OLA CONTROLLED CORRESPONDENCE

From	To	Control Number
Cohen, William	William French Smith AG	C 794

Subject and Date	Date Received
Letter of 10/26/84 concerning Implementation of the Bid Protest Provisions of the Competition in Contracting Act	10/29/84 in LIA
	Due Date 11/14/84

(1) Referred To	(2) Referred To	(3) Referred To	(4) Referred To	Interim Response
OLC	FYI: AG, DAG, SG, CIV	FYI: DeCair	FYI: Logan	Yes
Date 10/30/84	**Date** 10/30/84	**Date** 10/30/84	**Date**	**Date** 10/29/84

Prepare Reply for Signature of	Date Released
William French Smith	

Remarks	File
Prepare response and SEND LETTER TO LIA, 1607, for approval and transmittal to OAG -- SEND SIGNED LETTER BY MESSENGER TO LIA, 1607, FOR DELIVERY TO COHEN	☐
	Priority ☐ *(Explain in Remarks)*

FORM DAG-47
APR. 82

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 29, 1984

Honorable William S. Cohen
Chairman
Subcommittee on Oversight of
Government Management
Committee on Governmental Affairs
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This is to acknowledge receipt of your letter of October 26, 1984, to the Attorney General, received by the Department on October 29, 1984, regarding "Implementation of the Bid Protest Provisions of the Competition in Contracting Act."

A further response will be forthcoming as soon as possible.

Sincerely,

Robert A. McConnell
Assistant Attorney General

United States Senate

COMMITTEE ON
GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT
WASHINGTON, D.C. 20510

October 26, 1984

The Honorable William French Smith
Attorney General
Department of Justice
Washington, D.C. 20530

Dear Mr. Attorney General:

I am writing to share with you my grave concern over a memorandum that Acting Assistant Attorney General Larry L. Simms provided to you on October 17, 1984, regarding "Implementation of the Bid Protest Provisions of the Competition in Contracting Act," P.L. 98-369, §§2741, 2751, 98 Stat. 494, 1199-1203 (1984). Mr. Simms recommends in the memorandum that executive agencies should take no action to implement certain bid protest provisions which the Department of Justice believes to be unconstitutional.

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Absent a court ruling, Mr. Simms' recommendation to violate statutory provisions enacted by the Congress and signed into law by the President raises the most serious questions under the doctrine of the separation of powers. A unilateral decision by the Executive Branch to refuse to enforce a statute constitutes a usurpation of the proper role of the judiciary and a failure by the President to meet his constitutional responsibility to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, Sec. 3.

The bid protest provisions in question have been examined by the General Accounting Office, the Congressional Research Service, the Senate Legal Counsel, and the General Counsel to the Clerk of the House of Representatives, all of which concluded that these provisions passed constitutional scrutiny. I can appreciate that the Department sincerely differs from the conclusions these congressional entities have reached. I believe that it is nevertheless incumbent upon the Department to acknowledge that

the constitutional issues are complex and important and that other positions are worhty of consideration. Surely such controversial and difficult issues should be decided after the presentation of divergent views in the courts, not within the confines of the Department of Justice.

Mr. Simms' recommendation, moreover, is inconsistent with the Department's historical understanding of the obligation of Executive Branch agencies to enforce those statutes whose constitutionality the Department doubts. The Department has previously recognized its responsibility to enforce statutes, even while disputing their constitutionality in court. Thus, in the controversy over the constitutionality of the legislative veto, for example, the Executive Branch had always respected the exercise of a legislative veto, notwithstanding the view of the Department that legislative vetoes were unconstitutional.

In Immigration and Naturalization Service v. Chadha, 103 S.Ct. 2764 (1983), the Solicitor General explicitly stated that, "[u]ntil and unless the court of appeals entered a decision holding the statute unconstitutional, INS intended to enforce the law." Reply Brief for Appellant in No. 80-1832, at 11. The Solicitor General explained there that the alternative approach of "ignoring a resolution of disapproval passed by one House of Congress and to cancel deportation proceedings and confer permanent resident status on the alien...would be inconsistent with the accepted view that constitutional questions arising in the administration of a statute should, if possible, be resolved by the courts, not by the administrative agency itself." Id. at 14.

The Solicitor General viewed the Department as having been constrained in Chadha to act "under the compulsion of [the statute] and [having] adhered to the established practice of many agencies of declining to rule on constitutional challenges to the statute they are charged with administering, properly leaving such issues to the courts." Brief for the INS at 74. The Solicitor General concluded that the enforcement of the statute by the Executive Branch, despite its refusal to defend the statute once judicial proceedings were initiated, "was not merely permissible under the circumstances, but was a responsible and wholly appropriate response to the situation." Reply Brief at 14.

I am deeply concerned by the Department's contemplated deviation from this established practice for dealing with disputes between the branches over the constitutionality of

statutes. Here, no less than in Chadha, "because the constitutional question in this case involves a conflict between the Executive and Legislative Branches, it is particularly important that it be resolved by the Judicial Branch." Id. Moreover, this is not an instance in which the Executive Branch's enforcement of the statute could serve to insulate the constitutionality of the statute from judicial resolution. The context of government procurement disputes obviously provides a setting in which private parties can be anticipated expeditiously to institute litigation concerning the constitutionality of these provisions.

I strongly urge that you reject Mr. Simms' recommendation and instruct the executive agencies to conform to the historical understanding that they are obligated to enforce the laws of the United States unless and until those laws have been found unconstitutional in the courts.

Sincerely,

William S. Cohen
Chairman

WSC:jam

THE WHITE HOUSE

WASHINGTON

January 18, 1985

MEMORANDUM FOR JOSEPH R. WRIGHT
DEPUTY DIRECTOR
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING /s/
COUNSEL TO THE PRESIDENT

SUBJECT: OMB's Bulletin Concerning the Competition in Contracting Act of 1984

Counsel's Office has reviewed your proposed reply to Chairman Brooks concerning the above-referenced topic, and finds no objection to it from a legal perspective.

FFF:JGR:aea 1/18/85
cc: FFFielding
JGRoberts
Subj
Chron

THE WHITE HOUSE

WASHINGTON

January 18, 1985

MEMORANDUM FOR JOSEPH R. WRIGHT
DEPUTY DIRECTOR
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
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THE WHITE HOUSE

WASHINGTON

January 18, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: OMB's Bulletin Concerning the Competition in Contracting Act of 1984

Joe Wright has asked for your clearance as soon as possible on a letter he proposes to send to Chairman Jack Brooks concerning Administration constitutional objections to certain provisions of the Competition in Contracting Act of 1984. I provided information to you on these constitutional problems by memoranda dated November 7 and November 28, 1984 (copies attached). Briefly, the Justice Department has concluded that provisions in the Act authorizing the Comptroller General to lift a stay of a government contract award triggered by a bid protest and to award attorneys fees and costs to a prevailing bid protester are unconstitutional because such actions are executive in nature and the Comptroller General is a legislative, not executive officer. OMB issued a bulletin consistent with the Justice opinion, and Brooks objected to it. The draft letter from Wright to Brooks simply reiterates the Justice view, and notes that OMB is bound by it -- thus the bulletin. There is nothing new here; I have no objections.

Attachment

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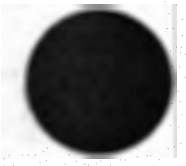

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Name of Correspondent: Jack Brooks

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Subject: OMB's Bulletin concerning the Competition in Contracting Act of 1984

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

Honorable Jack Brooks
Chairman
Committee on Government Operations
U.S. House of Representatives
Washington, D.C. 20515

Dear Jack:

I am writing in response to your letter to the Director of January 8, 1985 concerning OMB's issuance of a Bulletin implementing the opinion of the Department of Justice that certain provisions of the Competition in Contracting Act of 1984 were unconstitutional.

On July 18, 1984, the President, in signing the Competition in Contracting Act, issued a statement questioning the constitutionality of several provisions of the Act which ostensibly authorized the Comptroller General to bind Executive Branch agencies concerning certain aspects of the bid protest process. The President requested that the Attorney General advise Executive agencies how to comply with the Act in a manner consistent with the Constitution.

On October 17, 1984, the Department responded to the President's request by issuing an opinion which concluded that several provisions of the Act were unconstitutional. The Department concluded that the Comptroller General, as a Legislative Branch official, could not exercise these Executive Branch authorities consistent with the Constitution, as recently interpreted by the Supreme Court. The Department therefore concluded that these three sections must be stricken from the Act.

Section 203(a) of Pub. L. No. 98-411, 98 Stat. 1545, by continuing the authorities contained in Section 21 of Pub. L. No. 96-132, 93 Stat. 1049, requires that the Attorney General transmit a report to each House of Congress in any case in which he determines that the Department of Justice "will contest, or will refrain from defending, any provision of law enacted by Congress" in any administrative or judicial proceeding, because of the Department's conclusion that the provision is not constitutional. On November 21, 1984, the Attorney General duly notified the Speaker of the House and the President of the Senate pursuant to the provision that the Department would not defend these provisions in any proceeding in which their enforcement was sought. The Attorney General also stated that his position would facilitate prompt judicial consideration of the constitutional issues. Indeed, the Attorney General noted that this approach

might be the only manner in which the Judicial Branch could resolve these questions, because other persons would not have standing to raise these constitutional issues if the Executive Branch fully executed those provisions.

The opinions of the Attorney General interpreting the law are, of course, binding upon all Executive Branch agencies, including OMB. Pursuant to various statutes and Executive Orders, OMB is charged with supervising and coordinating the activities of the Executive agencies, in order to provide for the effective implementation and management of its programs. At the request of the Department of Justice, and in order to provide for coordination of the activities of Federal agencies in this dispute and facilitate a prompt judicial resolution of the constitutional question, on December 17, 1984, the Director issued Bulletin No. 85-8 to the Heads of Executive Departments and Agencies. That Bulletin informed the agencies of the Department of Justice's legal opinion and reminded them of their obligation to conduct their contracting authority in conformance with the Department's legal advice. The Bulletin also established reporting requirements, so that the Department of Justice would be notified of the initiation of any litigation challenging the Department's interpretation of the Act.

The issuance of the Bulletin was accordingly in keeping with OMB's responsibility to follow the legal advice of the Attorney General. We fully share the Attorney General's position that a determination not to defend provisions of law enacted by Congress is always a most sensitive determination, to be made with full realization of the separation of power implications of such decisions, and in strict conformance with the reporting provisions established by Congress for handling such extraordinary matters. We also share the Attorney General's views that a prompt judicial determination of the constitutionality of these provisions is highly desirable and that the position taken by the Attorney General is the most appropriate means of ensuring judicial resolution of the constitutional issues in a timely fashion.

Sincerely,

Joseph R. Wright, Jr.
Deputy Director

NINETY-NINTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT OPERATIONS

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, D.C. 20515

January 8, 1985

The Honorable David A. Stockman
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Dave:

I am deeply disturbed by the issuance of your December 17, 1984, directive regarding agency implementation of the Competition in Contracting Act of 1984. Based on an opinion by the Attorney General that certain provisions of the law pertaining to bid protests are unconstitutional, you have directed, among other things, that:

"o Agencies shall take no action, including the issuance of regulations, based upon the invalid provisions.

"o With respect to the 'stay' provision, agencies shall proceed with the procurement process as though no such provision were contained in the Act."

* * *

"o With respect to the damages provision of the Act, agencies shall not comply with declarations of awards of costs, including attorneys' fees or bid preparation costs, made by the Comptroller General."

In my opinion, your action in this matter is both inappropriate and illegal. The Competition in Contracting Act was duly enacted by Congress and signed into law by the President in accordance with Constitutional requirements. It is the law of the land. Absent a judicial determination as to the unconstitutionality of the provisions in question, you are duty bound to uphold the law. Furthermore, you have no legal basis to direct other Federal officials to violate the law. Surely you must recognize that only anarchy can prevail when the discretion to obey the law of the land is left to the individual, whether a private citizen or a Federal official.

I consider this to be a most serious matter, and question whether the President personally approved the directive and under what authority it was issued. In view of these concerns, I request that you provide a response to this letter within two weeks so that the Committee can decide what additional actions must be taken. Your expeditious handling of this request would be appreciated.

Sincerely,

JACK BROOKS
Chairman

THE WHITE HOUSE
WASHINGTON

TO: JGR

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

FYI: _____

COMMENT: _____

ACTION: _____

THE WHITE HOUSE

WASHINGTON

February 26, 1985

MEMORANDUM FOR GREGORY JONES
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS JGR
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Testimony of Carol Dinkins Regarding Competition and Contracting Act of 1984

Counsel's Office has reviewed the above-referenced proposed testimony, and offers the following suggestions:

1. At several points in the testimony there are references to the President that strike me as unnecessary. These references could be misinterpreted as evincing personal interest by the President in this dispute, rather than merely the interest of the Executive Branch. I recommend the following changes: Page 1, lines 6-7, delete "in response to a request from the President." Page 4, lines 7-8, delete "In response to the President's request for the advice of this Department," and add "thereafter" between "Counsel" and "prepared." Page 4, lines 18-19, delete "to provide them with the guidance requested by the President." With these deletions the point that the President requested the Justice Department advice is still preserved (top of page 4), but without possibly misleading repetition.

2. Something appears to be missing from line 3 of the Chase quotation on page 17.

3. Typos: Page 21, line 10, "proport;" line 12, "on" should be "of."

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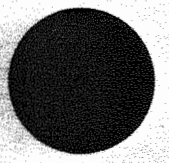

Name of Correspondent: Reg Jones

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

Subject: Testimony of Carol Dinkins re: competitiv
and Contracting Act of 1984

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DRAFT

TESTIMONY OF CAROL E. DINKINS
DEPUTY ATTORNEY GENERAL
BEFORE THE LEGISLATION AND NATIONAL SECURITY
SUBCOMMITTEE OF THE HOUSE COMMITTEE ON
GOVERNMENT OPERATIONS

February 28, 1985

I am happy to appear before you today to discuss the Department's position with respect to the Competition and Contracting Act of 1984 ("CICA" or "the Act"), which was enacted as part of the Deficit Reduction Act of 1984. Public Law No. 98-369, 98 Stat. 494 (1984). As you know, the Department has determined, in response to a request from the President, that federal agencies should not execute certain bid-protest provisions of the Act. The first provision requires a procuring agency to suspend or "stay" any procurement if a bid protest is filed prior to the award of a contract or within ten days after the award. The provision then purports to authorize the Comptroller General to lift this stay of the procurement by issuing his decision on the bid protest. See revised 31 U.S.C. § 3553(c) and (d). The second provision purports to authorize the Comptroller General to make binding awards of attorney's fees and bid preparation costs to successful bid protestors. See revised 31 U.S.C. § 3554(c).

In explaining the Department's decision, I would like to discuss three general subjects. First, I would like to set forth the history of the Department's policy with respect to this issue in order to place the decision in its proper context. Next, I would like briefly to describe the grounds for our legal conclusion with respect to the constitutionality of the CICA. Finally, I would like to discuss the reasons underlying the Department's decision not to enforce the unconstitutional provisions of the Act.

I

Since the adoption of the Budget and Accounting Act in 1921, the Department has taken a consistent position with respect to the power and authority of the Comptroller General. Because the Comptroller General is part of the Legislative Branch of the Government, the position of the Department has been that the Comptroller General may not bind the Executive Branch. See, e.g., Testimony of Larry Hammond, Deputy Assistant Attorney General, Office of Legal Counsel, before the Subcommittee on Legislation and National Security of the House Committee on Government Operations, 95th Cong., 2d Sess. (June 28, 1978). Although differences of opinion with respect to the proper role of the Comptroller General have led to a number of disputes between the Department and GAO, these disputes have not come to a head because the Comptroller General has not pressed his authority to bind the Executive Branch.

Early in 1984, the Department received a request from this Committee for comments on bid protest provisions, similar to the ones finally adopted in the CICA, that were then under consideration by the Committee as part of H.R. 5184. The Department commented on and objected to the constitutionality of the two provisions that purported to give the Comptroller General the authority to bind the Executive Branch. See Letter to Honorable Jack Brooks, Chairman, House Committee on Government Operations, from Robert A. McConnell, Assistant Attorney General, Office of Legislative and Intergovernmental Affairs (April 20, 1984). I would be happy to provide the Committee with a copy of this letter and any other documents referred to in my testimony. These comments were based on the Department's long-standing position with respect to the proper constitutional role of the Comptroller General and the authority of the Legislative Branch as most recently defined in INS v. Chadha, 462 U.S. 919 (1983).

Despite the comments of the Department with respect to the unconstitutionality of these provisions, the provisions were ultimately adopted by Congress as part of the CICA, which itself was made a part of the Deficit Reduction Act. Although the President believed the two provisions of the CICA that empowered the Comptroller General to bind the Executive Branch to be unconstitutional, he concluded that it would not be in the national interest to veto the entire Deficit Reduction Act because of

these provisions. Therefore, the President noted in a signing statement his constitutional objections to these provisions and requested the Department of Justice to inform Executive Branch agencies how they might comply with the Act in a manner consistent with the Constitution. See 30 Weekly Comp. Pres. Doc. 1037 (July 18, 1984).

In response to the President's request for the advice of this Department, the Office of Legal Counsel prepared a memorandum, which concluded that the two provisions purporting to vest the Comptroller General with authority to bind the Executive Branch were unconstitutional and recommended that these provisions not be enforced by the Executive Branch. See Memorandum for the Attorney General, from Larry L. Simms, Acting Assistant Attorney General, Office of Legal Counsel, re "Implementation of the Bid Protest Provisions of the Competition and Contracting Act" (October 17, 1984). The Attorney General directed that this memorandum be distributed to the Executive Branch agencies responsible for implementing the provisions of the CICA to provide them with the guidance requested by the President.

Subsequently, the Attorney General expressly adopted the conclusions of the Office of Legal Counsel in letters sent to the Speaker of the House and the President of the Senate to inform Congress, as required by statute, of the Department's decision not to enforce the two unconstitutional provisions of the CICA. See Letters to Honorable Thomas P. O'Neil, Jr., Speaker

of the House of Representatives, and Honorable George Bush, President of the Senate, from William French Smith, Attorney General (November 21, 1984). In addition, the Attorney General responded by a letter of the same date to a letter from Senator William S. Cohen, Chairman of the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs. In the letter to Senator Cohen, the Attorney General reiterated the basis for the Department's conclusions with respect to the unconstitutionality of the CICA and, in particular, set forth the basis for the Department's decision to advise Executive Branch agencies not to comply with the unconstitutional provisions.

The Attorney General also sent a letter to the Director of the Office of Management and Budget (OMB), dated November 21, 1984, which requested the Director to assist in ensuring compliance by all Executive Branch agencies with the legal advice provided by the Department of Justice concerning the CICA. Subsequently, the Director of OMB issued a bulletin to the heads of executive departments and agencies setting forth procedures governing implementation of the CICA, which advised executive agencies not to comply with the unconstitutional provisions. See OMB Bulletin No. 8-8 (December 17, 1984).

The bid protest provisions of the CICA went into effect on January 15, 1985, and we expect that litigation will soon be filed to test the validity of the Department's conclusions with

respect to the unconstitutionality of the two bid protest provisions.

II

The next issue I would like to address is the substance of the Department's legal conclusion that the two provisions purporting to authorize the Comptroller General to bind the executive branch are unconstitutional. The Office of Comptroller General of the United States was created by the Budget and Accounting Act of 1921. See 42 Stat. 23 (1921). The Budget and Accounting Act expressly stated that the Comptroller General is "independent of the executive departments . . . ." Id. Subsequent legislation made it clear that the Comptroller General is part of the Legislative Branch. The Reorganization Act of 1945 specified that, for the purpose of the Act, the term "agency" meant any executive department, commission, independent establishment, or government corporation, but did "not include the Comptroller General of the United States or the General Accounting Office, which are a part of the legislative branch of the Government." 59 Stat. 616 (1945). The same provision was included in the Reorganization Act of 1949. See 63 Stat. 205 (1949). The Accounting and Auditing Act of 1950 declared that the auditing for the Government would be conducted by the Comptroller General "as an agent of the Congress . . . ." 64 Stat. 835 (1950).

Although the President nominates and, with the advice and consent of the Senate, appoints the Comptroller General, the President has no statutory right to remove the Comptroller General,

even for cause. See 31 U.S.C. § 703 (1982). The Comptroller General is appointed for a fifteen-year term, but he may be removed either by impeachment or by a joint resolution of Congress, after notice and an oppportunity for hearing, for "(i) permanent disabilty; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude." 31 U.S.C. § 703(e)(1). Given the breadth of the grounds of removal, particularly the terms "inefficiency" and "neglect of duty," Congress enjoys a relatively unlimited power over the tenure in office of the Comptroller General. 1/

Congress expected this broad power of removal to give it the right effectively to control the Comptroller General. The chief House manager of the Budget and Accounting Act stated with respect to the new position of Comptroller General:

> This officer is to be the arm of Congress. When he fails to do that work in a strong and efficient way, in a way that Congress would have the law executed, Congress has its remedy, and it can reach out and say if the man is not doing his duty, if he is inefficient or guilty of any of these other things, he can be removed.

61 Cong. Rec. 1080 (1921) (remarks of Rep. Good).

1/ The Supreme Court has recognized that the power to remove an official is necessarily linked to the power to supervise and control the actions of that official. See Humphrey's Executor v. United States, 295 U.S. 602, 627 (1935).

Thus, the Comptroller General is unquestionably part of the Legislative Branch and is directly accountable to Congress. As part of the congressional establishment, the Comptroller General may constitutionally perform only those functions that Congress may constitutionally delegate to its constituent parts or agents, such as its own Committees.

The Supreme Court has most recently and thoroughly considered the scope of Congress's authority to act through its agents in INS v. Chadha, 462 U.S. 919 (1983). In Chadha, the Court declared unconstitutional a one-house legislative veto provision. In so doing, the Court underscored the constitutional requirement that, in order for Congress to bind or affect the legal rights of government officials or private persons outside the Legislative Branch, it must act by legislation presented to the President for his signature or veto:

> The decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed. It is beyond doubt that lawmaking was a power to be shared by both Houses and the President.

103 S. Ct. at 2782. When Congress takes action that has "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch," it must act by passing a law and submitting it to the President in accordance with the Presentment Clauses and the constitutionally

prescribed separation of powers. Id. at 2784 (emphasis added). The Court emphasized that "when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action." Id. at 2786. 2/

Finally, with respect to Congress's power over the Legislative Branch, the Court concluded:

> One might also include another "exception" to the rule that Congressional action having the force of law be subject to the bicameral requirement and the Presentment Clauses. Each house has the power to act alone in determining specified internal matters. Art. I, § 7, cls. 2, 3, and § 5, cl. 2. However, this "exception" only empowers Congress to bind itself and is noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances.

Id. at 2786 n.20 (emphasis added).

We believe that if a court were to apply the separation of powers principles discussed above to establish the constitutional

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2/ As the Court noted, there are only four provisions in the Constitution by which one House may act alone with the unreviewable force of law, not subject to the President's veto: the power of the House of Representatives to initiate impeachment, the power of the Senate to try individuals who have been impeached by the House; the power of the Senate to approve or disapprove presidential appointments; and the power of the Senate to ratify treaties negotiated by the President. See 103 S. Ct. at 2786.

role of the Comptroller General, it would limit the Comptroller General to those duties that could constitutionally be performed by a congressional committee. Thus, under the above principles, the Comptroller General may not act in an executive capacity, and he may not take actions that bind individuals and institutions outside the Legislative Branch. He may advise and assist Congress in reviewing the performance of the Executive Branch in order to determine if legislative action is desirable or necessary. He may not, however, substitute himself for either the executive or the judiciary in determining the rights of others or executing the laws of the United States. Our analysis of the bid protest provisions of the CICA is based upon these conclusions.

Under the stay provision of the CICA, a procuring agency is required to suspend a procurement upon the filing of a bid protest until the Comptroller General issues his decision on the protest. Thus, the Comptroller General is given the power to determine when the stay will be lifted by the issuance of his decision on a bid protest. As a practical matter, the Comptroller General could effectively suspend any procurement indefinitely simply by delaying for an indefinite period his decision on a bid protest.

From a constitutional perspective, we find nothing improper in the requirement for a stay, in and of itself. Congress frequently requires Executive Branch agencies to notify Congress of certain actions and wait a specified period before implementing those actions. These so-called "report and wait" requirements

were specifically recognized by the Supreme Court in Chadha as a constitutionally acceptable alternative to the legislative veto. See 103 S. Ct. at 2783.

The problem in this instance arises from the power granted to the Comptroller General to lift the stay. The CICA gives the Comptroller General, an agent of Congress, the power to dictate when a procurement may proceed. This authority amounts, in Chadha's words, to a power that has the "effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch." See 103 S. Ct. at 2784. As a constitutional matter, there is very little difference between this power and the power of a legislative veto.

A difficult problem is presented in this instance, however, by the question of the extent to which the unconstitutional provision is severable from the remainder of the CICA. In Chadha, the Court ruled that an unconsitutional provision is generally presumed to be severable. The Court outlined several guidelines with respect to evaluating this issue in a specific instance. First, the Court stated:

> Only recently this Court reaffirmed that the invalid portions of a statute are to be severed "'[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.'" Buckley v. Valeo, 424 U.S. 1, 108 . . . (1976), quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 . . . (1932).

INS v. Chadha, 103 S. Ct. at 2774. Thus, unless there are clear indications that Congress would have intended additional parts of

statute to fall because of the invalidity of a single provision, the invalid provision will be severed. Second, the Court stated that Congress did not intend that the entire statute or any other part of it would fall simply because another provision was unconstitutional. 103 S. Ct. at 2775. Finally, the Court stated that "[a] provision is further presumed severable if what remains after severance is 'fully operative as a law.' Champlin Refining Co. v. Corporation Comm'n, supra, 286 U.S. at 234." 103 S. Ct. at 2775. The severability issue must be analyzed in light of these principles.

The only aspect of the stay provision that is directly unconstitutional is the provision authorizing the Comptroller General to lift the stay by issuing his decision or finding that a particular protest is frivolous. If this provision alone were severed, the stay would remain in effect indefinitely because there would be no remaining statutory basis for terminating the stay. Although the statute could technically operate this way, as a practical matter this alternative would seem quite draconian because it would permit any bid protester effectively to cancel a procurement simply by filing a protest. It is clear that Congress did not intend such a result when it adopted the CICA. See H.R. Rep. No. 861, 98th Cong., 2d Sess. 1436-37 (1984).

Alternatively, the stay provision could be intepreted to require a mandatory stay for a set period of time in order to give the Comptroller General an opportunity to reach a decision

on the bid protest. This period of time might be set at 90 working days, which is the period of time established by the CICA as the standard time within which the Comptroller General should issue his decision on a bid protest.

We do not believe, however, that such a reworking of the statute would be consistent with Congress's intent. First, such a construction would involve essentially a redrafting of the stay provision rather than simple severance of the offending sections. Second, and more important, it would mean that any time a bid protest were filed, a procurement would automatically be delayed for 90 working days. Thus, any interested party who might be able to file a protest, however ill-founded, could prevent a procurement for a not insubstantial period of time.

We do not believe that Congress intended the bid protest process to be subject to such potential manipulation. In fact, Congress expressly included the provision granting the Comptroller General the power to dismiss frivolous protests precisely in order to avoid this potential abuse. The conference report stated:

> The conference substitute provides that the Comptroller General may dismiss at any point in the process a filing determined to be frivolous or to lack a solid basis for protest. This provision reflects the intent of the conferees to keep proper contract awards or due performance of contracts from

> being interrupted by technicalities which interested parties in bad faith might otherwise attempt to exploit.

H.R. Rep. No. 861, 98th Cong., 2d Sess. 1436-37 (1984). Given our conclusion that the provision permitting the Comptroller General to terminate the stay immediately in the case of a frivolous protest is unconstitutional, we do not believe that Congress would have intended for all contracts to be delayed for any set period of time simply upon the filing of a protest, regardless of the good faith of the protestor or merit of the protest. Therefore, because the provisions permitting the Comptroller General to terminate the stay must be severed from the statute, we believe that the entire stay provision must be stricken as well. 3/

The provision permitting the Comptroller General to award costs, including attorney's fees and bid preparation costs, to a prevailing protestor, and which purports to require federal agencies to pay such awards "promptly," 31 U.S.C. § 3554(c)(2), suffers from a constitutional infirmity similar to the one that afflicts the stay provision. By purporting to vest in the Comptroller General the power to award damage against an

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3/ We do not doubt that, under the severability principles set forth above, the stay provision may be severed. The Act may operate perfectly well without the stay provision, and there is no indication that Congress would have wished the entire Act to fall if the stay provision were invalidated.

Executive Branch agency, Congress has attempted to give its agents the authority to alter "the legal rights, duties and relations of persons . . . outside the legislative branch." 103 S. Ct. at 2784. That this authority is in the nature of a judicial power makes it no less impermissible for Congress to vest it in one of its own agents. Congress may no more exercise judicial authority than it may exercise executive authority. See INS v. Chadha, 103 S. Ct. at 2788 (Powell, J., concurring). Although Congress may by statute vest certain quasi-judicial authority in agencies independent of Executive Branch control, see Humphrey's Executor v. United States, 295 U.S. 602 (1935), Congress may not vest such authority in itself or one of its arms, in clear violation of the constitutionally prescribed separation of powers.

Based on the foregoing discussion of the law of severability, we believe that the damages provision is clearly severable from the remainder of the CICA. The remainder of the Act is unrelated to the damages provision and may clearly continue to operate fully as a law without the invalid provision. Moreover, we find no evidence, either in the statute or in its legislative history, to indicate that Congress would not have enacted the remainder of the CICA without the damages provision. Therefore, only the damages provision need be stricken from the statute.

We wish to emphasize that we do not question the validity of the remainder of the CICA, and, in particular, the general grant of authority to the Comptroller General to review bid protests. Congress may, consistent with the Constitution, delegate to a legislative officer the power to review certain Executive Branch actions and issue recommendations based upon that review. Thus, the Comptroller General may continue to issue decisions with respect to bid protests. In accordance with the principles discussed above, however, these decisions must be regarded as advisory and not binding upon the Executive Branch.

III

The final issue that I would like to address is the decision of the Attorney General not to execute the unconstitutional provisions of the CICA. Under the Constitution, the President and his subordinates have a duty "to take Care that the Laws be faithfully executed." Art. II, § 3. Unquestionably, the requirements of the Constitution prevail over any statute adopted by Congress. Therefore, in the case of a conflict between the Constitution and a statute, the President's duty faithfully to execute the laws requires him not to observe a statute that is in conflict with the Constitution, the fundamental law of the land.

We recognize, however, that, until a law is adjudicated to be unconstitutional, the issue of enforcing a statute of questionable

constitutionality raises sensitive problems under the separation of powers.

Historically, the Executive has taken the position that the Department appropriately will not defend the constitutionality of a statute when the statute, as does the CICA, infringes upon the constitutional prerogatives of the Executive. The President has a constitutional right, indeed a duty, to resist measures that would impermissibly weaken the Presidency: "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." INS v. Chadha, 462 U.S. 919 (1983).

The legitimacy of such a refusal by the Department not to defend the constitutionality of a statute has long been recognized. For example, during the impeachment trial of President Andrew Johnson, Chief Justice Chase declared that the President had no duty to execute a statute passed by Congress which:

> directly attacks and impairs the executive power confided to him by [the Constitution]. In that case appears to me to be the clear duty of the President to disregard the law, so far at least as it may be necessary to bring the question of its constitutionality before the judicial tribunals.

* * *

> How can the President fulfill his oath to preserve, protect, and defend the Constitution, if he has no right to defend it against an act of Congress, sincerely believed by him to of passed in violation of it? 4/

This general principle has been carried out by the Executive Branch in a number of instances since the time of President Johnson. For example, the President acted directly contrary to a statute that prohibited the removal of a postmaster, based on his conclusion that the statute was unconstitutional. This act eventually led to the Executive's successful challenge to the act's constitutionality in litigation brought by the removed postmaster. Myers v. United States, 272 U.S. 52 (1926). See also Humphrey's Executor v. United States, 295 U.S. 602 (1935). In other instances, the Executive refused to defend statutes that impaired the constitutional prerogatives of the Presidency. See United States v. Lovett, 328 U.S. 303 (1946)(successful challenge to a statute that directed the salaries of certain federal employees not be paid); Buckley v. Valeo, 424 U.S. 1 (1976) (successful challenge to constitutionality of a statute that permitted appointment of members of the Federal Election Commission by members of Congress).

4/ R. Warden, An Account of the Private Life and Public Services of Salmon Portland Chase, 685 (1874)(emphasis in original). Chief Justice Chase's comments were made in a letter written the day after the Senate had voted to exclude evidence that the entire cabinet had advised President Johnson that Tenure in Office Act was unconstitutional. Id. See M. Benedict, The Impeachment and Trial of Andrew Johnson, 154-55 (1973). Ultimately, the Senate admitted evidence that the President had desired to initiate a court test of the law. Id. at 156.

In addition to these examples involving actual litigation with respect to constitutional conflicts, there are a number of examples of presidential refusals to execute statutes that unconstitutionally infringe upon presidential prerogatives by purporting to give Congress the authority to direct the Executive Branch with respect to the execution of the law. For example, in 1955, almost three decades before the Chadha case was decided, President Eisenhower instructed the Secretary of Defense to ignore a so-called "committee approval" provision contained in a Department of Defense appropriations act, by stating in a signing statement that the provisions "will be regarded as invalid by the Executive Branch of the Government . . . unless otherwise determined by a court of competent jurisdiction." Public Papers of the Presidents: Dwight D. Eisenhower, 689 (1955). In 1963, President Kennedy stated that the unconstitutional features of another committee approval device would be ignored, with the provision to be treated as a "request for information." Public Papers of the Presidents: John F. Kennedy, 6 (1963). President Johnson also made clear that the unconstitutional aspects of legislative veto devices would be ignored. Public Papers of the Presidents: Lyndon B. Johnson, 104, 1250 (1963-64). President Johnson instructed the Secretary of Agriculture, in connection with the making of loans under an amendment to the Bankhead-Jones Farm Tenant Act, 7 U.S.C. §§ 1010-12, "to refrain from making any loans which would

require committee approval." 2 Weekly Comp. Pres. Doc. 1676 (1966). The Chadha court never suggested that there was any impropriety in the President's conduct in contesting acts of Congress he believed infringed on his constitutional prerogatives.

The decision not to execute the unconstitutional provisions of the CICA is entirely consistent with historical and judicial precedent. The two provisions at issue directly infringe upon the constitutional prerogatives of the Executive Branch by proporting to permit an arm of the legislature to bind Executive Branch officials. As we indicated earlier, this constitutional defect is precisely the same problem that caused the Supreme Court to strike down the legislative veto in Chadha. Thus, the same considerations that motivated President's Eisenhower, Kennedy, and Johnson to direct the Executive Branch to disregard certain legislative veto provisions also warrant the decision (particularly now that the Supreme Court in Chadha has so clearly declared legislative vetoes to be unconstitutional) not to execute the provisions proporting to give an arm of the legislature the authority to bind the Executive Branch.

IV

Finally, I would like to make one additional point with respect to this issue. We all recognize that the constitutional issue at stake here will ultimately be resolved by the courts and that the most responsible method for resolving this dispute

concerning the separation of powers is to ensure a rapid judicial hearing of this question. If the Department were to execute fully the provisions of the CICA, however, we believe it is unlikely that the substantive issue would ever be able to be presented to a court. The commercial litigation branch of the Civil Division specifically reviewed this question and issued a memorandum which concludes that it is unlikely that, if the Executive Branch were to implement fully the provisions of the CICA, anyone would have standing to challenge the constitutionality of the provisions that proport to authorize the Comptroller General bind the Executive Branch. Thus, on the basis on this conclusion, the Department's decision not to enforce the two unconstitutional provisions has the beneficial byproduct of rendering much more likely a speedy judicial resolution of this question, which would be in the best interests of both the Executive and Legislative Branches and would be most responsive to the special separation of powers problems presented by this issue.