THE WHITE HOUSE

WASHINGTON

July 1, 1983

MEMORANDUM FOR CRAIG L. FULLER

FROM: RICHARD A. HAUSER

SUBJECT: INS v. Chadha

You have asked for our analysis of the Supreme Court's legislative veto opinion "as soon as possible." We provided such an analysis to the Senior Staff the morning after announcement of the decision. A copy of that analysis is attached.

Since that time a working group chaired by Assistant Attorney General Olson has been convened to assess the impact of the decision. Our office, OMB, and Legislative Affairs are represented on the working group, in addition to the pertinent offices and divisions of the Justice Department and several other departments. The group is monitoring transmissions to Congress to ensure consistency with the Court's decision and to provide advance warning of any potential disputes concerning the effect of the decision.

It was the general consensus of the group that an immediate effort should be made to prevent Congressional overreaction to the Chadha decision. Our office has recommended that Legislative Affairs meet with appropriate legislators and perform a calming function, advising them that we would comply with existing "report" provisions and would work closely with Congress in assessing the long-term effect of Chadha. Establishment of such a low-key approach and cooperative tone will do much to dissipate Congressional fears and prevent Congressional overreaction.

RAH:JGR:aw 7/1/83

cc: RAHauser
JGRoberts
Subj.
Chron

John

Chadha

THE WHITE HOUSE
WASHINGTON

Date 7/5/83

Suspense Date _____

MEMORANDUM FOR: COUNSEL'S OFFICE ATTORNEYS

FROM: **DIANNA G. HOLLAND**

ACTION

_____ Approved

_____ Please handle/review

__XX__ For your information

_____ For your recommendation

_____ For the files

_____ Please see me

_____ Please prepare response for _____ signature

_____ As we discussed

_____ Return to me for filing

COMMENT

_____

_____

_____

_____

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

JUL 1 1983

MEMORANDUM TO THE ATTORNEY GENERAL

Re: Impact of and Consequences of
the Chadha Decision

At your request, the Office of Legal Counsel initiated the formation of an ad hoc working group to examine the United States Supreme Court decision in Immigration and Naturalization Service v. Chadha and report to you, so that you might be able to report to the President, the likely consequences of the Chadha decision and potential Administration responses thereto. This is a preliminary report on the status of that project.

A meeting was convened at 11:00 a.m. on Monday, June 27, 1983 at our offices. It was attended by representatives of this Office, the Civil Division, the Office of Legislative Affairs in the Department of Justice, and one of your special assistants, representatives of the Counsel to the President and the Office of Legislative Affairs in the White House, the General Counsel of the Office of Management and Budget and an attorney in that office, the General Counsel of the Department of Defense and the Acting Legal Adviser of the Department of State and another representative of the State Department. The Department of Defense and the Department of State were included because some of the most delicate and controversial legislative veto provisions (war powers resolution, arms sales, etc.) affect actions by those agencies. At the meeting, we discussed various potential legal problems and some of the likely legislative responses to the Supreme Court decision. In general, we took the following steps and made the following recommendations:

1. The Civil Division was to notify all United States Attorneys and the General Counsels of all Executive Branch and "independent" agencies that all litigation commenced or anticipated regarding any legislative veto matter would be promptly reported to and coordinated by the Civil Division. That step has been accomplished. A copy of Mr. McGrath's cable/memorandum is Attachment A.

2. The Office of Legal Counsel would send a memorandum to all General Counsels in the Executive Branch and the "independent" agencies asking for an immediate (COB July 1, 1983) inventory of all statutes known to or affecting each such agency which contained a legislative veto provision. After receipt of the information requested, the Office of Legal Counsel will itemize the legislative veto statutes, eliminate duplications and attempt to describe in a memorandum to you a brief summary of each relevant statute and a brief discussion of some of the legal issues raised by each such statute. The memorandum to agency General Counsel was sent on Tuesday, June 28, 1983. A copy is Attachment B. We are already receiving responses.

3. The Office of Management and Budget, through its General Counsel, Michael Horowitz, would take the steps necessary to make sure that each agency is informed of the necessity of bringing to the attention of OMB all anticipated actions by any agency under any statutes which contain a legislative veto provision. In this way OMB will be able to coordinate Administration activities (e.g. arms sales, budget deferrals, etc.) which might raise a legal or policy issue concerning a legislative veto provision or which might suggest the possibility of some hostile Legislative Branch response. I understand that this step has been taken and that OMB is now coordinating all such potential actions and reporting all such matters to the Counsel to the President and to this Office. If any such action suggests the possibility of litigation, OMB will report directly to the Civil Division of the Department of Justice as well.

4. The Office of Legal Counsel, as part of the process described in Item 2, is examining all of the legislative veto statutes of which we are aware in order to provide you and the White House with some tentative and preliminary legal analysis of each such statute and potential legal problems relative thereto. We will then be in a position more clearly to focus attention on specific areas of greatest legal or policy concern. We ought to be able to provide you with a draft of this memorandum by July 8. Since it is already in the preparation stage, we are, of course, in a position to try to answer any questions you might have regarding specific subjects in the meantime.

5. I believe that the consensus at the meeting was that the Office of Legislative Affairs at the White House should assume management responsibilities concerning the Administration's relationships with and responses to Congress concerning the Chadha decision and any legislative reactions to it. Individual agencies might have parochial interests or

concerns which, however legitimate, might be inconsistent with the preferable response regarding the legislative veto issue from the standpoint of the Administration as a whole. This is an area where government-wide coordination is not only appropriate, but highly necessary. We also generally felt that Congress should be assured that this Administration intends to act prudently, responsibly and cautiously in the wake of the Chadha decision, that it intends no aggressive or precipitious measures which would provoke any crisis or confrontation with the legislature. We also felt we should communicate to Congress the Administration position that the legislative responses, if any, to the Chadha decision ought to be carefully thought out and well considered and not developed or adopted with undue haste. There are a large number of different types of legislative veto provisions attached to various types of Executive Branch actions (from rule-making to specific Executive decisions). They relate to matters ranging from powers granted to agencies to inherent presidential power. No one response, if any is justified, would be suitable to such a large combination of situations and we feel that Congress should be encouraged to proceed deliberately and not with unnecessary haste. Mr. Fielding has communicated that sentiment to Messrs. Meese, Baker and Duberstein in a memorandum dated June 29, 1983, a copy of which is Attachment C.

We intended to have another meeting this week but determined that because Congress is now in recess and will not return until July 10th that we ought to postpone our next meeting to July 7, 1983 at 11:00 a.m.. We should have more information at that time and there did not appear to be any specific urgency which would require gathering such a large number of people together before that time.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

cc: Edward C. Schmults
Deputy Attorney General

Fred F. Fielding
Counsel to the President

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

June 28, 1983

MEMORANDUM

TO: ALL UNITED STATES ATTORNEYS
ALL GENERAL COUNSELS

FROM: J. Paul McGrath
Assistant Attorney General
Civil Division

SUBJECT: Cases Raising "Legislative Veto" Issues

On June 23, 1983, the Supreme Court issued a broadly worded decision in INS v. Chadha, No. 80-1832, striking down the legislative veto device as unconstitutional. We expect that there will now be many cases raising questions concerning the status of the numerous laws containing legislative veto provisions. It is essential that the Government's litigation position regarding these questions be coordinated. Therefore, I request that you notify the Civil Division as soon as possible of any pending cases that involve legislative veto issues, and in the future if such issues are raised in any case. These issues will normally take the form of questions of severability of legislative veto provisions and of the retroactive effect of the decision in Chadha. However, they may take other forms as well and should be brought to the Civil Division's attention. The persons to contact at the Civil Division are either Mark Rutzick (Federal Programs, 633-3315) or Douglas Letter (Appellate Staff, 633-3427). Thank you in advance for your cooperation.

Received OLC 6/28/83

Attachment A

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

JUN 30 1983

FROM: Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

TO: ALL AGENCY GENERAL COUNSEL

RE: Identification of Legislative Veto Devices

In view of the Supreme Court's decision in Immigration and Naturalization Service v. Chadha, No. 80-1832 (June 23, 1983), it has become necessary to ensure that this Department has an up-to-date list of all currently effective statutory provisions that purport to confer on one or two Houses or committees of Congress power to take any actions that, in the words of the Chief Justice, have "the purpose and effect of altering the legal rights, duties and relations of persons, including . . . Executive Branch officials and [private persons] outside the legislative branch." Id., slip op. at 32. Such provisions would include everything from two-House vetoes of agency regulations to committee "approval" or the use or appropriated funds for certain agency activities.

We would very much appreciate your assistance in compiling this comprehensive listing of legislative veto provisions by examining all statutes affecting your agency's operations (or others in which your agency may have a specific interest) and providing us with a list of those statutory provisions that constitute legislative vetoes. You need not include in your listing statutory provisions that provide only for the reporting of a particular action to Congress or one of its committees followed by a waiting period prior to implementation of that action, but any doubts regarding whether a provision is or is not a legislative veto device should be resolved in favor of inclusion on your listing.

Attachment B

For your convenience, we have attached a form for you to use in making this report. We would appreciate receiving your report by c.o.b. July 1, 1983 and would ask that you ensure delivery by messenger to my office, room 5214 at Main Justice. If your staff needs additional advice, they should contact Ms. Barbara Price of this Office at 633-2046. Thank you very much for your cooperation.

cc: Fred F. Fielding
Counsel to the President

Michael J. Horowitz
Counsel to the Director
Office of Management and Budget

AGENCY_____

Statutes containing legislative veto devices:

	Pub. L. No. and §	U.S. Code citation:	Severability Clause § in Pub. L. or U.S
1.	§ _____, Pub. L. No. __-___	_____ U.S.C. _____	_____
2.	§ _____, Pub. L. No. __-___	_____ U.S.C. _____	_____
3.	§ _____, Pub. L. No. __-___	_____ U.S.C. _____	_____
4.	§ _____, Pub. L. No. __-___	_____ U.S.C. _____	_____
5.	§ _____, Pub. L. No. __-___	_____ U.S.C. _____	_____
6.	§ _____, Pub. L. No. __-___	_____ U.S.C. _____	_____
7.	§ _____, Pub. L. No. __-___	_____ U.S.C. _____	_____
8.	§ _____, Pub. L. No. __-___	_____ U.S.C. _____	_____
9.	§ _____, Pub. L. No. __-___	_____ U.S.C. _____	_____
10.	§ _____, Pub. L. No. __-___	_____ U.S.C. _____	_____
11.	§ _____, Pub. L. No. __-___	_____ U.S.C. _____	_____
12.	§ _____, Pub. L. No. __-___	_____ U.S.C. _____	_____
13.	§ _____, Pub. L. No. __-___	_____ U.S.C. _____	_____
14.	§ _____, Pub. L. No. __-___	_____ U.S.C. _____	_____
15.	§ _____, Pub. L. No. __-___	_____ U.S.C. _____	_____

THE WHITE HOUSE

WASHINGTON

June 29, 1983

MEMORANDUM FOR EDWIN MEESE III
JAMES A. BAKER III
KENNETH M. DUBERSTEIN

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Congressional Reaction to INS v. Chadha

As you know, at present, the Department of Justice has set up a working group to review the impact of the recent Chadha decision on legislative veto, to devise a recommendation for the Administration position.

In the interim it would seem to me that there is a very real danger that Congress may overreact to the Supreme Court's legislative veto decision and to take precipitous action to circumscribe executive power or take legal stands that will inevitably create confrontation with the Administration. It is my understanding that legislative proposals to curb executive and agency authority are already circulating, and various legislators have been issuing statements expressing their own views on the effect of the decision on particular statutes.

Therefore, at this point it would appear important for the Office of Legislative Affairs to meet with appropriate legislators and perform a calming function. It would be my recommendation that we adopt a position that, for the time being, we will comply with the "report" provisions of existing legislative veto statutes and that we will work closely with Congress to assess the effect of the Chadha decision. Establishment of such a low-key approach and cooperative tone will do much to dissipate Congressional fears and prevent Congressional overreaction.

It is important that the White House provide leadership in establishing this tone. The various departments and agencies have parochial interests at stake in any dealings with their respective committees, and are not in the best position, at least in the first instance, to conduct discussions at which broader principles of executive power are at stake.

bcc: Theodore B. Olson

Attachment C

Chadha

7/7 DOJ

1. litigation
2. admin action
3. analyses of effects
4. testimony

FERC – no severability clause, one of most difficult cases on severability. DC found severable, S. Ct. seem affirm.

FTC – will agency decision.

Difficult for us to rescind rules. Admin legis may be nec.

Pay Act. Pay override linked to Cong vote → can't override pay act recommendation.

Legal mat as miserable, won in 4 Cir.

Try for legis on '84 pay. Change view on severability

GEDC. Lost authority from Reorg Act, w/legis veto. If miserable → no power.

Litigation being conducted by Civil – better to use and U.S. attys.

⇒ Specialty Steel : can OLC distribute opinion?
4 cases rules pending

Coke standards : mix by, m, em can by manufacturers

MFN hearing July 14 : China, Romania, Hungary.

Nuke route to Berlin. Can only send after main report to Congress, subject to 2-house veto

July 19, hearing Nuke Non-Prol. How comment res approval device in proposed bill.

CRS concludes federal power no longer exists in impeachment act.

Testimony:

7/14: State MFN

7/19: Sam Hall

7/20: Home Foreign Affairs

7/18: Grassley. House/Senate counsels, ABA, academics.

The New York Times

House Moves to Recoup on Lost Veto

By MARTIN TOLCHIN
Special to The New York Times

WASHINGTON, June 29 — The House tonight adopted two sweeping restrictions on the powers of the Consumer Product Safety Commission in an effort to regain the authority it lost when the Supreme Court struck down Congress's veto over certain executive actions.

The House actions, adopted by voice vote, were the first Congressional responses to the Supreme Court decision last week. They were adopted as amendments to a bill that gave the Government agency far less money and authority than had been recommended by the Energy and Commerce Committee. The bill, with its restricting amendments, was adopted by a vote of 238 to 177.

One restriction would provide that no agency rule take effect until adopted by a joint resolution and signed by the President, a requirement that opponents said would turn the agency to an advisory commission. The other would permit no rule to take effect until Congress had an opportunity to disapprove the legislation through a joint resolution.

Sponsors said that since a joint resolution required Presidential participation, it would not be proscribed as a legislative veto.

'First of Many Decisions'

"I predict that this will be the first of many, perhaps hundreds, of decisions by which we restructure the delicate balance of government," said Representative Elliot H. Levitas, a Georgia Democrat. He has been a leading Congressional champion of the legislative veto.

In the debate, the House members were virtually united on the need to find some way to curb what they considered excesses in regulatory agencies. Until last week, Congress gave these agencies broad discretionary powers, but retained its right to veto regulations.

One of the restrictions arose from a by Mr. Levitas. This provided that whenever the consumer agency adopted a rule that could have been vetoed legislatively, the rule would not take effect until approved by a joint resolution of Congress, which would require signing by the President.

Mr. Levitas contended that this would not be a legislative veto, but a new law, and noted that the Supreme Court had urged Congress to redress its grievances through legislation.

Representative Henry Waxman, Democrat of California, disagreed. "You are relegating the agencies to study commissions," he said.

Representative John Dingell, Michigan Democrat, chairman of the Energy and Commerce Committee, also opposed Mr. Levitas's proposal. "This body is badly overloaded now," he said. "We will become a court of review."

Waxman Offered Other Move

The other restrictive proposal was from Mr. Waxman, who said it was intended to give Congress the powers it enjoyed before the Supreme Court decision. The proposal provided that no agency rule could take effect for 90 days. In this time, Congress could enact a joint resolution of disapproval, which also requires a Presidential signature.

Some legal experts have questioned Congress's right to attach any ex-post facto conditions on the authority granted to executive agencies. Stanley Brand, counsel to the House, asserted that the Supreme Court decision meant that once Congress delegated power, "I don't think we can involve ourselves in the rule-making process on a return trip."

Representative Dingell deplored the haste of today's action. He noted that no hearings had been held and no constitutional scholars had been questioned. "Nobody can make a definitive statement at this time on whether this proposal is constitutional," he said of the Levitas proposal.

Mr. Levitas, asked about the apparent contradiction between his proposal and Mr. Waxman's proposal, which was adopted first, replied that House-Senate conferees could choose.

The basic bill enacted, which was a substitute, e provided a three-year authorization, rather than the five years recommended by the Energy and Commerce Committee. It provided $35.7 million next year, $2.2 million more than this year. The committee bill would have provided $47 million next year.

The committee bill would also have increased the agency's staff, and repealed that section of the Consumer Product Safety Act requiring the agency to notify a company of a request under the Freedom of Information Act. In addition, the committee bill would have changed the agency's rule-making procedures, simplifying the procedures for rules governing labels and eliminating the requirement that the commission base its actions on several findings.

N063
RW
LEGISLATIVE VETO
BY JERRY ESTILL

WASHINGTON (AP) -- THE HOUSE HAS FIRED THE FIRST SHOTS IN WHAT PROMISES TO BE A PROTRACTED CONGRESSIONAL CAMPAIGN TO RECOVER POWER LOST IN A SUPREME COURT DECISION BANNING THE 50-YEAR-OLD LEGISLATIVE VETO OVER EXECUTIVE BRANCH ACTION.

THE VOLLEY CAME WEDNESDAY WHEN THE HOUSE AGREED BY VOICE VOTE TO TWO SEPARATE PROVISIONS RESTRICTING THE CONSUMER PRODUCT SAFETY COMMISSION FROM PUTTING INTO PLACE ANY REGULATION WITHOUT CONGRESSIONAL APPROVAL.

THE TIGHTER OF THE TWO WAS OFFERED BY REP. ELLIOTT W. LEVITAS, D-GA., ONE OF THE MAJOR PROPONENTS OF THE TECHNIQUE STRUCK DOWN BY THE COURT A WEEK AGO TODAY.

IT WOULD KEEP ANY COMMISSION REGULATION FROM TAKING EFFECT UNLESS BOTH HOUSES SPECIFICALLY VOTED TO IMPLEMENT IT AND THE PRESIDENT AGREES.

THE OTHER PLAN, BY REP. HENRY A. WAXMAN, D-CALIF., COULD HAVE A SIMILAR IMPACT, BUT WOULD LEAVE THE AGENCY A LITTLE MORE RUNNING ROOM. THE WAXMAN PROPOSAL WOULD DELAY THE EFFECTIVE DATE OF ANY REGULATION FOR 90 DAYS, IN WHICH CONGRESS COULD OVERTURN IT BY A MAJORITY VOTE IN BOTH HOUSES IF THE PRESIDENT DID NOT OBJECT. IF CONGRESS DID NOT ACT, THE RULE WOULD TAKE EFFECT AUTOMATICALLY.

BOTH THE WAXMAN AND LEVITAS AMENDMENTS -- TO A BILL RE-AUTHORIZING CONTINUATION OF THE COMMISSION -- WOULD ALLOW CONGRESS TO OVERRIDE EVEN PRESIDENTIAL OBJECTIONS TO ITS PROPOSED VETO OF A RULE IF A TWO-THIRDS MAJORITY IN BOTH HOUSES AGREED.

LEVITAS SAID THE JUSTICE DEPARTMENT HAD REVIEWED HIS APPROACH AND CONCLUDED IT WOULD PASS CONSTITUTIONAL MUSTER UNDER THE GUIDELINES LAID DOWN BY THE COURT LAST WEEK.

HE SAID THE SAFEGUARD IS CRUCIAL BECAUSE CONGRESS HAS DELEGATED CONSIDERABLE AUTHORITY TO REGULATION-WRITING AGENCIES ON THE PREMISE THAT IT WOULD HAVE A SECOND LOOK AND COULD EXERCISE THE LEGISLATIVE VETO IF IT DIDN'T LIKE THE WAY ITS LAWS WERE IMPLEMENTED.
AP-WX-06-30-83 1251EDT

CHADHA

For immediate delivery to:
Mike Baroody
Pete Roussel
John Roberts

Department of Justice

FOR IMMEDIATE RELEASE
THURSDAY, JUNE 23, 1983

AG
202-633-2007

Attorney General William French Smith today issued the following statement:

The Supreme Court has reaffirmed in a strong and compelling opinion the vital and important role under our Constitution of the principle of separation of powers. As the Solicitor General argued to the Supreme Court, the Framers of our Constitution thoughtfully provided that when Congress acts to legislate it must be through the affirmative votes of both Houses with the participation by the President through his approval or veto. Once a law is passed, the President is given the constitutional power to execute the laws and Congress may not act to reverse or invalidate such Executive action except through subsequent legislation.

I am most gratified by the Supreme Court's decision. The long term effect of this decision will be a better and more effective Congress as well as a more effective presidency.

####

THE WHITE HOUSE
WASHINGTON

Date 6.29.83

Suspense Date _____

MEMORANDUM FOR: John

FROM: **DIANNA G. HOLLAND**

ACTION

_____ Approved

_____ Please handle/review

__X__ For your information

_____ For your recommendation

_____ For the files

_____ Please see me

_____ Please prepare response for _____ signature

_____ As we discussed

_____ Return to me for filing

COMMENT

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THE WHITE HOUSE
WASHINGTON

23 June 1983

FRED FIELDING:

FYI--This morning the Supreme Court upheld the 9th Circuit decision in Chadha v. INS (holding a concurrent resolution veto to be unconstitutional).

I haven't yet seen the opinions, but as I note in my new monograph on the War Powers Resolution (excerpt attached), the Chadha decision has implications for the constitutionality of the War Powers Resolution as well. I will have a copy of the decision by early afternoon. I have given a similar note to Bob Kimmitt.

Bob

Bob Turner

PS--I am just flagging this for you FYI, no need to respond.

$4.95

Philadelphia Policy Papers

The War Powers Resolution: Its Implementation in Theory and Practice

Robert F. Turner

Foreword by
Senator John G. Tower

FOREIGN POLICY RESEARCH INSTITUTE
Philadelphia, Pennsylvania

The second justification given by President Nixon in vetoing the War Powers Resolution was the provision in section 5(c) allowing the Congress to direct the president to remove U.S. forces from a hostile environment. The constitutional objection to this was not only that it would in some instances result in an impermissible legislative infringement upon valid presidential power under the Constitution, but even worse it would be accomplished by a *concurrent* resolution. Unlike a bill or joint resolution, which require signature by the president (or passage by a two-thirds vote of both houses subsequent to a presidential veto), a concurrent resolution needs only a simple majority of each house of Congress to become effective.

Article I, section 7, clause 3 of the Constitution provides that:

> Every order, resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be re-passed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

A lengthy study prepared in 1973 by the Congressional Research Service of the Library of Congress, in discussing the so-called presentation clause, concluded:

> "Necessary" here means necessary if an "order, resolution, or vote" is to have the force of law. Such resolutions have come to be termed "joint resolutions" and stand on a level with "bills," which if "enacted" become statutes. But "votes" taken in either House preliminary to the final passage of legislation need not be submitted to the President, nor resolutions passed by the Houses concurrently with a view to expressing an opinion or to devising a common program of action . . . or to directing the expenditure of money appropriated to the use of the two Houses.[37]

The House Committee on Foreign Affairs report on the War Powers Resolution acknowledged that "some question has been raised about the constitutionality of the use of a concurrent resolution for this purpose," but argued that there was "ample precedent for the use of the concurrent resolution to 'veto' or disapprove a future action of the President, which action was

previously authorized by a joint resolution or bill."[38] This was apparently based on the novel view that exercise of the president's constitutional war powers required prior affirmative congressional approval. Thus, the report said: "Under the Constitution, the President is designated as the Commander in Chief to prosecute wars authorized by Congress."[39] As examples of "legislative actions which have the effect of law without a Presidential signature," the report included "amendments to the Constitution of the United States and orders to spend money appropriated to the use of the Congress."[40] In supplemental and minority views, nine committee members expressed concern about the constitutionality of the proposed use of the concurrent resolution veto. If concurrent resolutions serve the purpose of expressing the view of the Congress, and providing for congressional housekeeping purposes, President Nixon would appear to be on strong ground in asserting that their use in restricting the constitutional commander-in-chief powers of the president is inappropriate. Indeed, as will be discussed below, it is well established that Congress cannot even limit the president's commander-in-chief powers by *statute*.[41]

Sections 6 and 7 of the War Powers Resolution provide for expedited consideration of legislation and resolutions pertaining to a war powers report by the president. Section 8 provides that authority to introduce U.S. forces into a hostile situation shall not be inferred from appropriations or other legislation unless expressly authorized with reference to the War Powers Resolution, nor from any treaty "heretofore or hereafter ratified" unless implemented by legislation expressly authorizing such use of U.S. armed forces. However, there is a possible inconsistency between this provision and the assertion in Section 8(d) that "nothing in this joint resolution . . . is intended to alter . . . the provisions of existing treaties."[42] Section 9 provides that "if any provision of this joint resolution . . . is held invalid, the remainder . . . shall not be affected thereby."

The President's Constitutional War Powers

Before reviewing the actual implementation of the War Powers Resolution, a review of the constitutional war powers—

on a Review of the Operation and Effectiveness of the War Powers Resolution, 95th Cong., 1st sess., 1977, p. 76 (hereafter, U.S. Senate, *Hearings* [1977]) (testimony of former State Department legal adviser Monroe Leigh).

43. Quoted in Charles C. Tansill, "War Powers of the President of the United States with Special Reference to the Beginning of Hostilities," *Political Science Quarterly,* March 1930, p. 6. Professor Edwin Corwin has described the Constitution as "an invitation to struggle for the privilege of directing foreign policy." (*The President: Office and Powers,* 4th rev. ed. (New York: New York University Press, 1957), p. 171.) For a discussion of the constitutionality of the "concurrent resolution veto" mechanism, see: U.S. Senate, *Congressional Record,* June 11, 1976, p. S9026 (daily ed.) (remarks of Senator Griffin); Alan S. Nanes, "Legislative Vetoes: The War Powers Resolution," in U.S. Library of Congress, Congressional Research Service, *Studies on the Legislative Veto,* prepared for the Subcommittee on Rules of the House, Committee on Rules, 96th Cong. 2d sess., 1980, p. 579; and U.S. Senate, *Hearings* (1977), pp. 74-76. Although as this is being written the U.S. Supreme Court has never ruled on the constitutionality of the legislative veto, two recent decisions by circuit courts of appeals declaring certain such vetoes to be unconstitutional are now before the Court. The first of these was *Chadha v. Immigration and Naturalization Service* (634 F.2d 408 [9th Cir. 1980]), in which the 9th Circuit Court of Appeals unanimously ruled that a statute permitting Congress by concurrent resolution to overturn an immigration decision by the executive branch was unconstitutional. Sullivan notes: "Some legal experts immediately suggested that the *Chadha* ruling would vitiate the restraining effects of the War Powers Resolution. On advice of counsel, House Clerk Edmund Henshaw warned House Foreign Affairs Committee Chairman Zablocki that the *Chadha* decision might be construed to limit the ability of Congress to act in situations of hostilities abroad under the War Powers Resolution . . . once the Executive has initiated action." (Sullivan Study, p. 282.) More recently, the D.C. Circuit Court of Appeals struck down a one-house legislative veto in *Consumer Energy, Etc. v. F.E.R.C.* (discussed above) noting that the "primary reason" for the presidential veto power in article I, section 7 (the presentation clause) of the Constitution "was to give the President a defensive weapon against legislative intrusions on the powers of the Executive." (Ibid., p. 461.) The *Consumer Energy* court noted that every administration since that of Herbert Hoover has attacked the legislative veto as unconstitutional. (Ibid., p. 453.)

44. W. Taylor Reveley III, *War Powers of the President and Congress: Who Holds the Arrows and Olive Branch?* (Charlottesville: University Press of Virginia, 1981), p. 36.

45. See for example Erik Castrén, *The Present Law of War and Neutrality* (Helsinki: Suomalaisen Tiedeakatemian Toimituksia Annales Academiae Scien-

THE WHITE HOUSE

WASHINGTON

June 29, 1983

MEMORANDUM FOR EDWIN MEESE III
JAMES A. BAKER III
KENNETH M. DUBERSTEIN

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Congressional Reaction to INS v. Chadha

As you know, at present, the Department of Justice has set up a working group to review the impact of the recent Chadha decision on legislative veto, to devise a recommendation for the Administration position.

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It is important that the White House provide leadership in establishing this tone. The various departments and agencies have parochial interests at stake in any dealings with their respective committees, and are not in the best position, at least in the first instance, to conduct discussions at which broader principles of executive power are at stake.

FFF:JGR:kkk 6/29/83

bcc: FFFielding/JGRoberts/Subject/Chron

bcc: Theodore B. Olson

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

June 28, 1983

MEMORANDUM FOR FRED F. FIELDING

THROUGH: RICHARD A. HAUSER

FROM: JOHN G. ROBERTS

SUBJECT: INS v. Chadha

I have prepared the attached proposed memorandum for your signature to implement the course of action recommended in my memorandum of yesterday. Since I believe time to be of the essence (see, e.g., Senator Percy's comments on the War Powers Act in today's Post), the proposed memorandum avoids any formal reference to the Legislative Strategy Group. The Office of Legislative Affairs wanted guidance from a higher authority before undertaking to calm Congress concerning Chadha; the draft memorandum seeks to provide that guidance.

Attachment

THE WHITE HOUSE

WASHINGTON

June 29, 1983

MEMORANDUM FOR EDWIN MEESE III
JAMES A. BAKER III
KENNETH M. DUBERSTEIN

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Congressional Reaction to INS v. Chadha

As you know, the Department of Justice has set up a working group to review the impact of the recent Chadha decision on legislative veto, to devise a recommendation for the Administration position. In the interim it would seem to me that there is a very real danger that Congress may overreact to the Supreme Court's decision and take precipitous action to circumscribe executive power or take legal stands that will inevitably create confrontation with the Administration. It is my understanding that legislative proposals to curb executive and agency authority are already circulating, and various legislators have been issuing statements expressing their own views on the effect of the decision on particular statutes. Therefore, at this point it would appear important for the Office of Legislative Affairs to meet with appropriate legislators and perform a calming function. It would be my recommendation that we adopt a position that for the time being we will comply with the "report" aspect of existing legislative veto provisions and that we will work closely with Congress to assess the effect of the Chadha decision. Establishment of such a low-key approach and cooperative tone will do much to dissipate Congressional fears and prevent Congressional overreaction.

It is important that the White House provide leadership in establishing this tone. The various departments and agencies have parochial interests at stake in any dealings with their respective committees, and are not in the best position, at least in the first instance, to conduct discussions at which broader principles of executive power are at stake.

FFF:JGR:aw 6/29/83
cc: FFFielding/JGRoberts/Subj./Chron

bcc: Theodore B. Olson

THE WHITE HOUSE

WASHINGTON

DRAFT
(F³ Changes)

June 28, 1983

MEMORANDUM FOR EDWIN MEESE III
JAMES A. BAKER III
KENNETH M. DUBERSTEIN

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Congressional Reaction to INS v. Chadha

There is a very real danger that Congress may overreact to the Supreme Court's legislative veto decision and take precipitous action to circumscribe executive power or take legal stands that will inevitably create confrontation with the Administration. It is my understanding that legislative proposals to curb executive and agency authority are already circulating, and various legislators have been issuing statements expressing their own views on the effect of the decision on particular statutes. ~~Both I and the Department of Justice consider it imperative for the White House to begin immediately to explain to the Congressional leadership and the various committees our views on the consequences of the Supreme Court's action. Such consultations should take place immediately in order to forestall rash legislative reactions; perhaps this process has already begun.~~

~~All that need be done at this point is for~~ the Office of Legislative Affairs to meet with appropriate legislators and perform a calming function, ~~assuring them~~ that we will comply with the "report ~~and wait~~" provisions of existing legislative vetoes and that we will work closely with Congress to assess the effect of the Chadha decision. Establishment of such a low-key approach and cooperative tone will do much to dissipate Congressional fears and prevent Congressional overreaction.

It is important that the White House provide leadership in establishing this tone. The various departments and agencies have parochial interests at stake in any dealings with their respective committees, and are not in the best position, at least in the first instance, to conduct discussions at which broader principles of executive power are at stake.

LEGISLATIVE VETO

Q: What is your reaction to the Supreme Court's decision in INS v. Chadha, striking down the legislative veto?

A: As you know, the Supreme Court agreed with our legal arguments in that case, and naturally I was pleased with the result. I think the decision will force Congress to draft laws with greater care and precision, since Congress will not have a chance to veto subsequent agency actions based on those laws. In the long run this will make for a more effective Congress and a more effective Executive branch.

Q: During the campaign you supported the legislative veto, as a means for Congress to police the bureaucracy. Hasn't Congress now lost that power?

A: We argued against the legislative veto in Court because we became convinced that the Constitution did not permit Congress to take action without going through the full process of passing a bill through both Houses and presenting it to the President for veto or approval. In the long run, I think the Court's decision will make the bureaucracy more responsible, because it will force Congress to make the hard choices about what it wants the bureaucracy to do, and spell those out in the statutes. In the past, Congress gave some agencies and the bureaucracy too much leeway in the first instance while reserving the power to later veto their actions. Without that power, Congress can be expected to be more circumspect in the delegation of authority in the future.

Q: Will you ignore legislative veto provisions in existing laws, such as the War Powers Act?

A: I don't want to get into the question of the impact of the decision on specific statutes. The Justice Department is reviewing that issue and will look at each particular question as it comes up. The decision is clear, however, that unless Congress passes a bill through both Houses and presents it for Presidential veto or approval, its actions are without legal effect. We certainly expect Congress to act consistent with the decision.

THE WHITE HOUSE

WASHINGTON

June 24, 1983

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS

SUBJECT: "Report and Wait" Provisions After Chadha

I have been giving some thought to the question whether "report and wait" provisions are constitutional in the wake of the Chadha decision. We have discussed this question briefly, and I thought it advisable to alert you that my conclusion upon reflection differs from my off-the-cuff reaction.

A "report and wait" provision typically requires an agency to submit its proposed rules to Congress, and provides that the rules will not be effective for a specified period. The theory is that Congress, if it disagrees with the rules, can pass legislation during the "wait" period preventing the rules from going into effect. In the absence of such action, the rules would become effective at the end of the "wait" period.

This procedure is similar to the legislative veto, in that it permits Congress to affect executive action (delay it) without passing a law concerning that specific action and presenting it to the President. This similarity was the basis of my original reaction that "report and wait" provisions may be constitutionally suspect for the same reasons the legislative veto fell in Chadha. At the same time, however, Congress doubtless has the authority to require the submission of proposed agency actions, as well as the power to provide a generally-applicable period of delay for the effectiveness of agency action. Indeed, Congress has done the latter in the Administrative Procedure Act. A "report and wait" provision simply joins the exercise of these two powers. Its operation in any particular case is not the result of impermissible congressional action -- a one-house veto or concurrent resolution -- but rather of the original legislation establishing the report and wait procedure, which legislation satisfied the Chadha requirements.

Footnote 9 in the Chief Justice's Chadha opinion suggests acceptance of the "report and wait" procedure, although of course the issue was not before the Court. Sibbach v. Wilson, 312 U.S. 1 (1941), cited in footnote 9, approved the "report and wait" procedure with respect to the Federal

Rules, but that situation -- rules of procedure promulgated by the Supreme Court -- is somewhat different from the situation of rules promulgated by an executive agency. In short, I still think the question needs thorough review and analysis by the Justice Department, particularly since I suspect Congress may begin enacting "report and wait" provisions with a vengeance. I am now leaning, however, to the conclusion that "report and wait" provisions are valid.

I take refuge from the anticipated charge of vacillation in the words of Baron Bramwell, who wrote "The matter does not appear to me now as it appears to have appeared to me then." Were I less modest I could also quote Lord Westbury, who turned aside a barrister's reliance upon an earlier opinion of his by saying "I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion." See generally McGrath v. Kristensen, 340 U.S. 162, 176-178 (1950) (Jackson, J., explaining his concurrence with a Court opinion disagreeing with a previous Attorney General opinion he had authored).

"Report and wait" provisions would only be valid, however, when Congress could withhold the grant of rulemaking authority in the first place. Different issues would be raised by a congressional attempt to delay the exercise of inherent executive authority.

6/27 Legislative veto mtg - DOJ

Critical issue is severability. Generally agree severable.
Assume severability, report as in part.
Rudy: consultations w/ committee chairmen + ranking members,
to tell them what will be doing.
Will abide by all report + wait provisions.
P. McG: don't back in on severability
Need central clearinghouse for agency transmittals. Key
low-key
Review legis vetoes: no requisition unless cleared →
requisition valid, restraint warrant.
Bob + Rudy: FBI should call CSG mtg on issue.

THE WHITE HOUSE

WASHINGTON

June 27, 1983

FOR: FRED F. FIELDING

THRU: RICHARD A. HAUSER RAH

FROM: JOHN G. ROBERTS, JR. JGR

SUBJECT: Response to INS v. Chadha

I attended a meeting at the Department of Justice this morning concerning what actions the Government should take in the wake of the Supreme Court's decision in INS v. Chadha. The meeting was chaired by Ted Olson and attended by Paul McGrath, Bob McConnell, Will Taft, Dan McGovern, Mike Horowitz, Bob Cable, Randy Davis, and others. The group agreed that severability would be the critical issue in the future, and Olson noted that our general position has been that legislative veto provisions are typically severable. Any departure from this rule in a particular case would have to be carefully weighed in light of potential consequences on executive power in other areas. It was agreed that we should comply with "report and wait" provisions, which were also viewed as severable.

There was general consensus that we should try to calm the fears of legislators, and attempt to forestall any precipitous action on their part, such as enactment of an omnibus report and wait law. Cable and Davis were reluctant to commit Legislative Affairs to the task of meeting with chairmen and ranking members to convey our low-key approach. After the meeting, they suggested to me that you convene a meeting of the Legislative Strategy Group to address the question of how to work with Congress on abiding by the Supreme Court's decision. They did not think it was something Duberstein should do on his own. Olson and the others are awaiting leadership from the White House on dealing with the Hill and explaining what we will be doing with existing legislative veto provisions.

The other conclusion from the meeting was that the various departments should keep OMB apprised of any controversial submissions to Congress under report and wait provisions containing presumptively invalid and severable legislative vetoes. The effort is to provide the West Wing with advance warning before a battle on the consequences of Chadha is joined.

THE WHITE HOUSE

WASHINGTON

June 27, 1983

FOR: FRED F. FIELDING

THRU: RICHARD A. HAUSER

FROM: JOHN G. ROBERTS, JR.

SUBJECT: Response to INS v. Chadha

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Name of Correspondent: Theodore B. Olson

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Subject: Analysis of the Supreme Court's legislative veto opinion

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CU	Holland	ORIGINATOR	83/07/12			/ /
CU	AT 18/09	A	83/07/12			/ /
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C - Comment/Recommendation
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F - Furnish Fact Sheet to be used as Enclosure
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S - For Signature
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5/81

U.S. Department of Justice

Office of Legal Counsel

PR

Office of the
Assistant Attorney General

Washington, D.C. 20530

JUL 8 1983

MEMORANDUM TO CRAIG L. FULLER
ASSISTANT TO THE PRESIDENT FOR CABINET AFFAIRS

The Attorney General has requested that I respond to your request for an analysis of the Supreme Court's legislative veto opinion. I am accordingly enclosing herewith a copy of a brief analysis which I have prepared for the Attorney General which describes the Chadha decision (and the Process Gas decisions, i.e., the decisions of the Supreme Court relative to the Federal Trade Commission and the Federal Energy Regulatory Commission vetoes which were decided on July 6) and sets out a summary and review of certain of the issues raised by the decisions. Needless to say, we may wish to amplify this analysis within a few weeks as our process of evaluation continues.

As you know, at the request of the White House, a legislative veto working group has been assembled within the Administration to discuss the ramifications of the Supreme Court decisions and to assist the Administration in responding to developments in this area. This group consists of representatives from OMB, the State Department, the Department of Defense, the Offices of Counsel to the President and Legislative Affairs in the White House and the Civil Division and the Offices of the Attorney General, Legal Counsel and Legislative Affairs in the Department of Justice. For your further information, I am enclosing herewith copies of two memoranda which I have prepared for the Attorney General setting out the matters discussed at the first two meetings of this working group.

One of the Administration's first decisions subsequent to Chadha relative to legislative vetoes was to render an opinion for the Office of the United States Trade Representative regarding the authority of the President to impose import restrictions under § 203 of the Trade Act of 1974 with respect to specialty steel products. I am enclosing herewith a copy of the memorandum prepared by my Deputy, Ralph Tarr, in connection with this matter. It provides some illumination as to how we intend to approach these matters as they come up in the future.

We believe that it is very important to take each matter, to the extent permitted by the exigencies of the circumstances, on a case-by-case basis, thereby carefully building up a storehouse of expertise and experience in responding to specific problems. Our hope is that this process will ensure that each decision is made thoughtfully and in a manner which provides some precedent and guidance for subsequent decisions. This process generally counsels against any broad generic statements regarding how legislative veto matters will be handled, but we can try to provide general guidance whenever it is sought. I feel that if we proceed cautiously we will hopefully avoid the pitfall of making decisions with unintended consequences and will also avoid unnecessarily inflaming those Members of Congress who are already emotionally aroused by the Court's decisions and who possess the potential to advocate broad and undoubtedly counterproductive legislative "solutions."

We are also providing these materials in response to Ed Meese's direct request this morning to Ed Schmults.

Please let me know if we can be of any further assistance.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

Enclosure

cc: Attorney General

Deputy Attorney General

✓Fred F. Fielding
Counsel to the President

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

JUL 8 1983

MEMORANDUM TO THE ATTORNEY GENERAL

RE: ANALYSIS OF SUPREME COURT LEGISLATIVE VETO DECISIONS

This memorandum responds to your request for a summary analysis of the recent Supreme Court decisions regarding legislative vetoes and their potential impact on existing statutes and other sources of presidential authority. This analysis will necessarily be brief and somewhat over-simplified.

1. Legislative Vetoes

Legislative vetoes are provisions pursuant to which Congress, or a unit of Congress, is purportedly authorized to adopt a resolution that will impose on the Executive Branch (or the "independent" agencies) a specific requirement to take or refrain from taking an action. A key characteristic of all legislative veto provisions is that a resolution pursuant to such a provision is not presented to the President for his approval or veto. Legislative vetoes authorize procedures under which one or both Houses of Congress or a Committee of either House may act (or, in some cases, by failing to act) in a manner not fully consistent with the constitutionally ordained procedure for enacting laws in order to overrule, reverse, revise, modify, suspend, prevent or delay an action by some part of the Executive Branch or an agency. The veto may purport to affect a purely Executive decision such as the suspension of deportation of an alien or the authorization of the sale of property or a quasi-legislative decision such as a rulemaking by the Federal Trade Commission.

Legislative vetoes first surfaced approximately fifty years ago, but in the past ten to fifteen years the trickle has become a torrent. Every President since Hoover has opposed legislative vetoes on either policy or constitutional grounds or both, with the intensity of their opposition tending to increase in direct proportion to the length of their experience with them as Chief Executive.

2. Chadha, FERC and FTC - The Circuit Court Decisions.

These three cases collectively represent a relatively complete range of types of legislative vetoes and the constitutional issues which have been raised with respect to them.

Chadha involved an Attorney General's statutorily authorized decision to suspend the deportion of an alien for humanitarian reasons which was "vetoed" by a resolution passed by one House of Congress. FERC and FTC involved rulemaking decisions by "independent" regulatory commissions (bodies whose decision makers have been legislatively placed beyond the President's removal power and who, therefore, are not accountable to the President). FERC, involved an incremental pricing regulation (higher prices for business than for consumers) for natural gas, seemingly required by statute, but reversed by one House of Congress not long after the rule was promulgated. FTC was a regulation requiring disclosure of known defects at the time of used car sales which was vetoed by a concurrent resolution of Congress (concurrent resolutions, as distinguished from joint resolutions are not presented to the President for his approval or veto).

The Attorney General's suspension of Mr. Chadha's deportation was struck down by a unanimous 9th Circuit panel in an opinion written by Judge Kennedy in December of 1980. The Court reasoned that the veto provision violated the constitutionally required separation of powers in that it intruded on the Executive's authority to faithfully execute the laws and the judicial power to determine cases or controversies (in the sense that the congressional resolution responded to a committee "finding" that Mr. Chadha did not meet the statutory criteria for the relief accorded by the Attorney General). To the extent that the action of the House of Representatives was viewed as legislative in nature rather than judicial or executive, the Court concluded that it failed to comply with Article I, § 7 (Presentment Clauses) of the Constitution which requires that all legislative actions of Congress be passed by both Houses of the congress and presented to the President for his approval or veto.

FERC was a unanimous panel decision, of the D.C. Circuit with an exhaustive 104 page opinion by Judge Wilkey. The one house veto was held inconsistent with the Presentment Clauses and the principle of bicameralism that all legislation must be approved by both Houses of Congress. The Court also found the veto to violate the separation of powers in that the action purported to interfere both in the judicial and executive spheres. The fact that FERC, was an "independent"

agency not subject to presidential control did not diminish the constitutional problem because an important purpose behind the separation of powers principle was to prevent the concentration of power in any one branch of government, including, particularly, Congress.

The concurrent resolution rejecting the FTC "used car rule" was overturned by an en banc per curiam opinion of the D.C. Circuit on the grounds of separation of powers and failure to comply with the Presentment Clauses.

3. The Supreme Court Decisions

The Supreme Court decided Chadha on June 23, 1983. The Chief Justice wrote the Court's opinion. Justice White dissented on the merits. Justice Rehnquist dissented on the grounds of severability (discussed infra). Justice Powell found that the Congress had invaded judicial powers and concurred in the Court's decision. Thus, only Justice White actually rejected the analysis in the Chief Justice's opinion.

The Chief Justice rested his opinion on the requirement of the Presentment Clauses that laws be made by enactment in each House of Congress and the concurrence of the President (or by a two-thirds vote of both Houses of Congress overriding a presidential veto). The Court found these provisions to be "integral parts of the constitutional design for the separation of powers."

It is significant, perhaps more so in a larger sense than presented in Chadha, that the Court expressly found "beyond doubt" that "lawmaking was a power to be shared by both Houses and the President" and declared that the "Presentment Clauses serve the important purpose of assuring that a 'national' perspective is grafted on the legislative process."

The Court also emphasized the bicameralism requirement of Article I and its extreme importance to the Framers.

The key to the Court's conclusion is that it found that the "veto" of Mr. Chadha's deportation suspension was legislative in nature because it had the "purpose and effect of altering the legal rights, duties and relations of persons, including . . . Executive Branch officials . . . outside the legislative branch." As such it "involves determinations of

policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked."

The Court brushed aside claims that the legislative veto mechanism was a "useful 'political invention'", a "convenient shortcut" or an "appealing" and "efficient" "compromise" for the sharing of legislative power with the Executive:

> "The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked."

On July 6 the Supreme Court, in Process Gas summarily affirmed the D.C. Circuit Court decisions in FERC and FTC. FTC was a two House veto. Both FERC and the FTC are "independent" regulatory commissions. A vigorous severability argument was implicit in the FERC case and had been discussed at length in the Circuit Court opinion. Both FERC and FTC involved "rule-making" whereas Chadha involved a more purely administrative action.

The aggregate effect of these three decisions is that 12 circuit court judges in two separate circuits and six Supreme Court Justices have found legislative vetoes unconstitutional in one and two House manifestations for "executive" and "rule-making" actions and with respect to vetoes of Executive Branch and "independent" regulatory body actions. Only one member of the judiciary in these three cases, Justice White, disagreed on the constitutional issues. There remains no reasonable room for argument that legislative vetoes in any form or context heretofore contemplated are constitutional. Justice Powell, in his concurring opinion in Chadha said that the decision will "apparently invalidate every use of the legislative veto." Justice White in dissent, declared that the decision "sounds the death knell for 200 other statutory provisions . . . ."

4. Public and Legislative Branch Reaction

Journalists and commentators generally portrayed these decisions as major and unmitigated "victories" for the presidency. Commentators from the Congress did not disagree regarding the Court's death knell for legislative vetoes, but some commented that power heretofore so generously delegated to the Executive and independent agencies would be sharply narrowed and authority previously enjoyed by the President would be withdrawn.

Some proposals in the House of Representatives to reduce the power of the Consumer Product Safety Commission (CPSC) have enjoyed some temporary popularity in the aftermath of Chadha, but the Congress may soon find that political figures on the conservative side of the political spectrum have been seeking for years to find ways to rein in the broad authority legislatively granted to agencies such as the CPSC. Unless the Executive Branch provokes a confrontation with the Legislature through ill considered and highly controversial actions or statements, congressional reaction on a broad gauge, i.e. to legislatively withdraw all delegated authority to which a legislative veto is attached, is not likely to develop widespread support.

5. Legislation and Presidential Authority Affected

Estimates have suggested that some 200 statutes have some form of legislative vetoes attached to some form of delegated power. A precise figure is difficult to develop because some provisions have lapsed or have been repealed, some provisions have been erroneously characterized as legislative vetoes, and some provisions are simply buried in the statutes. An Administration working group is preparing an inventory and a reasonably comprehensive report should be available in one or two weeks.

Some of the most significant and/or controversial provisions are:

1. War Powers Resolution, 50 U.S.C. § 1544 (removal of armed forces engaged in foreign hostilities may be required by concurrent resolution);

2. International Security Assistance and Arms Control Act, 22 U.S.C. § 2776(b) (concurrent resolution may halt certain proposed arms sales);

3. National Emergencies Act, 50 U.S.C. § 1622 (concurrent resolution may terminate declaration of national emergency under International Emergency Economic Powers Act [IEEPA - used in Iran situation]);

4. International Security Assistance Act of 1977, 22 U.S.C. § 2753(d)(2) (Supp III 1979) (concurrent resolution disapproving defense equipment transfers);

5. Nuclear Non-Proliferation Act of 1978, 42 U.S.C. §§ 2160(f), 2155(b), 2157(b), 2153(d) (Supp III 1979) (disapproval by concurrent resolution of exports of nuclear material and technology);

6. Congressional Budget and Impoundment Control Act of 1974, 31 U.S.C. § 1403 (one House veto of spending deferrals);

7. Trade Act provisions. Various provisions regarding duties, quotas, waivers (concurrent disapproval provisions);

8. Energy provisions. Various provisions granting presidential emergency powers (one or two House disapproval provisions);

9. Federal Election Campaign Act Amendments of 1979, 2 U.S.C. § 438(d)(2) (Supp III 1979) (one House veto of Federal Election Commission rules);

10. Various Reorganization Acts;

11. Federal Pay Comparability Act;

12. District of Columbia legislation;

13. Interior Department actions such as off-shore leasing and wilderness designations.

6. Severability

Litigation will undoubtedly initially center on whether the invalidity of legislative veto provisions causes the power to which the veto provision is attached to be void as well on the ground that the power is "inseverable" from the veto. Members of Congress may claim that power which the Executive seeks to exercise would never have been granted in the absence of the veto potential. Private parties adversely

affected by future and past administrative actions, even if there was no action in Congress to veto it, will contend that the action itself was void because the power was never validly granted to the official or agency exercising it.

The severability issue must necessarily be examined on a case-by-case basis because its resolution will depend on the nature of the authority being exercised (whether inherently presidential or delegated by Congress), whether a severability clause is contained in the legislation (declaring that the unconstitutionality of one provision will not serve to void another -- which will generally result in a presumption of severability), whether the statutory scheme and legislative history demonstrates that Congress apparently intended to have the authority stand even if the veto condition fell, and whether the power can be exercised in a rational manner independent of the Congressional veto provision.

The Supreme Court's Chadha decision and its affirmance of FERC clearly suggest that the severability issue will generally be resolved in a manner which preserves executive and agency power, stripped of the offending veto provisions.

7. Retroactivity

Some litigation may arise over the validity of past agency actions pursuant to authorities or power which are arguably void because inseverably connected with legislative vetoes. These issues will have to be evaluated as they arise, but it is not likely that the courts will overturn whole regulatory schemes or administrative actions which have created vested rights.

8. Report and Wait Provisions

The Chadha decision stands for the proposition generally that statutes which require actions to be reported to Congress and remain in suspension for a certain period to allow a legislative response will be upheld. However, unless Congress acts through substantive legislation, most actions will become effective at the end of the waiting period.

We expect to be able to provide additional guidance on these and other issues in 10-14 days when we have proceeded further on the inventory and analysis presently in progress.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

JUL 1 1983

MEMORANDUM TO THE ATTORNEY GENERAL

Re: Impact of and Consequences of the Chadha Decision

At your request, the Office of Legal Counsel initiated the formation of an ad hoc working group to examine the United States Supreme Court decision in Immigration and Naturalization Service v. Chadha and report to you, so that you might be able to report to the President, the likely consequences of the Chadha decision and potential Administration responses thereto. This is a preliminary report on the status of that project.

A meeting was convened at 11:00 a.m. on Monday, June 27, 1983 at our offices. It was attended by representatives of this Office, the Civil Division, the Office of Legislative Affairs in the Department of Justice, and one of your special assistants, representatives of the Counsel to the President and the Office of Legislative Affairs in the White House, the General Counsel of the Office of Management and Budget and an attorney in that office, the General Counsel of the Department of Defense and the Acting Legal Adviser of the Department of State and another representative of the State Department. The Department of Defense and the Department of State were included because some of the most delicate and controversial legislative veto provisions (war powers resolution, arms sales, etc.) affect actions by those agencies. At the meeting, we discussed various potential legal problems and some of the likely legislative responses to the Supreme Court decision. In general, we took the following steps and made the following recommendations:

1. The Civil Division was to notify all United States Attorneys and the General Counsels of all Executive Branch and "independent" agencies that all litigation commenced or anticipated regarding any legislative veto matter would be promptly reported to and coordinated by the Civil Division. That step has been accomplished. A copy of Mr. McGrath's cable/memorandum is Attachment A.

2. The Office of Legal Counsel would send a memorandum to all General Counsels in the Executive Branch and the "independent" agencies asking for an immediate (COB July 1, 1983) inventory of all statutes known to or affecting each such agency which contained a legislative veto provision. After receipt of the information requested, the Office of Legal Counsel will itemize the legislative veto statutes, eliminate duplications and attempt to describe in a memorandum to you a brief summary of each relevant statute and a brief discussion of some of the legal issues raised by each such statute. The memorandum to agency General Counsel was sent on Tuesday, June 28, 1983. A copy is Attachment B. We are already receiving responses.

3. The Office of Management and Budget, through its General Counsel, Michael Horowitz, would take the steps necessary to make sure that each agency is informed of the necessity of bringing to the attention of OMB all anticipated actions by any agency under any statutes which contain a legislative veto provision. In this way OMB will be able to coordinate Administration activities (e.g. arms sales, budget deferrals, etc.) which might raise a legal or policy issue concerning a legislative veto provision or which might suggest the possibility of some hostile Legislative Branch response. I understand that this step has been taken and that OMB is now coordinating all such potential actions and reporting all such matters to the Counsel to the President and to this Office. If any such action suggests the possibility of litigation, OMB will report directly to the Civil Division of the Department of Justice as well.

4. The Office of Legal Counsel, as part of the process described in Item 2, is examining all of the legislative veto statutes of which we are aware in order to provide you and the White House with some tentative and preliminary legal analysis of each such statute and potential legal problems relative thereto. We will then be in a position more clearly to focus attention on specific areas of greatest legal or policy concern. We ought to be able to provide you with a draft of this memorandum by July 8. Since it is already in the preparation stage, we are, of course, in a position to try to answer any questions you might have regarding specific subjects in the meantime.

5. I believe that the consensus at the meeting was that the Office of Legislative Affairs at the White House should assume management responsibilities concerning the Administration's relationships with and responses to Congress concerning the Chadha decision and any legislative reactions to it. Individual agencies might have parochial interests or

concerns which, however legitimate, might be inconsistent with the preferable response regarding the legislative veto issue from the standpoint of the Administration as a whole. This is an area where government-wide coordination is not only appropriate, but highly necessary. We also generally felt that Congress should be assured that this Administration intends to act prudently, responsibly and cautiously in the wake of the Chadha decision, that it intends no aggressive or precipitious measures which would provoke any crisis or confrontation with the legislature. We also felt we should communicate to Congress the Administration position that the legislative responses, if any, to the Chadha decision ought to be carefully thought out and well considered and not developed or adopted with undue haste. There are a large number of different types of legislative veto provisions attached to various types of Executive Branch actions (from rule-making to specific Executive decisions). They relate to matters ranging from powers granted to agencies to inherent presidential power. No one response, if any is justified, would be suitable to such a large combination of situations and we feel that Congress should be encouraged to proceed deliberately and not with unnecessary haste. Mr. Fielding has communicated that sentiment to Messrs. Meese, Baker and Duberstein in a memorandum dated June 29, 1983, a copy of which is Attachment C.

We intended to have another meeting this week but determined that because Congress is now in recess and will not return until July 10th that we ought to postpone our next meeting to July 7, 1983 at 11:00 a.m.. We should have more information at that time and there did not appear to be any specific urgency which would require gathering such a large number of people together before that time.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

cc: Edward C. Schmults
Deputy Attorney General

Fred F. Fielding
Counsel to the President

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

June 28, 1983

MEMORANDUM

TO: ALL UNITED STATES ATTORNEYS
ALL GENERAL COUNSELS

FROM: J. Paul McGrath
Assistant Attorney General
Civil Division

SUBJECT: Cases Raising "Legislative Veto" Issues

On June 23, 1983, the Supreme Court issued a broadly worded decision in INS v. Chadha, No. 80-1832, striking down the legislative veto device as unconstitutional. We expect that there will now be many cases raising questions concerning the status of the numerous laws containing legislative veto provisions. It is essential that the Government's litigation position regarding these questions be coordinated. Therefore, I request that you notify the Civil Division as soon as possible of any pending cases that involve legislative veto issues, and in the future if such issues are raised in any case. These issues will normally take the form of questions of severability of legislative veto provisions and of the retroactive effect of the decision in Chadha. However, they may take other forms as well and should be brought to the Civil Division's attention. The persons to contact at the Civil Division are either Mark Rutzick (Federal Programs, 633-3315) or Douglas Letter (Appellate Staff, 633-3427). Thank you in advance for your cooperation.

Attachment A

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington D.C. 20530

JUN [illegible] 1983

FROM: [illegible]
Assistant Attorney General
Office of Legal Counsel

TO: ALL AGENCY GENERAL COUNSEL

RE: Identification of Legislative Veto Devices

In view of the Supreme Court's decision in Immigration and Naturalization Service v. Chadha, No. 80-1832 (June 23, 1983), it has become necessary to ensure that this Department has an up-to-date list of all currently effective statutory provisions that purport to confer on one or two houses or committees of Congress power to take any actions that, in the words of the Chief Justice, have "the purpose and effect of altering the legal rights, duties and relations of persons, including . . . Executive Branch officials and [private persons] outside the legislative branch." Id., slip op. at 32. Such provisions would include everything from two-house vetoes of agency regulations to committee "approval" of the use of appropriated funds for certain agency activities.

We would very much appreciate your assistance in compiling this comprehensive listing of legislative veto provisions by examining all statutes affecting your agency's operations (or others in which your agency may have a specific interest) and providing us with a list of those statutory provisions that constitute legislative vetoes. You need not include in your listing statutory provisions that provide only for the reporting of a particular action to Congress or one of its committees followed by a waiting period prior to implementation of that action, but any doubts regarding whether a provision is or is not a legislative veto device should be resolved in favor of inclusion on your listing.

Attachment B

For your convenience, we have attached a form for you to use in making this report. We would appreciate receiving your report by c.o.b. July 1, 1983 and would ask that you ensure delivery by messenger to my office, room 5214 at Main Justice. If your staff needs additional advice, they should contact Ms. Barbara Price of this Office at 633-2046. Thank you very much for your cooperation.

cc: Fred F. Fielding
Counsel to the President

Michael J. Horowitz
Counsel to the Director
Office of Management and Budget

AGENCY ______________________________

Statutes containing legislative veto devices:

Pub. L. No. and §	U.S. Code citation:	Severability Clause § in Pub. L. or U.S
§ ________, Pub. L. No. __-___	_____ U.S.C. _____	____________________
§ ________, Pub. L. No. __-___	_____ U.S.C. _____	____________________
§ ________, Pub. L. No. __-___	_____ U.S.C. _____	____________________
§ ________, Pub. L. No. __-___	_____ U.S.C. _____	____________________
§ ________, Pub. L. No. __-___	_____ U.S.C. _____	____________________
§ ________, Pub. L. No. __-___	_____ U.S.C. _____	____________________
§ ________, Pub. L. No. __-___	_____ U.S.C. _____	____________________
§ ________, Pub. L. No. __-___	_____ U.S.C. _____	____________________
§ ________, Pub. L. No. __-___	_____ U.S.C. _____	____________________
§ ________, Pub. L. No. __-___	_____ U.S.C. _____	____________________
§ ________, Pub. L. No. __-___	_____ U.S.C. _____	____________________
§ ________, Pub. L. No. __-___	_____ U.S.C. _____	____________________
§ ________, Pub. L. No. __-___	_____ U.S.C. _____	____________________
§ ________, Pub. L. No. __-___	_____ U.S.C. _____	____________________
§ ________, Pub. L. No. __-___	_____ U.S.C. _____	____________________

THE WHITE HOUSE

WASHINGTON

June 29, 1983

RECEIVED
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OFFICE OF LEGAL COUNSEL

MEMORANDUM FOR EDWIN MEESE III
JAMES A. BAKER III
KENNETH M. DUBERSTEIN

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Congressional Reaction to INS v. Chadha

As you know, at present, the Department of Justice has set up a working group to review the impact of the recent Chadha decision on legislative veto, to devise a recommendation for the Administration position.

In the interim it would seem to me that there is a very real danger that Congress may overreact to the Supreme Court's legislative veto decision and to take precipitous action to circumscribe executive power or take legal stands that will inevitably create confrontation with the Administration. It is my understanding that legislative proposals to curb executive and agency authority are already circulating, and various legislators have been issuing statements expressing their own views on the effect of the decision on particular statutes.

Therefore, at this point it would appear important for the Office of Legislative Affairs to meet with appropriate legislators and perform a calming function. It would be my recommendation that we adopt a position that, for the time being, we will comply with the "report" provisions of existing legislative veto statutes and that we will work closely with Congress to assess the effect of the Chadha decision. Establishment of such a low-key approach and cooperative tone will do much to dissipate Congressional fears and prevent Congressional overreaction.

It is important that the White House provide leadership in establishing this tone. The various departments and agencies have parochial interests at stake in any dealings with their respective committees, and are not in the best position, at least in the first instance, to conduct discussions at which broader principles of executive power are at stake.

bcc: Theodore B. Olson

Attachment C

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

JUL 8 1983

MEMORANDUM TO THE ATTORNEY GENERAL

Re: Legislative Veto Working Group

The second meeting of the legislative veto working group took place on Thursday, July 7, 1983 from 11:00 a.m. to 12:00 p.m. The same offices represented at the first meeting were represented at this meeting. We discussed the following subjects and came to the following conclusions and/or recommendations:

1. Pending or Anticipated Litigation.

(a) The FERC and FTC decisions (which, because of the Supreme Court's caption, will hereinafter collectively be referred to as Process Gas Consumers Group v. Consumers Energy Council of America (Process Gas)), were announced by the Supreme Court on July 6. The decisions of the District of Columbia Circuit Court were in each case summarily affirmed. Justice White dissented. The decision relative to the FERC veto is particularly significant because the question of severability had been raised in the Circuit Court and, notwithstanding a relatively strong case to be made against severability, the Circuit Court had decided that the unconstitutional legislative veto provision was severable from FERC's substantive authority.

The Process Gas decisions were significant also because, while Chadha involved a one-House veto, the FTC veto was a two-House veto. Both cases involved "independent" agencies rather than Executive Branch agencies. Thus, potential arguments regarding the remaining vitality of legislative vetoes in a two-House context (overcoming the bicameralism argument), or involving "independent" agencies (where the "interference with presidential power" argument is weaker) are no longer viable. Process Gas therefore makes it very clear (although Chadha left very little room to argue) that all legislative vetoes are unconstitutional.

Justice White, who dissented from the two decisions, was particularly disturbed about the decisions as they relate to independent agencies. In this regard, he quoted his earlier comments in Buckley v. Valeo, 424 U.S. 1, 284-85 & n.30 (1976). In Process Gas he stated further:

> Congress, with the President's consent, characteristically empowers the agencies to issue regulations. These regulations have the force of law without the President's concurrence; nor can he veto them if he disagrees with the law that they make. The President's authority to control independent agency law-making, which on a day-to-day basis is non-existent, could not be affected by the existence or exercise of the legislative veto. To invalidate the device, which allows Congress to maintain some control over the law-making process, merely guarantees that the independent agencies, once created, for all practical purposes are a fourth branch of the government not subject to the direct control of either Congress or the executive branch. I cannot believe that the Constitution commands such a result.

Of course, the Constitution does not command the result which bothers Justice White the most. Congress need not create "independent" agencies, and it may be the time for the three Branches of government to reconsider whether the "independent" agency concept is either wise or constitutionally defensible.

(b) The Federal Pay Comparability Act of 1970. Litigation is pending, under the supervision of the Civil Division, regarding the Federal Pay Comparability Act of 1970. This Act involves recommendations for pay raises for federal employees to make their pay "comparable" to private sector wages. The President's pay agent, as well as the Advisory Committee on Federal Pay, make recommendations to the President. The President may accept the recommendations or submit an alternative plan to Congress adopting a different percentage pay increase. Congress has a legislative veto over the alternative plan. The litigants have taken the position with respect to back pay that the President's power to alter the pay agent's recommendation is not severable from the legislative veto and, consequently, that existing wages must be revised

upward to reflect the recommendation of the pay agents, rather than the lower wage increases contained in alternative plans submitted by two different Presidents. An answer to the complaint is not due until September, but because under the usual timetable the pay agent's and Advisory Committee's recommendations are submitted and the President's decision is made by the first of September, the plaintiffs may seek provisional injunctive relief prior to the deadline to answer, which would might require earlier official Administration action in the case.

The pay comparability case is complicated because the Fourth Circuit previously found, with respect to a similar legislative veto provision in a similar federal pay statute, and at the urging of the Department of Justice, that there was no severability, McCorkle v. U.S., 559 F. 2d 1258 (4th Cir. 1977). The Department's position in that case was advanced in order to avoid the court's reaching the issue of the constitutionality of the legislative veto mechanism. The Department will presumably be taking the opposite position on severability in this case. Estimates of OPM are that 20-30 billion dollars may be at stake.

(c) EEOC Litigation.

Private litigants are contending that the EEOC lacks certain enforcement authority because the power which was transferred from the Labor Department to it by an executive order occurred pursuant to reorganization statute which contained a legislative veto provision. The litigants contend that the legislative veto provision was not severable from the President's reorganization authority and that, therefore, the authority of the President to delegate power to the EEOC is invalid. Accordingly, they argue, the decisions of the EEOC which are at issue in the case are invalid. EEOC is representing itself in this case but is accepting advice and assistance from the Civil Division.

(d) Another immigration case similar to Chadha is pending which apparently presents no peculiar problems.

(e) On July 5, 1983, Exxon Corp. filed a motion for reconsideration and relief from a $1.6 billion judgment of June 7, 1983 against it for gasoline overcharges. United States v. Exxon Corp., Civ. No. 78-1035 (D.D.C.). Exxon's motion is based on its argument that the statutes under which the judgment was obtained fall in their entirety based on the alleged in-

severability of the legislative veto devices in those statutes. Exxon's motion does not discuss nor cite to the FERC decision on severability, discussed above, a decision probably decisive of the severability issue against Exxon's position.

2. Administration actions and decisions pursuant to statutes which contain legislative veto provisions.

(a) Specialty Steel Decision. The President's decision on July 5, 1983 establishing quotas and duties on specialty steel imports required us to advise the President (through advice to the Office of the United States Trade Representative) that presidential power to enforce the contemplated restrictions on imported steel products was severable from a legislative veto provision. The discussion of this issue was memorialized in a memorandum prepared by Deputy Assistant Attorney General Ralph Tarr. The Office of Legal Counsel also reviewed and approved as to any legislative veto concerns the transmittal letters to Congress advising it of the decision as required by statute. The office is currently reviewing the President's proclamation in the office's usual role.

(b) Arms Sales.

Noncontroversial arms sales are being reported to the Congress, pursuant to 22 U.S.C. § 2776(b), after coordination with and notification to the Office of Legal Counsel of the Department of Justice, the Office of General Counsel to the Office of Management and Budget, and the Office of the Counsel to the President. The more controversial sales are being examined more closely, but will probably also be sent forward.

(c) Budget Deferrals Under the Impoundment Control Act of 1974.

Noncontroversial deferrals were being held by OMB to permit consultation and coordination with OLC and White House Counsel; we were informed today by OMB that a deferral message was in fact transmitted to Congress today, the first since Chadha was decided, due to an adminisrative error. The more controversial items are being studied to determine whether the deferrals are of such a nature that they ought to be forwarded also.

(d) CAFE Standards.

This misleading acronym relates to fuel efficiency standards for cars sold in the United States and the fact that several major automobile manufacturers are liable for substantial

fines because aggregate automobile sales are averaging higher fleet miles per gallon than required by statute, due to increased sales of larger automobiles. The Secretary of Transportation apparently has the power to modify the statutory standards by rule, which rule is subject to a legislative veto provision.

The question of the Secretary's power under this statute is extremely important because millions of dollars of potential fines or penalties are apparently involved. The industry itself is split on whether presidential relief should be granted (General Motors is exposed to substantial penalties, whereas Chrysler is within or much closer to the requirements and thereby exposed to a lesser or no liability). OLC is looking into the scope of presidential power and the severability question.

(e) The Jackson-Vanik Amendment

The President sent a message to Congress on June 3, 1983 renewing "most favored nation" trade status for the People's Republic of China, Rumania and Hungary. The statute which authorizes this extension has a legislative veto provision, and the President's decision is presently being considered by the House Ways and Means Committee. Rep. Crane of Illinois has introduced a veto measure.

(f) Atomic Energy Act.

Pursuant to § 129 of the Atomic Energy Act, a waiver of restrictions on the sale of nuclear reactor components to India has been, or will be, sent to the Hill pursuant to a 60 day (continuous session) concurrent resolution legislative veto provision. The State Department feels that the legislative veto provision is severable and that the Administration will probably go forward with this transaction because of promises Secretary Schultz has made to India.

(ii) Under § 123 of the Atomic Energy Act, certain nuclear components are contemplated for sale to Sweden and Norway. Again, there is a 60-day (continuous session) concurrent resolution legislative veto provision. It is contemplated that notification of the Administration's intended action will be sent to the Hill. These transations do not promise to be particularly controversial because of the two nations involved.

3. Analysis of Legislative Veto Decision and Expected Reaction to it.

(a) The OLC study is ongoing. OLC is making an inventory of existing legislative veto statutes and examining potential legal issues. Completion of the inventory of statutes awaits final responses from agencies. A target for completion of a preliminary inventory and analysis will be set as July 15, 1983.

(b) The Congressional Research Service has released a summary and preliminary analysis of Chadha. It contains some previously prepared inventories of statutes and some comments on the Supreme Court's decision. The analysis states that the "substantive ruling was not unexpected [but] the reach of the Court's rationale came as a surprise to many." The author declares that the court's analysis "apparently invalidates all legislative vetoes irrespective of their form or subject."

4. Contemplated Testimony.

The following hearings have been scheduled and are now presently pending:

(a) July 14. Testimony by the State Department expert before the Trade Subcommittee of the House Ways and Means Committee relative to the Jackson-Vanik Amendment and the President's decision of June 3 to renew "most favored nation" trade status for Hungary, Rumania and the People's Republic of China.

(b) July 18. Testimony before Senator Grassley's Subcommittee on Administrative Practice of the Senate Judiciary Committee. Senator Grassley expects to receive testimony from counsel to the House and Senate, the American Bar Association and certain academicians. He will accept testimony from an Administration witness, but will not require it.

(c) July 19. Testimony has been requested from the Department of Justice (either the Attorney General or the Deputy Attorney General) before the Administrative Law Subcommittee of the House Judiciary Committee (Congressman Sam Hall).

(d) July 20. Testimony is requested from the Department of Justice and the State Department before the House Foreign Affairs Committee.

The persons attending the working group meeting generally felt that the Administration should try to avoid testimony regarding legislative veto before the August recess,

but that if testimony cannot be avoided, the testimony should be as narrow as possible and provided at a reasonably low level. In other words, the general sentiment at the meeting was that we should provide as little headline potential to these hearings as possible. The Legislative Affairs people from the White House, the Department of Justice and the Department of State were to try to implement the foregoing objective.

I have subsequently been advised by the Office of Legislative Affairs of the Department of Justice that it is not considered possible to avoid testimony on July 19th before Congressman Hall and that the Attorney General or the Deputy Attorney General (but probably the Attorney General) will be the witness. The same is true for the hearing on the 20th by representatives of State and Justice.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

cc: Edward C. Schmults
Deputy Attorney General

Fred F. Fielding
Counsel to the President

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

05 JUL 1983

MEMORANDUM FOR CLAUD GINRICH
General Counsel
Office of the United States
Trade Representative

Re: Presidential Authority to Impose Import Restrictions Under § 203 of the Trade Act of 1974

This memorandum responds to your oral request for our views whether the President continues to have authority to proclaim import relief under § 203 of the Trade Act of 1974 (the Trade Act), 19 U.S.C. § 2253, in light of the recent Supreme Court decision in Immigration and Naturalization Service v. Chadha, Nos. 80-1832, 80-2170, 80-2171 (June 23, 1983). In Chadha, the Court held unconstitutional the one-house legislative veto provision in § 244(c)(2) of the Immigration and Naturalization Act, 8 U.S.C. § 1254(c)(2). Section 203(c)(1) of the Trade Act, 19 U.S.C. § 2253(c)(1), also contains a legislative veto provision which permits Congress, by passage of a concurrent resolution, to invalidate the President's action under § 203. Because the legislative veto in § 203(c)(1) of the Trade Act is unconstitutional under the analysis set forth in Chadha, 1/ you

1/ In Chadha, the Supreme Court struck down the one-house legislative veto provision in section 244(c)(2) of the Immigration and Naturalization Act, 8 U.S.C. § 1254(c)(2) on the grounds that it violated the constitutional requirement of bicameralism and presentment to the President, as set forth in Art. I, § 7, cl. 2 & 3. Under the broad analysis of this decision, the two-house legislative veto provision in § 203(c)(1) of the Trade Act clearly violates the constitutional requirement of presentment to the President, and therefore, in our view, is unconstitutional. Because one clause of § 203 is unconstitutional, the continued authority of the President to take action under § 203 is also brought into question, depending upon whether the legislative veto provision in § 203(c)(1) is severable from the remainder of § 203.

have asked us to examine the validity of the remaining parts of § 203. For the reasons set forth below, we conclude that the legislative veto provision in § 203(c)(1) is severable from the rest of that section and thus that there is no constitutional impediment to the President taking action under § 203.

I. Background

Section 203 is the latest in a series of provisions passed by Congress attempting to ameliorate the effect on domestic industry of mutual tariff reductions negotiated by the President with foreign countries. Since 1934, see Pub. L. No. 316, 48 Stat. 943 (1934), Congress has periodically granted the President temporary authority to enter into trade agreements with other countries for a mutual reduction in import restrictions, and to amend the tariff schedules of the United States to conform to such agreements. Because such reductions can pose a serious threat to domestic industry, Congress has also given the President authority in several of these acts, beginning first with the 1951 Trade Agreements Extension Act of 1951, to impose temporary import restrictions in order to protect a domestic industry immediately threatened by tariff reductions negotiated by the President under the Act. See Pub. L. 50, § 7, 65 Stat. 72, 74 (1951). Under the terms of the 1951 Act, the President could order relief on the basis of an investigation by the United States Tariff Commission (later named the International Trade Commission) and a recommendation by the Commission that he grant import relief. A 1958 Act, Pub. L. No. 85-686, § 2, 72 Stat. 673 (1958), which extended the President's authority to enter into trade agreements, however, first added a legislative veto provision permitting Congress, on the vote of two thirds of the members of each House, to override the President's decision with respect to import relief and thereby adopt the relief recommended by the United States Tariff Commission. See Pub. L. 85-686, § 6, 72 Stat. 673, 677 (1958). Congress passed a new statute in 1962 granting the President authority to enter into trade agreements for another 5 years, with an escape clause subject to a legislative veto provision requiring a majority vote of two Houses. See Pub. L. 87-794, §§ 301, 302, 351, 352, 76 Stat. 883-886, 899-901 (1962).

The current statute, the Trade Act of 1974, continues this general functional scheme, although, unlike the prior statutes, it does not condition relief on increased competition due to tariff reductions, but merely on increased imports. Under § 201 of this Act, 19 U.S.C. § 2251, various parties -- the President, two selected committees of Congress, the Special Representative

for Trade Negotiations, or representatives of industry -- can request the International Trade Commission (the Commission) to examine "whether [a particular] article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." The Commission must then, within six months, undertake an investigation and submit a report of its findings to the President. Should the Commission conclude that importation of the article presents such a "serious injury or threat thereof," it must set forth in its report the amount of duties and/or import restrictions it believes is necessary to prevent such injury. 2/

In a case where the Commission finds that imports are a serious threat to a domestic industry, and recommends import relief, the President must, within 60 days of the receipt of the report (30 days in the case of the receipt of a supplemental report), make a decision to take one of three actions under the terms of the Act. First, he may accept the import relief suggested by the Commission, and notify Congress of his action. See §§ 202(a), § 203(a) & (b), 19 U.S.C. § 2252(a), 2253(a) & (b). Second, if he determines that import relief is not "in the national economic interest," he may grant no import relief, although he must notify Congress of his reasons for refusing to take any action. Id. Finally, the President may decide to accept import relief different from that recommended by the Commission. Id. If the President chooses this third option, he is required to notify Congress of the reasons for his decision not to accept the recommendations of the Commission. In any case where the President decides to impose import relief, the statute places a quantitative limitation on the level of duties and quotas that can be ordered, and the length of time of such restrictions. See § 203(d), 19 U.S.C. § 2253(d). Where the President does not adopt the recommendations of the Commission, however -- either because he decides to grant no relief or to grant relief different from that recommended by the Commission -- Congress may within 90 days, by a concurrent resolution adopted by a majority of both Houses, invalidate the President's action and adopt in its place the relief recommended by the Commission. See § 203(c)(1), 19 U.S.C. § 2253(c)(1). When Congress exercises such power, the President must, within 30 days of the adoption of such resolution, proclaim the import restrictions recommended by the Commission. See § 203(c)(2), 19 U.S.C. § 2253(c)(2).

2/ Alternatively, in such a situation the Commission may, if it wishes, recommend only adjustment assistance for the domestic industry. See 19 U.S.C. § 2251(d)(1)(B). Such a recommendation, however, only authorizes the President to direct expeditious consideration of domestic adjustment assistance, not to impose import relief. The President's action is also not subject to a legislative veto. See 19 U.S.C. § 2253(c)(1).

II. Severability

Whether the President continues to have authority to impose import relief under § 203 in the absence of the legislative veto in § 203(c)(1) depends upon whether § 203(c)(1) is severable from the rest of § 203. The severability of an unconstitutional provision from the rest of the statute presents a question of legislative intent: would Congress have wished the remainder of the statute to continue in effect had it recognized that the provision was unconstitutional and therefore that it could not have properly been included in the statute? See Dorchy v. Kansas, 264 U.S. 286, 290 (1924). "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independent of that which is not," the invalid portion should be severed, and the remaining statutory authority continued. INS v. Chadha, slip op. at 10, quoting Champlin Refining Co. v. Corporation Comm'n., 286 U.S. 210, 234 (1932). In the present case, the invalidity of the legislative veto provision would have presented Congress with essentially two options. First, Congress could have decided to authorize the President to continue to exercise his authority under § 202(a) and 203(a) in the absence of the threat of a legislative veto. In such a case, the veto in § 203(c)(1) would be severable from the rest of the statute. Second, Congress could have refused to authorize the President or the Commission to exercise any authority in the absence of the legislative veto. In that case, the veto would be inseverable from all of § 203 as well as 202, and no import relief could be granted.

In determining which action Congress would have taken, we are strongly aided by the potentially dispositive presence of a severability clause in the Trade Act of 1974, which provides that "[i]f any provision of this Act . . . shall be held invalid, the validity of the remainder of this Act . . . shall not be affected thereby." See § 605, 19 U.S.C. § 2101 note. This clause, which is virtually identical to the clause in the Immigration and Nationality Act reviewed by the court in Chadha, is, as the Court in Chadha concluded, "unambiguous and gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or of any part of the Act, to depend on whether the veto clause . . . was invalid. . . . Congress could not have more plainly authorized the presumption that the provision for a . . . veto . . . is severable. . . ." INS v. Chadha, slip op. at 11.

The Chadha opinion also identified yet another characteristic present in the Trade Act that creates a presumption of severability. "A provision is further presumed severable if what remains after severance 'is fully operative as a law.'" Slip op. at 13, quoting

Champlin Refining Co. v. Corporation Comm'n., 286 U.S. at 234 (1932). 3/ If the legislative veto in § 203(c)(1) of the Trade Act is excised from the rest of the Act, the activities of the International Trade Commission in recommending relief and of the President in ordering or denying relief can continue under the current statutory framework. Congress may overturn the decisions of the President and, if it wishes, implement the recommendations of the Commission, but only, as in the case of the deportation decisions in Chadha, slip op. at 14 n. 8, through passage of a statute enacting those recommendations into law. In light of the fact that the statute is "operable" in the absence of the veto and contains a severability clause, therefore, the President is presumed to have the authority under § 203 to grant import relief unless the legislative history of this provision rebuts the presumption that Congress would have wished him to exercise this power in the absence or Congress' ability to exercise the veto.

A. Legislative History of the Trade Act and Severability of § 203(c)(1)

Although no single factor can resolve definitively the elusive question of what Congress would have intended without the veto, we believe that, taken as a whole, the legislative history provides affirmative evidence that Congress would have wanted the President to exercise such authority absent the veto. More importantly, there is no compelling evidence, certainly none sufficient to rebut the presumption of severability, that Congress would not have granted such authority.

First, finding the legislative veto inseverable would eliminate any mechanism for protecting domestic industry from import competition. The Trade Act, however, like its precedessor acts, was passed in order to "provide greater access and more effective delivery of import relief to industries, firms, and workers which are seriously injured or threatened with serious

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3/ In treating the operability of a statute, after excision of an unconstitutional provision from it, as creating a "presumption" of severability, the Court went beyond its decision in Champlin, in which a "presumption" was identified only with the existence of a severability clause in the statute before it. Similarly, in Buckley v. Valeo, 424 U.S. at 108-09, the Supreme Court dealt with a statute that did not contain a severability clause and found an unconstitutional provision in that statute to be severable by relying on the fact that the statutory scheme was fully functional; the Court did not, however, use the word "presumption" in Buckley.

injury by increased imports." S. Rep. No. 93-1298, 93rd Cong., 2d Sess. 3 (1974); H.R. Rep. No. 93-571, 93d Cong., 1st Sess. 8 (1973). To achieve these objectives, the Act, among other things, relaxes the standard required for a finding by the Commission that importation of goods threatens domestic industry, thereby making it easier to impose import restrictions than under earlier acts. See H.R. Rep. No. 93-571, 93d Cong., 1st Sess. 8 (1973). Although the legislative veto provision appears to have been intended generally as a device for providing greater protection for domestic industry by restraining the power of the President to ignore the recommendations of the Commission, see S. Rep. No. 93-1298, 93rd Cong., 2d Sess. 27 (1974), striking down the President's power to grant relief would provide even less protection for industry. Thus, if given the choice between continuing the President's authority to impose import restrictions or denying any relief, it is probable that Congress would have opted to assure at least some relief for domestic industry.

The early history of the escape clause, moreover, reveals that Congress was previously willing to give the President authority to impose import restrictions not subject to the veto. As discussed above, when Congress originally granted the President authority in 1951 to provide domestic industry with import relief from foreign competition, it did not include a legislative veto provision in that Act. See Pub. L. 82-656, 72 Stat. 673 (1951). From that point until 1958, when the first legislative veto provision was added, Congress permitted the President to exercise authority under a procedure which would be identical to the procedures followed if the legislative veto were severable. Although a legislative veto provision was contained in succeeding trade acts passed in 1962 and 1974, this earlier history indicates that Congress was willing to grant the President authority to restrict imports to protect a domestic industry even when it believed that it could subject his decisions to the veto.

In addition, it is important to recognize that when Congress first subjected Presidential trade restrictions to a legislative veto in 1958, it expressed its intent not to restrict improperly the President's powers, noting that "the President must continue to have discretion in escape clause cases because their effects on foreign relations and other aspects of the national interest may outweigh the benefit to a particular industry." H.R. Rep. No. 1761, 85th Cong., 2d Sess. 11 (1958). Two thirds of both Houses were needed to override the President's determination under the 1958 Act because, according to the House report, "it is reasonable and just to require a two-thirds majority of each House to reverse an action of the President in a field which is so intimately related to the conduct of foreign relations of the United States and where action by the Congress without immediate participation of the President during the course of such action is involved." H.R. Rep. No. 1761, 85 Cong., 2d Sess. 12 (1958).

Congress also believed that a two thirds vote of both Houses of Congress was analogous to Congress repassing a bill after a Presidential veto, suggesting, in its view, that the provision would be held constitutional. Id. at 13. Thus, Congress recognized that the President should have authority to take action in this area. In light of the fact that the President's authority to proclaim import relief under § 203 is, as we discussed above, limited by statute as to the level of the restrictions and time of their imposition, it is probable that Congress would have wished the President continue to exercise authority in this area.

Finally, in practice, the legislative veto has not played an important role in the operation of § 203. Since the legislative veto provision was first adopted in 1958, and continued in the 1962 and 1974 Trade Acts, Congress has never, according to the Office of the United States Trade Representative, exercised a legislative veto of a Presidential proclamation restricting imports in this area. Thus, if Congress had been faced with the question in 1974, when the present act was drafted, of whether to permit no import relief to be granted or to continue the current system without the veto, it is most likely they would have continued the present system without the veto. That is the system that has, in practice, existed since 1958.

In summary, the legislative history of § 203 provides affirmative evidence that Congress would have wished the President to continue to exercise his authority in the absence of the legislative veto provision. More importantly, we have found no legislative history which is sufficient to rebut the presumption that Congress intended the President to continue to have such authority.

B. Severability of § 203 from the Remainder of the Act

Even though it is reasonably clear that Congress would have intended import relief to continue in the absence of a legislative veto, it remains for us to consider one legislative option not discussed above. It might be argued that, in the absence of the veto, Congress would have wished the Commission's recommendations to have binding effect without participation of the President. Under this interpretation, the veto in § 203(c)(1) would be inseverable from the rest of § 203, which authorizes the President to take action, but severable from the statutory authority in § 201 supporting the activities of the Commission. Moreover, according to this argument, the "recommendations" of the Commission would apparently become mandatory and self-executing. Although representatives of domestic industry may press this interpretation, we find it impersuasive.

First, this argument is inconsistent with the approach set forth by the Supreme Court for determining the effect on a statute of a finding that one of its clauses is unconstitutional.

In order to find that the Commission's actions are mandatory in this case, § 201 would need to be completely rewritten. This section currently directs the Commission only to make "recommendations," not to take substantive action. Under the case law, however, when one section in a statute is held unconstitutional, the Court merely seeks to determine whether "the legislature would not have enacted those provisions which are within its power, independently of those which are not," INS v. Chadha, slip op. at 10, quoting Champlin Refining Co. v. Corporation Comm'n., 286 U.S. at 234, not to guess what other type of statutory scheme Congress might have established in its place had it known the provision was unconstitutional. No court, in our view, would have authority to rewrite the statute in this manner based on its speculation as to what type of alternative scheme Congress might have created.

Even if we were to attempt to make such a predication, moreover, investing the Commission with such powers would completely transform it from an advisory body into an agency executing the law. Since its inception, the Commission has acted merely as an advisory committee in this process, leaving all independent decisions to be made by the President, or in theory, by Congress through a legislative veto. As we discussed above, when Congress first added a legislative veto in 1958, it reaffirmed the importance of Presidential discretion in this area, observing that "the President must continue to have discretion in escape clause cases because their effects on foreign relations and other aspects of the national interest may outweigh the benefit to a particular industry." H.R. Rep. No. 1761, 85th Cong., 2d Sess. 11 (1958) (emphasis added). There is no compelling indication that Congress would have wished such an organization to be free to amend the tariff schedules of the United States, with serious foreign policy implications, independent of any control by either the President or Congress. Thus, in our view, invalidation of the legislative veto would clearly not authorize amendment of § 201 to make the Commission's recommendations mandatory.

III. Conclusion

For the foregoing reasons, we conclude that while the two-House disapproval mechanism set forth in § 203(c) of the Trade Act fails as an unconstitutional legislative veto provision under the Chadha analysis, the provision is severable from the remainder of § 203. Therefore, the President still has authority under § 203 of the Trade Act to consider the International Trade Commission's recommendations and grant import relief or decide not

to grant such relief. In either case, the President must also still notify Congress of his decision under the terms of § 203(b). Congress can then, if it disagrees with the President's decision, alter that decision by legislative action in the manner prescribed by Art. I, Sec. 7, cl. 2 and 3 of the Constitution.

Ralph W. Tarr
Acting Assistant Attorney General
Office of Legal Counsel

cc: Fred Fielding
Counsel to the President

VGR

Chadha

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 11, 1983

FOR: RICHARD A. HAUSER

FROM: PETER J. RUSTHOVEN

SUBJECT: Memoranda from Ed Harper's Office re: Legislative Vetos

As you requested, I have prepared for your review and signature the attached memorandum for Edwin Harper, with copy to Wendell Gunn, responding to their inquiry about the effect of the Supreme Court's decision in INS. v. Chadha on the legislative veto provision of section 203 of the Trade Act of 1974, 19 U.S.C. § 2253. This memorandum reiterates the advice on this issue we have received from OLC (now in writing), as previously stated in our comment memorandum on the specialty steel decision.

As you may also be aware, Harper has asked all his Assistant OPD Directors to compile lists of statutes with legislative veto provisions involving their respective areas of substantive responsibility, via a memorandum (also attached) that was copied to Mr. Fielding and in turn forwarded to John Roberts and myself. John and I think it would be prudent to advise Harper that the Department of Justice has responsibility for conducting the overall survey of the effect of the Chadha decision on legislative veto provisions. Accordingly, the attached memorandum also advises Harper that he should forward the results of the OPD survey to you, and that our office will then coordinate with Justice.

Attachments

cc: Fred F. Fielding
John G. Roberts, Jr.

THE WHITE HOUSE

WASHINGTON

July 11, 1983

MEMORANDUM FOR EDWIN L. HARPER
ASSISTANT TO THE PRESIDENT
FOR POLICY DEVELOPMENT

FROM: RICHARD A. HAUSER
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: Legislative Veto Provisions

This will respond to the question noted on Wendell Gunn's June 23 memorandum for you about the impact of the Supreme Court's decision in INS. v. Chadha on the legislative veto provision of section 203 of the Trade Act of 1974, 19 U.S.C. § 2253, with specific reference to the recent specialty steel case.

Prior to the President's decision in that case, we were advised by the Office of Legal Counsel at the Department of Justice that it had reviewed this issue, and believed that the Chadha decision invalidated this legislative veto provision. OLC was also of the view, however, that the President retained his statutory authority to review United States International Trade Commission recommendations, and that he should continue to report to the Congress his decisions with respect to such recommendations. Our office reiterated this OLC advice in our comment memorandum on the specialty steel case.

With respect to your more general memorandum to Assistant Directors of the Office of Policy Development, asking them to compile lists of statutes with legislative veto provisions involving their respective areas of substantive responsibility, you should know that the Department of Justice has been assigned the responsibility of conducting an overall survey of legislative veto provisions that may have been affected by the Supreme Court's decision. Accordingly, when the results of the OPD survey are in, you should forward them to me. I will then see to it that the information is submitted to appropriate Justice officials.

Let me know if you have any questions; thank you.

cc: Wendell W. Gunn

7/6/83

THE WHITE HOUSE
WASHINGTON

TO: AGR

FROM: *Richard A. Hauser*
Deputy Counsel to the President

FYI: _____

COMMENT: _____

ACTION: ✓ You have already answered the question in the Specialty Steel memo. Plz prepare short memo for Wendell. Merci.

THE WHITE HOUSE
WASHINGTON

TO: Dick Hauser

FROM: WENDELL GUNN

See attached memo
How should we go
about answering
this question?

THE WHITE HOUSE

WASHINGTON

June 23, 1983

MEMORANDUM FOR: EDWIN L. HARPER

FROM: WENDELL W. GUNN

SUBJECT: Presidential Discretion on Import Relief

From time to time when the Administration is considering import relief, there is concern that denial of relief by the President will be overridden by the Congress. Specifically, the concern is that Congress would pass a concurrent resolution pursuant to Section 203 of the Trade Act, 19 U.S.C. Section 2253.

Yesterday the Supreme Court decided that legislative veto provisions, which deny the President this veto power, are unconstitutional. The Court held that the particular unconstitutional legislative veto provision before it was severable, allowing the rest of the statute to remain in force.

Does this mean that when the President turns down an ITC recommendation for such import relief, that Congress cannot override the President's decision?

Very interesting.

cc: Craig Fuller
Mike Smith
Lionel Olmer
Roger Porter
Eric Garfinkel

So what is the answer?

EL

THE WHITE HOUSE

WASHINGTON

June 30, 1983

MEMORANDUM FOR ASSISTANT DIRECTORS

FROM: EDWIN L. HARPER

SUBJECT: Impact of Court's Legislative Veto Decision

Attached is a copy of the article from Newsweek magazine of July 14th discussing the background of the Court's decision overturning the legislative veto.

Would you please identify the significant applications of the legislative veto concept in your area of responsibility and comment on whether it is likely and/or desireable that the President's new-found freedom from the threat of legislative veto be exercised.

cc: Edwin Meese III
Fred Fielding

Attachment

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 25, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Proposed Bulletin on Actions Pursuant to Statutes Containing Legislative Veto Provisions

Richard Darman has asked for our views on the above-referenced proposed OMB bulletin to all executive departments and establishments by Wednesday, July 27. The stated purpose of the bulletin is to coordinate actions with respect to invalidated legislative vetoes and avoid unnecessary confrontation with Congress. The bulletin mandates OMB clearance of any action taken under a statute with a legislative veto provision, and provides a copy of the Justice Department list of such statutes. Paragraph 8 of the proposed bulletin, which I regard as critical, emphasizes that its purpose is not to impede agency action under statutes with invalid legislative vetoes but simply to coordinate such action. There is a danger that the executive branch might snatch defeat from the jaws of victory in this area by being too reluctant to take action under statutes with legislative vetoes. Paragraph 8 guards against that danger.

I have no objection to the proposed bulletin.

Attachment

THE WHITE HOUSE

WASHINGTON

July 25, 1983

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Proposed Bulletin on Actions Pursuant to Statutes Containing Legislative Veto Provisions

Counsel's Office has reviewed the above-referenced proposed bulletin and finds no objection to it from a legal perspective.

FFF:JGR:aw 7/25/83

cc: FFFielding
JGRoberts
Subj.
Chron

THE WHITE HOUSE

WASHINGTON

July 25, 1983

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Proposed Bulletin on Actions Pursuant to Statutes Containing Legislative Veto Provisions

Counsel's Office has reviewed the above-referenced proposed bulletin and finds no objection to it from a legal perspective.

FFF:JGR:aw 7/25/83

cc: FFFielding
JGRoberts
Subj.
Chron

ID # _____ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Richard G. Darman

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: Proposed Bulletin on Actions Pursuant to Statutes Containing Legislative Veto Provisions

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
C Holland		ORIGINATOR	83/07/22			/ /
CWAT 18		Referral Note:				
		D	83/07/22		S	83/07/27
		Referral Note:				
			/ /			/ /
		Referral Note:				
			/ /			/ /
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			/ /			/ /
		Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

Document No. _____

WHITE HOUSE STAFFING MEMORANDUM

DATE: July 22 ACTION/CONCURRENCE/COMMENT DUE BY: Wednesday, JULY

SUBJECT: PROPOSED BULLETIN ON ACTIONS PURSUANT TO STATUTES CONTAINI
LEGISLATIVE VETO PROVISIONS

	ACTION	FYI		ACTION
VICE PRESIDENT	☐	☐	HARPER	☑
MEESE	☐	☑	HERRINGTON	☐
BAKER	☐	☑	JENKINS	☐
DEAVER	☐	☐	McMANUS	☐
STOCKMAN	☐	☐	MURPHY	☐
CLARK	☑	☐	ROGERS	☐
DARMAN	☐P	☑SS	ROLLINS	☐
DUBERSTEIN	☑	☐	VERSTANDIG	☐
FELDSTEIN	☐	☐	WHITTLESEY	☐
FIELDING	☑	☐	BRADY/SPEAKES	☐
FULLER	☐	☐	_____	☐
GERGEN	☐	☐	_____	☐

REMARKS:

Please provide any comments/edits by Wednesday, July 27th.

RESPONSE:

Richard G. Darman
Assistant to the Preside
Ext. 2702

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

BULLETIN NO. 83-

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Proposed Actions Pursuant to Statutes Containing Legislative Veto Provisions

1. Background. The recent decision by the Supreme Court in INS v. Chadha, broadly declaring legislative vetoes to be unconstitutional, requires careful review and coordination of agency actions that will hereafter be taken under statutes that still contain such veto provisions. This will be necessary in order to avoid unnecessary confrontation with the Legislative branch; to assure consideration of the precedential impact of individual actions on the Executive branch as a whole; and to allow the Executive and Legislative branches to accommodate to the Court's decision in a constructive manner.

2. Definition. The term "proposed agency action" shall include the taking of any act, the submission of any notice to the Congress of a proposed action, the submission of a notice to the Federal Register of any proposal for action, or the submission of formal notice required by law or traditionally given to the general public or any defined segment thereof, whichever occurs first.

3. Action Requirements. Where proposed agency actions are subject to legislative veto provisions still set forth in statutory law, the following procedures are to be observed before those actions are implemented:

- Notices of proposed regulatory actions will continue to be submitted to the OMB Office of Information and Regulatory Affairs, pursuant to Executive Order 12291 or the Paperwork Reduction Act; however, proposed regulatory actions governed by currently enacted legislative vetoes should be expressly identified as such by the agencies.

- Notices of proposed appropriations-related actions should be delivered to the appropriate OMB budget division; however, those actions that are routine in nature (e.g., the annual submission to the Congress of operating plans) should not be included if prior agreement has been reached with the appropriate OMB budget division to exclude them.

- Notices of other proposed agency actions should be delivered to the personal attention of James M. Frey, Assistant Director, Legislative Reference, Room 7202 New Executive Office Building; however, in order to avoid unnecessary reporting, these notices should be sent only in the case of proposed actions that are likely to be of a controversial character.

- All Congressional testimony dealing with legislative veto matters, whether of an oversight or legislative character, should be submitted for clearance to the OMB Legislative Reference Division; the procedures of OMB Circular A-19 should be deemed applicable to all such testimony whether expressly applicable by its terms or not,

4. Clearance Requirements. Clearance procedures concerning regulations are established by Executive Order 12291; in all other cases, an agency is not to proceed with the proposed action without affirmative OMB clearance.

5. Procedural Requirements. The following procedures shall apply to the submissions of proposed agency actions (other than proposed testimony) required under paragraph 3:

a. Notice of proposed agency actions should be given to OMB as early as possible, and in any event at least five working days prior to planned agency submission of the proposed action to the Congress. Early notice is required in order to assure adequate time for OMB review.

b. When providing notice, the agency should submit to OMB the actual documents that it proposes to send to the Congress, the Federal Register or the general public or any defined segment thereof.

c. Where the proposed agency action is likely to be of a controversial character, the agency also should submit to OMB a concise statement setting forth all pertinent facts regarding the controversial aspects of the proposed action.

d. The Director of OMB may define generic categories of proposed agency actions that are likely to be of a controversial character and for which individual submissions are to be made for all proposed actions.

6. Statutes. A list of statutes that contain legislative veto provisions is attached. This list, prepared by the Department of Justice, is intended to be exhaustive, but agencies should report to James M. Frey any currently enacted legislative vetoes not set forth in the attachment. In this regard, it should be noted that the Department of Justice has advised that under the Chadha decision, statutes purporting to empower Congressional committees to waive waiting periods under report-and-wait provisions are unconstitutional.

7. General Provisions. The coordination of these actions by OMB is not intended to supersede or to alter any other review procedures that may be currently applicable to proposed agency actions, including consultations or reports regarding legislative vetoes requested by the Department of Justice.

8. Although these requirements reflect the Administration's determination to avoid unnecessary controversy in connection with proposed agency actions, each agency should clearly understand that these procedures are not to be used as a justification for failing to proceed with discretionary action that the agency believes appropriate to carry out its statutory responsibilities and Administration policies. The procedures of this Bulletin, calling for the exercise of coordinated judgment with regard to potentially controversial actions, are to be understood as facilitating, not impeding, the exercise of appropriate policy discretion by each agency.

9. Because the issues raised by the Chadha decision are of historic importance, your personal attention is requested to assure compliance by your agency with the provisions of this memorandum.

10. Sunset Date. This bulletin will remain in effect until September 30, 1984 unless superseded or rescinded.

David A. Stockman
Director

I. FOREIGN AFFAIRS AND NATIONAL SECURITY

A. War and National Defense

War Powers Resolution, Pub. L. No. 93-148

H.R. J. Res. 683, Pub. L. No. 94-110

National Emergencies Act, Pub. L. No. 94-412

International Emergency Economic Powers Act, Pub. L. No. 95-223

Neutrality Act of 1939, 54 Stat. 4

Arms Control and Disarmament Act of 1961, Pub. L. No. 87-297

B. International Assistance and Arms Export Control

Foreign Assistance Act of 1961, Pub. L. No. 87-195

Export Administration Act, amended by Department of Defense Appropriation Authorization Act, 1975, Pub. L. No. 93-365

International Development and Food Assistance Act of 1975, Pub. L. No. 94-161

International Security Assistance and Arms Control Act of 1976, Pub. L. No. 94-329

International Security Assistance Act of 1977, Pub. L. No. 95-92

International Development and Security Cooperation Act of 1980, Pub. L. No. 96-533

International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113

C. Department of Defense

Defense Reorganization Act of 1958, Pub. L. No. 85-599

Department of Defense Appropriation Authorization Act, 1974, Pub. L. No. 93-155

Department of Defense Authorization Act, 1982, Pub. L. No. 97-86

Department of Defense Authorization Act, 1983, Pub. L. No. 97-252

Military Construction Codification Act, Pub. L. No. 97-214

Defense Production Act of 1950, Pub. L. No. 81-774

Defense Production Act Amendments, 1970, Pub. L. No. 91-379

Energy Security Act, Defense Production Act Amendments of 1980, Pub. L. No. 96-294

Rubber-Producing Facilities Disposal Act, Pub. L. No. 83-205

Disposal of Surplus Vessels and Other Naval Property, Pub. L. No. 79-649

Long-Range Proving Ground for Guided Missiles, 1949, Pub. L. No. 81-60

D. Armed Forces Personnel

Department of Defense Authorization Act, 1981, Pub. L. No. 96-342

Universal Military Training and Service Amendments of 1951, Pub. L. No. 82-51

Veterans Health Program Extension and Improvement Act of 1979, Pub. L. No. 96-151

II. IMMIGRATION AND NATIONALITY

Immigration and Nationality Act of 1952, Pub. L. No. 82-414

Immigration and Nationality Act Amendments, Pub. L. No. 85-316

III. BUDGET

Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344

IV. INTERNATIONAL TRADE

Trade Expansion Act of 1962, Pub. L. No. 87-794

Trade Act of 1974, Pub. L. No. 93-618

Export-Import Bank Amendments of 1974, Pub. L. No. 93-646

Export Administration Act of 1979 ("EAA"), Pub. L. No. 96-72

V. ENERGY

Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153

Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. No. 93-577

Energy Policy and Conservation Act, Pub. L. No. 94-163

Naval Petroleum Reserves Production Act of 1976, Pub. L. No. 94-258

Department of Energy Act of 1978 -- Civilian Applications, Pub. L. No. 95-238

Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372

Natural Gas Policy Act of 1978, Pub. L. No. 95-621

Energy Security Act, United States Synthetic Fuels Corporation Act of 1980, Pub. L. No. 96-294

Energy Research and Development Administration Authorization Act, Pub. L. No. 94-187

Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1980, Pub. L. No. 96-164

Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1981, Pub. L. No. 96-540

Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1982, Pub. L. No. 97-90

VI. ATOMIC ENERGY AND NUCLEAR MATERIALS

Atomic Energy Act of 1954, Pub. L. No. 83-703, as amended

Atomic Energy Act Amendment of 1957, Pub. L. No. 85-79, as amended

Atomic Energy Act Amendments of 1964, Pub. L. No. 88-489

Atomic Energy Act Amendments of 1974, Pub. L. No. 93-377

Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95-242

Nuclear Regulatory Commission Authorization, Pub. L. No. 97-415

Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425

VII. FEDERAL PAY AND EMPLOYMENT

Federal Pay Comparability Act of 1970, Pub. L. No. 91-656

Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206

Civil Service Reform Act of 1978, Pub. L. No. 95-454

Central Intelligence Agency Retirement Act of 1964 for Certain Employees, Pub. L. No. 88-643

International Development and Food Assistance Act of 1978, Pub. L. No. 95-424

VIII. LAND AND NATURAL RESOURCES

Water Resources Development Act of 1974, Pub. L. No. 93-251

Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579

Marine Protection, Research, and Sanctuaries Act Amendments, 1980, Pub. L. No. 96-332

National Parks and Recreational Act of 1978, Pub. L. No. 95-625

Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378

Act to Expedite the Rehabilitation of Federal Reclamation Projects, Pub. L. No. 81-451

Act to Facilitate the Construction of Drainage Works, Etc., Pub. L. No. 84-575

Amendment to Watershed Protection and Flood Prevention Act, Pub. L. No. 87-639

Imperial Dam Project Modifications -- Colorado River Basin Salinity Control Act, Pub. L. No. 93-320

Conveyance of Submerged Lands to Guam, Virgin Islands, and American Samoa, Pub. L. 93-435

Olympic National Park -- Authority to Accept Land, Pub. L. No. 94-578

Alaska National Interest Lands Conservation Act, Title IX, Implementation of Alaska Native Claims Settlement Act and Alaska Statehood Act, Pub. L. No. 96-487

IX. INDIAN AFFAIRS

Indian Claims Judgment Funds Act, 1973, Pub. L. No. 93-134, as amended

Menominee Restoration Act, Pub. L. No. 93-197

Restoration of Indian Tribes of Unclaimed Payments, 1961, Pub. L. No. 87-283

Government-Owned Utilities Used for Bureau of Indian Affairs, 1961, Pub. L. No. 87-279

Act of July 1, 1932, Pub. L. No. 72-240, as amended

Education Amendments of 1978, Pub. L. No. 95-561

X. TRANSPORTATION

Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236

Education Amendments of 1974, Pub. L. No. 93-380

Education Amendments of 1978, Pub. L. No. 95-561

Education Amendments of 1980, Pub. L. No. 96-374

Student Financial Assistance Technical Amendments Act of 1983, Pub. L. No. 97-301

Federal Election Campaign Act Amendments, Pub. L. No. 93-443

Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187

Federal Rules of Evidence, Pub. L. No. 93-595

Airline Deregulation Act of 1978, Pub. L. No. 95-504

Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252

Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364

Farm Credit Act Amendments of 1980, Pub. L. No. 95-592

Comprehensive Environmental Response, Compensation and Liability Act of 1980 Pub. L. No. 96-510

National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515

Coastal Zone Management Improvement Act of 1980, Pub. L. No. 96-464

Federal Insecticide, Fungicide and Rodenticide Extension Act, 1980, Pub. L. No. 96-539

Motor Vehicle and Schoolbus Safety Amendments of 1974, Pub. L. No. 93-492

Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526

Amendment to Social Security Act Child Support Provisions, Pub. L. No. 94-88

Omnibus Budget Reconciliation Act of 1981, Consumer Product Safety Amendments of 1981, Pub. L. No. 97-35

Emergency Interim Consumer Product Safety Standard Act of 1978, Pub. L. No. 95-319

Omnibus Budget Reconciliation Act of 1981, Rail Passenger Service Act, Pub. L. No. 97-35

Omnibus Budget Reconciliation Act of 1981, Amendment to Highway Safety Programs, Pub. L. No. 97-25

International Navigational Rules Act of 1977, Pub. L. No. 95-75

Social Security Amendments of 1977, Pub. L. No. 95-216

Housing and Community Development Amendments of 1978, Pub. L. No. 95-557

XIV. APPROPRIATIONS ACTS

Energy and Water Development Appropriations Act, 1982, Pub. L. No. 97-88

Appropriations -- Department of the Interior -- Fiscal Year 1982, Pub. L. No. 97-100

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XV. MISCELLANEOUS

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