guarded its prerogative from perceived presidential circumvention, it entered the process too late for its threatened legislative veto to effectuate more than minor Executive adjustments. Second, Congress' entrance into the process was more attributable to Arab and Israeli lobbying efforts than to a true congressional desire to codetermine American foreign policy. Finally, once Congress became involved, the vote became a "litmus

221. *Id.* at 108-09. Henry Kissinger and Senator Abraham Ribicoff (D-Conn.) were among the political forces the President relied upon to support his effort. *Id.*; *see also Congress Backs Jet Sales to Arabs*, *supra* note 205, at 410 (Senator Ribicoff supporting "even-handed" relations with both Israel and Arab states).

222. Letter from Harold Brown to Senator Sparkman (May 9, 1978), *reprinted in* 124 CONG. REC. 13627 (1978). According to a letter from Defense Secretary Harold Brown to Senator Sparkman, the Saudis made the following concessions: (1) they would not purchase equipment that would extend the F-15s range or ground attack capability; (2) they would not base the planes at Tabuk, near Israel; (3) they promised not to use the planes offensively; and (4) they promised not to buy additional planes while receiving the F-15s. *Id.*

223. *Id.*

224. T. FRANCK & E. WEISBAND, *supra* note 3, at 109.

225. *See Congress Backs Jet Sales to Arabs*, *supra* note 205 at 410 (noting that President Carter sent every Senator a letter emphasizing aircraft rejection to Egypt would be a "breach of trust").

226. *Id.* at 408. The Senate Committee tied 8-8 on the sales disapproval resolution. *Id.*

227. R. Grimmet, *supra* note 26, at 19.

228. *Id.*

229. *Id.*

test" of support for both foreign and domestic interests. Accordingly, the *vote* on the arms sale was far more significant than the actual sale.

B. CASE STUDY II: THE ABORTED 1985 SALE OF AIRCRAFT AND OTHER EQUIPMENT TO JORDAN AND SAUDI ARABIA: THE SALE THAT NEVER TOOK OFF

During September and October 1985, the Reagan Administration's Middle East arms sales policy suffered a series of severe reversals. First, the President sacrificed a pending sale of additional F-15s to Saudi Arabia in an effort to ensure support for a sale of sophisticated weaponry to Jordan.[230] This tactic failed when the Senate rebuffed the Jordan arms proposals.[231] Finally, to avoid further embarrassment, the President reluctantly agreed to postpone an arms sale to Jordan until at least March 1, 1986.[232] Initially, the President promised both Jordan and Saudi Arabia large quantities of modern weapons.[233] In an effort to justify these sales, the Executive argued that military cooperation encouraged moderate Arab regimes in their peace initiatives with Israel.[234]

The Reagan Administration knew that Congress might oppose the sale and therefore acted cautiously. Despite this caution, and although the legislative veto was no longer a constraint, congressional opposition forced the President to scale back his plans. As a result, the Saudi arms request was revised. Reports surfaced in January 1985 that President Reagan intended to announce a multi-billion dollar weapons package during a February 11 visit of Saudi King Faud.[235] Public and congressional opposition, however, mounted even before the President announced the sale. In response, President Reagan decided to postpone

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230. Wash. Post, Sept. 10, 1985, at A6, col. 1.

231. *See* Felton, *Senate Deals Blow to Reagan, Hussein on Arms*, 43 CONG. Q. WEEKLY REP. 2135 (Oct. 26, 1985) (reporting that the President postponed Jordan arms sales pending Jordan and Israel peace talks).

232. Wash. Post, Oct. 24, 1985, at A31, col. 1.

233. Wash. Post, June 24, 1985, at A2, col. 5. In particular, the Saudi package reportedly included forty to sixty F-15s, multiple ejection bomb racks, fuel tanks, and Sidewinder missiles for their air force as well as Stinger shoulder fired missiles and M1 tanks for its army. *Id.* The Jordanians, on the other hand, were to receive forty-four F-20 or F-16 fighters, twelve Hawk mobile surface to air batteries, 108 Stingers, 300 air-to-air missiles, and thirty-two Bradley armored personnel carriers. Felton, *Reagan: Warming Up for Fight on Jordan Arms*, 43 CONG. Q. WEEKLY REP. 1959 (Sept. 28, 1985).

234. *See* Felton, *Arms and the Middle East Part 1*, 43 CONG. Q. WEEKLY REP. 2136 (Oct. 26, 1985) (examining the impact of President Reagan's arms sales attempts to Jordan on Middle East peace efforts and on regional security).

235. Wash. Post, Jan. 24, 1985, at A18, col. 1.

the deal pending a comprehensive policy review.[236] Unnamed sources partly attributed the delay to Administration fears that the sale might waste considerable political capital.[237] When officials finally disclosed large planned sales to Saudi Arabia and Jordan during the fall of 1985, they also revealed that the sale excluded F-15s.[238] Speculation that the United States would supply Saudi Arabia with the planes at a later date ended when the Saudis announced that they would procure European built Tornados instead.[239] Given the Saudis' desire to base the new aircraft at Tabuk near Israel, a step that certainly would have inflamed Congress,[240] the President sacrificed the Saudi sale hoping to salvage the sale to Jordan.[241] The Saudis developed second thoughts about their other purchases[242] and as a result, the rest of the sale eventually was delayed.[243]

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236. N.Y. Times, Jan. 31, 1985, at A1, col. 6. The review's focus concerned the connection between American security assistance and peace and stability in the Middle East. *Id.*

237. *Id.*

238. Wash. Post, Sept. 6, 1985, at A1, col. 1.

239. Wash. Post, Sept. 15, 1985, at A1, col. 6. Some analysts argue that the Tornado sale represented a greater offensive threat to Israel than a sale of F-15s. Wash. Post, Sept. 17, 1985, at A8, col. 4 (describing "Tornado" primarily as an offensive weapon). Unlike the F-15, an interceptor, the Tornado can be configured for ground attack. *See id.* (noting F-15's role is to shoot down enemy aircraft). Moreover, the Saudis have not agreed to any self-imposed restraints on the Tornado's use as they have with the F-15s. *Id.*

240. Wash. Post, Sept. 10, 1985, at A6, col. 1. A condition for Congress' approval of the 1978 F-15 sale to Saudi Arabia was that the planes would not be based at Tabuk. *Id.* As a result, any Saudi effort to base the new planes there would have certainly caused a furor in Congress. *Id. See also supra* note 224 and accompanying text (discussing the concessions President Carter made to assure passage of the 1978 Saudi F-15 sale).

241. Wash. Post, Sept. 10, 1985, at A6, col. 1.

242. Wash. Post, Sept. 28, 1985, at A3, col. 5.

243. As this article was being prepared for publication during Spring 1986, the President faced a showdown with Congress over an abbreviated version of the Saudi sale involving $354 million worth of air-to-air, ground-to-air, and air-to-sea missiles. *See Opponents Take Steps to Block Sale of Weaponry to the Saudis*, 44 CONG. Q. WEEKLY REP. 789 (Apr. 12, 1986) (reporting the introduction of congressional resolutions of disapproval under the newly amended AECA aimed at blocking the Saudi arms sale). Congress delivered the President a stunning defeat when both Houses voted by wide margins to block the sale. *Both Chambers Say "No" to Saudi Arms Deal*, 44 CONG. Q. WEEKLY REP. 1019 (May 10, 1986) (reporting that the legislation passed by votes well above the two-thirds necessary to override a veto). Some observers attributed the defeat to administration complacency following AIPAC's decision not to actively lobby against the sale. *Id.* at 1020. In any event, despite a Saudi offer to withdraw the entire request, the Administration decided to push forward with the balance of the sale after vetoing the legislation. Pressman, *Hill, Reagan Reach a Standoff Over Saudi Weapons Package*, 44 CONG. Q. WEEKLY REP. 1164 (May 24, 1986) (providing the text of President Reagan's veto). After the President agreed to remove portable Stinger anti-aircraft missiles from the deal, the heavily lobbied Senate salvaged the rest of the sale by refusing to override the President's veto. Wash. Post, June 6, 1986, at A1, col.

If President Reagan believed a retreat on the Saudi sale would advance his Jordanian request, he was mistaken. Under the 1986-1987 Foreign Aid Authorization Bill,[244] Congress prohibited advanced weapons transfers to Jordan unless the President certified Jordan's public commitment to recognize and negotiate with Israel.[245] Thus, the President was handicapped before the Administration prepared its plans for the sale. Whether Jordan met the public commitment requirement depended on Jordan's King Hussein. King Hussein was required to take a leading role that consequently limited the Administration's capacity to influence the events surrounding the sale.

During late September and early October, King Hussein made a strong effort to persuade Congress.[246] In addition to courting legislators in Washington, King Hussein made a United Nations speech informing the world community that Jordan was prepared to negotiate a peace agreement with the Government of Israel.[247]

Hussein's efforts, however, proved futile. While his speech drew a predictable response from pro-Israeli groups such as AIPAC,[248] statements by Senate Foreign Relations Committee Chairman Lugar that Hussein's speech fell short of congressional expectations doomed the sale.[249] Thereafter, the Reagan Administration worked with King Hussein in a concerted effort to draft a formula to avoid outright defeat.[250]

Because of widespread acknowledgment that the House did not support the sale, the Administration's efforts centered on the Senate.[251] The move towards compromise began when Senator Lugar asked colleagues to reserve their judgment pending further developments in the search for peace in the Middle East.[252] By October 24, just three days after the President formally notified Congress about the sale, this pro-

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244. Foreign Aid Authorization Bill, Pub. L. No. 99-83 (1986).

245. *See* Felton, *Friends of Israel on Hill Seek Compromise on Jordan Arms*, 43 CONG. Q. WEEKLY REP. 1896, 1897 (Sept. 21, 1985) (highlighting arms sales aspects of bill).

246. Felton, *Hussein Courts Wary Congress, But Arms Sale is Uphill Struggle*, 43 CONG. Q. WEEKLY REP. 2018 (Oct. 5, 1985).

247. Wash. Post, Sept. 28, 1985, at A3, col. 5. Hussein more specifically stated that he was willing to negotiate under the basic tenets of Security Council Resolutions 242 and 338. *Id.*

248. *Id.*

249. *Id.*

250. *See Hussein Courts Wary Congress, But Arms Sale is Uphill Struggle*, *supra* note 245, at 2018 (discussing Administration efforts at promoting arms sales at the same time as peace talks).

251. *Id.*

252. *Id.*

posal took shape.[253] After President Reagan reluctantly agreed, the Senate approved S.J. Res. 228 by a ninety-seven to one vote.[254] Under this legislation, later approved by the House,[255] any arms sale was delayed until March 1, 1986, "unless direct and meaningful peace negotiations between Israel and Jordan [were] under way."[256]

The abortive sale of military equipment to Saudi Arabia and Jordan demonstrates that even before the AECA's recent amendment, Congress' influence over arms sales decision-making did not end with the legislative veto's demise. A motivated Congress can still force delays or, under the correct circumstances, cancel sales. Nevertheless, final appraisal of the package sale must await President Reagan's decision. Full commitment of presidential prestige and threat of an executive veto may alter the result, especially if the President keeps his pledge and proceeds with his plan eventually.[257]

VI. ASSESSING THE ALTERNATIVES

Evaluating Congress' decision to continue wide delegation to the President depends on a comparison of Congress' present and past performances. If framework legislation resulted in a "more rational, publicly acceptable policy,"[258] as the AECA's sponsors contemplated, then Congress should have adopted proposals that would preserve a preeminent role for itself. If, on the other hand, events proved framework legislation unsuccessful, Congress correctly retained the President's present broad delegation.

The AECA's sponsors advertised the Act's reporting and legislative veto provisions as guaranteeing congressional participation in arms sale decision-making.[259] The AECA's sponsors claimed "shining the public spotlight"[260] on arms sales through open congressional debate would result in a coherent arms sales policy.[261] Presumably, congressional

253. *See* Felton, *Senate Deals Blow to Reagan, Hussein on Arms*, 43 CONG. Q. WEEKLY REP. 2135 (Oct. 26, 1985) (describing the voting results and reporting President Reagan's and King Hussein's reaction to the Senate resolutions).

254. *Id.*

255. *See Delay of Jordan Arms Sale is Cleared*, 43 CONG. Q. WEEKLY REP. 2387 (1985) (discussing the terms of the bill delaying U.S. arms sales to Jordan).

256. *Senate Deals Blow to Reagan, Hussein on Arms*, *supra* note 252, at 2135.

257. Wash. Post, Oct. 31, 1985, at A26, col. 1.

258. *See supra* note 42 and accompanying text (discussing Congress' hopes for framework legislation in the arms sales area).

259. *See generally Senate Report on S. 2662*, *supra* note 5, at 5-7 (commenting on the virtues of framework legislation).

260. *Id.*; *see also supra* note 42 and accompanying text (discussing Congress' hopes for framework legislation in the arms sales area).

261. *Senate Report on S. 2662*, *supra* note 5, at 7; *see also supra* note 42 and

codetermination would curtail unwanted foreign commitments[262] and refocus United States priorities on arms control.[263]

If by writing and promoting framework legislation the AECA's sponsors truly believed they could insure regular congressional participation in a coherent and deliberate review of United States arms sales decisions, then Congress has not achieved its goal. Before *Chadha*, Congress never used the legislative veto to prune unwanted foreign commitments or redirect United States arms sales policy towards arms control.[264] Instead, Congress used leverage it believed was contained within the legislative veto to modify a very limited number of sales. Only four sales other than the 1978 Fighter package engendered enough controversy to threaten legislative vetoes.[265] All five concerned the Middle East and four involved AIPAC's efforts to protect Israeli security.[266]

Given the limited nature of actual congressional involvement, framework legislation did not result in a "more rational, publicly acceptable policy."[267] Rather, history indicates Congress acted in an ad hoc fashion in response to specific domestic pressures.[268] Absent pressure from lobbyists, Congress chose not to intervene.[269] Even when Congress in-

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accompanying text (discussing Congress' hopes for framework legislation in the arms sales area).

262. *Senate Report on S. 2662, supra* note 5, at 6; *see also supra* note 17 and accompanying text (discussing Senator Nelson's fears that arms sales could engender additional foreign wars like Vietnam).

263. *See supra* note 42 and accompanying text (discussing Congress' hope that the framework legislation would result in a decline in arms sales). Although Senator Nelson introduced a large number of resolutions of disapproval to this end, nothing came of them. *Congress Declines to Block Arms Sales*, 32 CONG. Q. WEEKLY REP. 253 (1976).

264. *See generally Legislative Veto after Chadha: Hearings before the House Comm. on Rules*, 98th Cong., 2d Sess. 193 (1984), *reproduced from* Collier, *Legislative-Executive Balance in Foreign Policy without the Legislative Veto*, CRS REV. (Fall 1984) (unpaginated) [hereinafter cited as *House Rules Hearings*] (describing these sales and veto threats).

265. *Id.*

266. *Id.*

267. *See supra* note 42 and accompanying text (discussing Congress' hopes for framework legislation in the arms sales area).

268. *House Rules Hearings, infra* note 263, at 941, *reproduced in* Gilmour & Craig, *After the Congressional Veto: Assessing the Alternatives*, 3 J. POL. ANAL. & MGMT. 375 (1984).

269. *Id.* For example, when President Reagan notified Congress about a sale of F-16s to Pakistan, no resolution of disapproval was reported though the balance of power between India and Pakistan was thereby endangered. *Id.* at 942. President Carter's AWACS sale to Iran represents the one exception. T. FRANCK & E. WEISBAND, *supra* note 3, at 105. The recent Saudi missile deal represents another post-*Chadha* case where a sale faltered without active lobbying. *See supra* note 215 (noting that AIPAC did not actively lobby against the sale).

tervened, the results were negligible. While Congress compelled the President to adjust numbers, eliminate components, or attach conditions on a weapon's use, it never blocked a sale before *Chadha*.[270] The 1978 Fighter package offers a case in point. Though the Saudis accepted conditions on their purchase, they still received the F-15s. Those opposed to the sale were forced to accept additional aircraft for Israel rather than no aircraft for Saudi Arabia. While Congress received a myriad of reports it still entered the process too late to veto or extensively modify the sale without risking serious damage to United States foreign policy.[271] Accordingly, despite intense political pressures against the sale, President Carter prevailed.

Failure of framework legislation questioned moves designed to preserve a preeminent role for Congress by rescinding wide executive delegation. On a theoretical level, joint resolutions of approval would have offered the advantage of approximating the force of a one-house veto because a single house could have prevented the sales. Effective legislation would have required Congress to enter the process prior to the sale's finalization. The earlier Congress entered the process, however, the more it would invade the Executive's domain. Conceivably, members of Congress may have "negotiated" with foreign powers thus impinging on the President's status as the "sole organ" of foreign relations.[272] Moreover, premature involvement might have violated the separation of powers.

Aside from the separation of powers issues, this proposal would have increased Congress' workload to such an extent that it would have further burdened an already overburdened and generally disinterested Congress. As a result, under such a proposal, Congress might have unintentionally delayed even noncontroversial sales, risking serious damage to United States foreign policy.[273] Controversial sales would have

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270. *House Rules Hearings*, *infra* note 263, at 941, *reproduced from* Gilmour & Craig, *After the Congressional Veto: Assessing the Alternatives*, 3 J. POL. ANAL. & MGMT. 375 (1984). Ironically, the first veto of an arms sale did not occur until after *Chadha* and the amendment to the AECA. *See supra* note 242 (describing the showdown between President Reagan and Congress over a $354 million missile sale to the Saudis).

271. *See* R. Grimmet, *supra* note 26, at 21 (discussing risks to United States foreign policy if Congress enters into arms negotiation after a formal offer has been made to a foreign government).

272. *See* T. FRANCK & E. WEISBAND, *supra* note 3, at 185 (noting that some observers considered lobbying by foreign governments during various arms sales controversies an "unseemly" impingement on the President's position as "sole organ" in such matters).

273. *See Foreign Affairs Legislative Veto Hearing*, *supra* note 179 at 97-98 (providing Deputy Secretary of State Kenneth W. Dam's concerns that joint resolutions of approval might overburden Congress).

undoubtedly faced even greater hurdles. Conceivably, groups such as AIPAC could have enlisted congressional allies to procedurally halt sales in committee.[274] Assuming sales reached the floor, pressure groups could have easily transformed the vote into a referendum on United States policy in the country involved.[275]

While a narrow delegation strategy would have lessened Congress' workload, separation of powers concerns would have remained. Moreover, this strategy would have raised the additional problem of exempting certain countries from congressional scrutiny while discriminating against other, nonexempt nations. Such a strategy potentially would have harmed our foreign relations.[276]

In light of these difficulties, Congress chose the best strategy by continuing wide delegation to the President. Considering Congress' treatment of arms sales decision-making, retaining the AECA as a report-and-wait provision will not adversely affect congressional prerogatives in the arms sale area.[277] Procedurally, the report-and-wait provision operates like the AECA's two-house veto to the extent that a resolution of disapproval must pass in both houses before Congress can block a sale. Unlike the legislative veto, however, a resolution of disapproval must conform to the presentment clause.[278] Accordingly, the President may veto Congress' resolution of disapproval, forcing it to muster a two-thirds vote to override. Essentially, Congress must effectuate an overide of a Presidential veto enacted to counter Congressional disapproval.[279]

Despite this daunting prospect, Congress still retains ample influence over the President's arms sales plans. The aborted 1985 Jordanian and Saudi sales prove that, notwithstanding the President's veto power, political realities require the President to negotiate with Congress to avoid losses of valuable political capital.[280] Even foreign countries rec-

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274. *See id.* at 97 (noting Deputy Secretary Dam's concerns about controversial sales).

275. *Hearings on S. 1050*, *supra* note 16, at 41 (citing the prepared statement of Matthew Nimetz, former Undersecretary of State).

276. *See id.* at 28 (questioning of Kenneth W. Dam, Deputy Secretary of State).

277. The recent compromise Saudi missile sale represents a case in point. *See supra* note 245 (discussing the sale).

278. U.S. CONST. art. I, § 7, cl. 2.

279. *House Rules Hearings*, *supra* note 117, at 948, *reproduced from* Gilmour & Craig, *After the Congressional Veto: Assessing the Alternatives*, 3 J. POL. ANAL. & MGMT. 382 (1984).

280. *See supra* notes 239-256 and accompanying text (discussing the abortive 1985 Jordanian and Saudi sales); *see also* note 253 (discussing the President's decision to eliminate Stinger missiles from the recent Saudi missile request under the amended AECA to assure that Congress would not override his veto of a resolution disapproving the sale).

ognize the need for congressional acquiescence.[281] No foreign government would allow their arms supply to depend on a Presidential veto.[282]

Beyond the leverage associated with the legislative veto, the report-and-wait provision preserves flexibility, an important advantage for Congress. Rescinding or narrowing delegation involves Congress in all or most arms sales, whether or not Congress desires such involvement. Pursuant to a report-and-wait strategy, Congress intervenes only when it chooses to, as it did under the AECA before *Chadha*. Moreover, with the exception of a few controversial sales, the President can make commitments to sell arms. Because sales do not need affirmative approval, each sale will not involve a referendum on United States foreign policy and the foreign country involved. In addition, opponents of a particular sale are unable to scuttle it on procedural grounds. Rather, moves to block sales must actually win wide-reaching support on the merits.

Finally, Deputy Secretary of State Dam holds out the possibility that a return to wide delegation will foster a return to cooperation rather than confrontation between the branches. This is as of yet, an unrealized hope:

> We have seen in the last 15 years that when Congress and the President are at loggerheads, the result can be a stalemate and sometimes harm to our foreign policy.
>
> We now have an opportunity, all of us, to put much of that past behind us, and to start afresh. We have a chance to shape a new era of harmony between the branches of government—an era of constructive and fruitful policy-making, of creativity and statesmanship. That is President Reagan's goal and the goal of all of us in his Administration.[283]

CONCLUSION

The AECA's recent amendment marks a return to broad delegations of foreign affairs power to the President. Nevertheless, proponents of legislative power do not need to view this development as an abdication of Congress' responsibilities in external relations. Experience proves that framework legislation failed to initiate the type of congressional codetermination of arms sales policy that the AECA's sponsors contemplated. Instead of consistently participating in arms sale decision-

281. *Hearings on S. 1050*, *supra* note 16, at 42 (citing prepared statement of Matthew Nimetz, former Undersecretary of State).

282. *Id.* For example, Saudi Arabia offered to withdraw its entire arms request when Congress voted against the recent Saudi missile sale in May 1986. *See supra* note 253 (noting the Saudi offer).

283. *Hearings on S. 1050*, *supra* note 16, at 22 (citing prepared statement of Kenneth W. Dam, Deputy Secretary of State).

making, Congress only intervened in response to significant domestic opposition against a sale. As the aborted 1985 Saudi and Jordanian sales demonstrate, the recent amendment of the AECA preserves Congress' option to intervene. As a result, through passage of this legislative response to *Chadha*, Congress retains a more modest but no less important role in forcing the President to justify or possibly lose a sale when a significant portion of the American people register their disagreement.

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