Department of Justice

STATEMENT

OF

THEODORE B. OLSON
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

BEFORE

THE

COMMITTEE ON RULES
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

THE EFFECT OF INS V. CHADHA ON THE
ADMINISTRATIVE PROCESS

ON

MAY 10, 1984

Mr. Chairman and Members of the Committee:

Thank you for affording me the opportunity to appear before you today on behalf of the Administration to discuss the impact of the Supreme Court's decision in INS v. Chadha, 103 S. Ct. 2764 (1983), on the administrative process, particularly in light of the several across-the-board "regulatory reform" proposals that have been introduced in Congress or discussed since the Chadha decision was handed down on June 23, 1983.

To begin, I would like to note that in many ways the impact of the Chadha case has been considerably less draconian than was predicted by many commentators both prior to and after the Court's decision. Chadha has not resulted in a dramatic shift of power away from Congress and toward the President; nor has Congress acted precipitously to eliminate or circumscribe delegations of authority to the Executive Branch. Rather, both Congress and the Executive Branch have for the most part worked together in a reasoned and deliberate fashion to assess the long-range effect of the Chadha decision, and to determine whether changes should be made to accommodate the legitimate concerns of the three Branches that share power in our form of government. The hearings being held by this Committee are a prime example of this effort, and I am pleased to be able to participate in this thoughtful and responsible process.

More than anything else, Chadha provides a unique opportunity for a badly needed reexamination of the allocation of governmental power and accountability in this country. Now that the Supreme Court has definitively disposed of the constitutional "cloud" created by use of the legislative veto device as a means of retaining Legislative Branch control over Executive discretion, we can address jointly many of the difficult concerns that encouraged resort to the legislative veto device. Before Chadha, that debate was, to a large degree, obscured by constitutional considerations. With that debate behind us, I believe our two Branches can focus on what those underlying concerns are, and whether there are steps that should be taken to improve the efficiency and public accountability of the federal government, consistent with the "single, finely wrought and exhaustively considered, procedure for making laws that is embodied in the Constitution." INS v. Chadha, 103 S. Ct. at 2784.

Much of the current discussion of possible legislative steps to be taken post-Chadha has focused on oversight and control over the rulemaking authority of federal agencies that engage in substantial administrative and regulatory activities. The subject of regulatory reform is, of course, not new, and the Department of Justice has commented in the

past on a number of such proposals. 1/ I can fully appreciate, however, why regulatory reform has a new impetus in the wake of Chadha. While there is no constitutional basis for distinguishing between rulemaking by federal agencies and other actions by those agencies taken pursuant to delegated authority, rulemaking is perceived as a form of "lawmaking" more often than most other methods by which the Executive implements laws. This perception is particularly prevalent if the standards in a statute governing the exercise of rulemaking authority are broad and open-ended. The task the agency must perform is to fill the interstices left by Congress when it passed the statutory scheme -- a task that in many cases requires the agency to make its best guess as to what Congress intended to be done. Such a system understandably will sometimes provoke considerable controversy over whether the agency has reached the correct conclusions regarding legislative intent.

Perhaps even more importantly, the concern with regulatory reform stems from a sense that the federal agencies may be "out of control," exercising considerable authority over the lives of individuals and the conduct of business, without

1/ See Statement of Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy, Before the Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, United States Senate, Concerning S. 1080, the Regulatory Reform Act (Sep. 21, 1983); Statement of Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, Before the Committee on Rules, Subcommittee on Rules, United States House of Representatives, Concerning the Legislative Veto and Congressional Review of Agency Rules (Oct. 7, 1981).

being accountable for how such authority is exercised. 2/ This is a concern that this Administration shares, particularly with respect to the accountability of the independent regulatory agencies and commissions -- the "fourth branch" of Government that exists largely outside the day-to-day control of either the President or Congress. I would like to begin, therefore, by addressing some issues related to the President's control over "independent" regulatory agencies within the Executive Branch. I will then discuss briefly some of the concerns raised by various proposals for enhancing congressional control over those agencies.

Presidential Control over Independent Regulatory Agencies

An issue that the Court's decision in Chadha and its summary affirmances in the FTC "used car rule" and FERC cases 3/ has highlighted is the need for oversight and control over the regulatory authority exercised by the so-called "independent" agencies and commissions. As stated by former Deputy Attorney General Schmults before a subcommittee of the House Committee on the Judiciary on July 18, 1983, "[T]he legislative veto decisions mark an appropriate point in our

2/ See Sierra Club v. Costle, 657 F.2d 298, 405-06 (D.C. Cir. 1981).

3/ Process Gas Consumers Corp. v. Consumers Energy Council of America, 103 S. Ct. 3556 (1983).

history for serious reexamination of the wisdom of the creation of this 'fourth branch of the Government . . . .'" 4/

Central to the Court's analysis in Chadha is the well-founded proposition that the Constitution recognizes only three Branches of Government -- Legislative, Executive, and Judicial -- and that the respective spheres of power of those three Branches are identifiable and distinct:

> Although not 'hermetically' sealed from one another, the powers delegated to the three Branches are functionally identifiable. When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it. When the Executive acts, it presumptively acts in an executive or administrative capacity as defined in Art. II. And when . . . Congress purports to act, it is presumptively acting within its assigned sphere.

103 S. Ct. at 2784 (citations omitted). As the Court recognized in Chadha, the fundamental thrust of the tripartite scheme designed by the Framers was to ensure that each Branch fulfilled the functions for which it is best suited, and that each Branch is accountable for performance of those functions. And, the

4/ Statement of Edward C. Schmults, Deputy Attorney General, Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary Concerning Legislative Veto, at 5 (July 19, 1983), quoting Process Gas Consumers Group v. Consumers Energy Council of America, 103 S. Ct. at 3558 (White, J., dissenting).

Supreme Court reminded us that the division of powers among the three Branches was to assure

> as nearly as possible, that each Branch of government would confine itself to its original responsibility. 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.

Id.

It is difficult to reconcile this constitutional scheme with the reality of regulation by the mixed assortment of commissions, agencies, government or quasi-government corporations, authorities, institutions, and boards generally referred to as "independent" regulatory agencies. Historically, the premise underlying creation of such "independent" agencies has been that some forms of regulation (primarily adjudication and investigation) should be entrusted to nonpartisan "experts" whose decisions are free from "political" supervision by the President. See H. Bruff, "Presidential Power and Administrative Rulemaking," 88 Yale L.J. 451, 480 (1979). Whatever its original validity, however, that premise now seems questionable. Today, Executive Branch agencies that cannot be characterized as "independent" engage in rulemaking in a functionally indistinguishable fashion from the so-called "independents,"

and many of the responsibilities and functions of the independent agencies overlap considerably with responsibilities and functions placed by Congress in other Executive Branch agencies. In fact, in the recent past Congress has seen fit to transfer to Executive Branch agencies some functions performed by these "independent" agencies. For example, in 1978 Congress transferred a number of functions exercised by the Civil Aeronautics Board with respect to interstate and overseas air transportation to the Department of Transportation and the Department of Justice. Pub. L. No. 95-504, § 40(a), 92 Stat. 1744, 49 U.S.C. § 1551.

By and large, those independent agencies are not cohesive, centrally managed, or, most important from a constitutional standpoint, accountable in any effective way to the Congress or the President, those organs of Government to whom the Founders gave exclusive power to make and to execute the laws. In the wake of Chadha, it is appropriate to reexamine whether responsibility for administrative and regulatory execution and enforcement of our laws should be vested in governmental entities that are not accountable to our elected President. Alexander Hamilton explained in The Federalist No. 70 why he opposed diffusing the executive power in the hands of largely unaccountable individuals, in words that are equally applicable to our system of unaccountable commissions and agencies:

> The plurality of the Executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, first, the restraints of public opinion, which lose their efficacy as well on account of the division of the censure attendant on bad measures among a number, as on account of the uncertainty on whom it ought to fall; and secondly, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office, or to their actual punishment in cases which admit of it.

We believe that some of the energy being expended in seeking alternatives to legislative vetoes should be channeled into efforts to return lawmaking and lawexecuting authority to the political branches of the Government, as intended so clearly by the Framers of the Constitution. As a beneficial byproduct, this process might well expose governmental authority that is not only lodged improperly in various politically unaccountable agencies, but is not even the proper business of the federal government. The primary objective, however, should be to reaffirm that, in our system, governmental power must be allocated in a manner that allows for direct political accountability in the spheres of lawmaking and lawexecuting.

Several of the regulatory reform bills or proposals that have been advanced in the wake of Chadha would enhance, to a greater or lesser extent, the accountability of the independent agencies to the Executive Branch, at least with respect to the rulemaking functions of those agencies. Both S. 1080 and H.R. 3939, for example, would include independent agencies and commissions within the definition of "agency" for the purposes of those bills. Since those bills would give the President the authority to establish procedures for agency compliance with the detailed provisions requiring a regulatory analysis for every "major rule," the authority to monitor, review, and ensure agency implementation of such procedures, and the authority to designate "major rules," the President would have a measure of control over rulemaking by the independent agencies. The Administrative Conference of the United States, which has given much thought to this issue, has discussed the alternative of creating a "super-agency" within the Executive Branch that would be responsible for review of the rules of all agencies, and that would provide a single agency as a focus for oversight of agency rulemaking. I would note that, to a certain extent, this "super-agency" concept already exists in the Office of Management and Budget, under Executive Order 12291, although that Executive Order does not require compliance by independent agencies and commissions.

I do not mean to suggest that the Administration endorses any of the particular proposals that would provide for increased Executive Branch control over the rulemaking of these so-called independent agencies. Nonetheless, I believe the time has come to give very serious consideration to the problems of unaccountability of the independent agencies, which, after all, execute the law and therefore functionally belong as a part of the Executive Branch, and to come up with reasonable, and reasoned, solutions.

Congressional Review of Rulemaking

I would also like to make some general observations about the question of enhancing congressional review of federal agencies' rulemaking in the aftermath of Chadha. Christopher DeMuth, the Administrator for Information and Regulatory Affairs of the Office of Management and Budget, has recently succinctly identified the relevant question: "Should the President and Congress agree, through legislation, to procedures that would approximate the defunct legislative vetoes over some or all agency rules, while avoiding their constitutional pitfalls?" 5/ The Administration has serious concerns about the viability of some of the provisions of H.R. 3939 and S. 1080. My observations here are general, and I will not

5/ Statement of Christopher DeMuth, Administrator for Information and Regulatory Affairs, Office of Management and Budget, Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, on Legislative Veto (Feb. 8, 1984).

attempt to address each and every facet of the pending regulatory reform proposals.

First, I would like to highlight what I believe to be the fundamental problem that is not addressed by any of the various proposals to give Congress a "second shot" at reviewing agency rules through a joint resolution of approval or disapproval mechanism. While for the most part these mechanisms would satisfy minimal constitutional requirements for legislation, 6/ they fail to ameliorate the basic difficulty confronting agencies that are delegated rulemaking authority, viz., that the statutory criteria under which such authority is granted are in all too many cases not well-defined, are too broad,

6/ H.R. 3939 and S. 1080 (as amended by Chairman Grassley's amendment no. 2655) would both require congressional approval by joint resolution of "major rules" and would authorize congressional disapproval by joint resolution of "nonmajor" rules. The Department of Justice has consistently taken the position that action by joint resolution satisfies the bicameralism and presentment requirements of the Constitution, because joint resolutions are passed by both Houses and presented to the President for signature or veto. However, both bills currently provide that one House may speed up the effective date of a rule, by acting or failing to act on joint resolutions of approval or disapproval prior to expiration of the prescribed waiting period. In Chadha, the Supreme Court held that such action, taken by one House with "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch," would be "essentially legislative in purpose and effect," INS v. Chadha, 103 S. Ct. at 2784, and would therefore "require action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President." Id. at 2787. Because these provisions of S. 1080 and H.R. 3939 conform to neither procedure for legislative action, they are unconstitutional.

and provide only limited guidance to the agencies in the exercise of their discretion. I can only echo the words of former Assistant Attorney General Rose, in a statement transmitted last fall to the Subcommittee on Administrative Practice and Procedures of the Senate Judiciary Committee, on the "Bumpers Amendment" in S. 1080, which raises many of the same concerns that the congressional review provisions of that bill and H.R. 3939 raise:

> While we agree that some agencies have acted beyond the limits of their authority, we believe that the roots of agency activism more often lie in the vaguely-defined objectives and standards found in many regulatory statutes. Of course, general delegations of power to administrative agencies are inevitable, given the sophistication and complexity of the technical areas covered by many regulatory statutes and the institutional constraints upon the time and resources of Congress. However, as the full Senate Judiciary Committee acknowledged in its report last Congress on S. 1080 . . . , Congress has frequently asked the agencies to make the basic, vitally important policy choices that, at least in theory, are more properly for the legislature to make. To the extent that agencies have

misread the direction that Congress intended them to take, we believe that Congress -- and not the courts -- should be responsible for articulating regulatory policies. 7/

To the extent that statutes give the agencies clear, precise guidance as to how, and to what ends, discretion should be exercised, all our jobs would be easier. The Executive Branch would have a clearer view of its responsibility to execute the laws, and therefore would be better able to keep administrative agencies politically accountable; Congress would not be faced with agency rulemaking that distorts or exceeds what Congress intended in the statute; and the courts would be better able to determine whether particular agency action lies within the scope intended by Congress when it delegated the authority in question. Most important, this process would be more fully in accord with the lawmaking and lawexecuting processes envisioned by the Framers of the Constitution, processes that were intended to be political and subject to democratic controls.

By contrast, some of the congressional review proposals that have been advanced, particularly those that would require congressional approval by joint resolution of agency rules,

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7/ Statement of Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy, Before the Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, United States Senate, Concerning S. 1080, The Regulatory Reform Act (Sep. 21, 1983) (footnote omitted).

would not be wholly compatible with the Framers' view of how the Government should work. I do not believe that the Framers envisioned a legislative process in which no issues of national importance (and therefore worthy of congressional attention) could ever be resolved with a reasonable degree of certainty because Congress would reserve to itself an opportunity and a power to redebate its prior decisions on a continuing basis through a veto power over implementing regulations. Rather, what the Framers envisioned was that Congress would make laws with reasonable specificity, reflecting policy judgments and decisions that then would guide the Executive in execution of those laws.

Of course, making the political choices that must be made in order to give clear, precise policy guidance to administrative agencies is not easy. In the past, the legislative veto mechanism has often been rationalized as an attractive substitute for making those difficult choices, by giving Congress leverage to pull back particular agency decisions and take another look, free of Executive Branch input or veto. Yet, I think it is relatively clear that the legislative veto mechanism, in addition to its constitutional infirmities, simply has not been effective in checking agency abuses and has in fact subliminally encouraged the passage of vague and overly-broad delegations of authority. Although there has not been any relevant experience with "regulatory veto" mechanisms, such as those in H.R. 3939 and S. 1080, we

believe that such mechanisms would be similarly counterproductive and would mask, rather than relieve, the fundamental problem of clearly articulating public policies in law.

In addition, we have serious concerns about the workability of the various congressional review mechanisms that have been proposed. Most of these proposals impose rigid timetables upon Congress and its committees to introduce, debate, report upon, and enact literally thousands of resolutions every year. The cumulative burden of such paperwork could overwhelm committee staffs, and the possibilities for stalemate and delay would be virtually endless. Even assuming that Congress could always overcome these obstacles and meet its self-imposed deadlines, I have serious questions about the quality of the decisions that would result from such a process. Would only two hours of debate, for example, give Congress adequate opportunity to explore and evaluate the merits of a complex major rule promulgated after years of agency proceedings pursuant to a statute, such as the Clear Air Act, that itself had been the product of years of congressional deliberation, not to mention the procedural deliberative process prescribed by the Administrative Procedure Act?

The Framers understood that, to the extent Congress as a body were to become seriously involved in the process of reviewing the substance of every detailed, complex, and

elaborate rule, it would likely become hopelessly mired in details. Thomas Jefferson wrote nearly two hundred years ago that:

> Nothing is so embarrassing nor so mischievous, in a great assembly, as the details of execution. The smallest trifle of that kind occupies as long as the most important act of legislation, and takes place of everything else. Let any man recollect, or look over, the files of Congress; he will observe the most important propositions hanging over, from week to week, and month to month, till the occasions have past them, and the thing never done. I have ever viewed the executive details as the greatest cause of evil to us, because they in fact place us as if we had no federal head, by diverting the attention of that head from great to small subjects . . . ." 8/

Although the actual impact may differ with the various proposals that have been advanced, it also seems evident that there is considerable potential for injecting massive

8/ 6 T. Jefferson, The Writings of Thomas Jefferson 228 (A. Bergh, ed. 1903) (letter to E. Carrington, Aug. 4, 1787).

delay, uncertainty, and paperwork into the administrative process without any substantial countervailing benefit, and for creation of difficult problems of interpretation in judicial review of agency rulemaking decisions.

Finally, I think we have to ask whether the various proposed congressional review procedures offer any discernible improvement over the process currently available for reviewing agency rulemaking. I do not think they do. Under Executive Order 12291, the President, through the Office of Management and Budget, maintains considerable oversight over the process of rulemaking by the nonindependent Executive Branch agencies, both to ensure that the agencies scrutinize carefully the legal and factual basis for major rules in order that those rules maximize social benefits and minimize costs to the extent permitted by law, and to ensure a consistent, well-reasoned Administration-wide approach to policies for which the Executive Branch is responsible. Once the agency has done the regulatory impact analysis required by Executive Order 12291 for a major rule and published the rule in the Federal Register, Congress has time to inform itself about, and legislatively to block, offensive rules, as it has done in the past in exceptional cases on an ad hoc basis.

Perhaps more important, there is a constant, informal and ongoing dialogue between every federal agency and Congress. That dialogue serves both to inform Congress of the agency's

plans and interpretations of its statutory authority, and to give the agencies information about congressional concerns and views. This process is supplemented by the considerable political influence that Congress can bring to bear on the agencies, through the authorization and appropriations process and through legislative hearings and inquiries. The process generally works quite well, although I am sure there are many cases in which the Executive Branch could improve the lines of informal communication with the various committees of Congress, and I would hope that we are trying to do so, particularly in the wake of the Chadha decision.

In sum, let me say that there should be no doubt regarding this Administration's concern about excessive and abusive agency actions, and about our interest in taking a hard look at the need for reform. One area in which both Branches can, I believe, successfully focus their attention, is the need to gain control over the so-called independent agencies, and to make those agencies directly accountable for the choices they make in executing and enforcing the law. We look forward to working with you to achieve that end. With respect to the question of enhanced congressional review of rulemaking, however, we would caution against any quick fixes. There is no more reason to believe that the proposed regulatory vetoes would solve any problems or make the Government work better, than to believe that legislative vetoes would be

a panacea for overly broad delegations of rulemaking authority. That is where we should focus our efforts -- on making the hard policy choices required by disciplined law-making. The regulatory veto proposals would only divert that essential effort, and would inevitably complicate, delay, and frustrate operation of the lawmaking and lawexecuting process as the Framers envisioned it.

THE WHITE HOUSE

WASHINGTON

April 24, 1984

MEMORANDUM FOR DIANNA G. HOLLAND

FROM: PETER J. RUSTHOVEN

SUBJECT: Draft Statement by Assistant Attorney General Olson on Legislative Vetos and the Effect of the INS v. Chadha Decision

OMB's Legislative Reference Division copied our office on a legislative referral memorandum on the above-referenced draft statement, which Assistant Attorney General Theodore Olson is scheduled to deliver on May 10 to the House Rules Committee.

Previously, we received a copy of the same statement directly from Justice. This was staffed to John Roberts for direct response to OMB's Branden Blum, and John advises that he has already reviewed the statement and signed-off on it. I share John's view that the statement raises no problems on which our office need comment.

No further action by our office is needed, and the statement may simply be filed. Thank you.

cc: John G Roberts, Jr. ←

Chadha

COMMENTARY & INSIGHT

Legislative Veto Overreaction Must Be Avoided

By Stuart M. Statler

Mr. Statler is a member of the Consumer Product Safety Commission and its former acting chairman.

Hearings during the last few weeks by both the House Rules Committee and the Senate Judiciary Committee highlight Congress' ongoing struggle with the Supreme Court's landmark action last June that struck down the legislative veto as unconstitutional. The Federal Trade Commission authorization bill is about to come before the Senate with this critical matter still unresolved. How should Congress respond? By not overreacting.

As a means of congressional oversight, veto authority by one or both houses was applied to a host of government programs and policies—everything from the budget and clean air to war powers, arms sales, and even home rule for the District of Columbia. In all, about 200 legislative veto provisions were written into various laws.

Some obvious questions arise: Can the veto provision be removed from any given law without fundamentally perverting the intentions of the legislators? (In other words, would Congress have enacted the legislation anyway, even without the veto?) Are actions previously carried out under the aegis of laws containing such veto provisions now null and void? These issues will most likely be decided on an individual, statute-by-statute basis.

Assessment Imperative

It is imperative now, however, to assess the very nature of congressional oversight in a postveto setting, and to identify ways in which Congress can ensure its proper oversight role.

Consider, for example, the business of regulating. Congress intended that agency rulemaking reflect careful deliberation upon all the facts presented, with due process extended to each of the parties involved. But before the Court ruled in *Immigration and Naturalization Service v. Chadha*, the legislative veto occasionally landed such decisions back into Congress' lap. There they fell victim to a tug of war between special interests pleading their special cases, usually behind closed doors and with campaign contributions hanging in the balance. Likewise, presidential decisions were second-guessed and worked over by a few in Congress who sought a piece of the action in implementing policy as well as in making it.

The legislative veto circumvented the orderly plan for making laws that is outlined in Article I of the Constitution. It allowed Congress to block an action of the executive branch or an independent agency regulation without the full participation of both houses of Congress and the president.

Loud and Anguished Outcry

The outcry from Capitol Hill following the Court's expansive ruling was predictably loud and anguished. Typical of the early reaction was the House legal counsel's lament that "It took the Court 18 months to screw up what it took Congress 50 years to set up." Overnight, some in Congress sought ways to offset what they perceived as a critical loss of leverage in the balancing act among the branches of government. They proposed quick fixes that ranged from a constitutional amendment reversing the Chadha ruling to the imposition of limits on federal court authority to hear cases involving the legitimacy of any such veto to the redrafting each of the 200 affected statutes.

Whoa! The Court's decision speaks to the means, not the ends, of congressional oversight. Congress in fact has lost none of its ability to influence the activity of the executive branch. It need only reassert authority it already has at its disposal. For starters, when possible, Congress should clarify existing agency mandates and make them more specific. It should eliminate contradictory directives like those that instruct the Civil Aeronautics Board to regulate *and* promote the U.S. air transport industry.

But most importantly, Congress can also continue to guide the policies and priorities of regulatory bodies it has created by: (i) reclaiming some of the extensive authority it previously delegated to the executive branch, (ii) using more effectively the oversight and appropriations process, and—only if those methods should prove unsatisfactory—by (iii) forging a viable two-house veto procedure that would pass constitutional muster.

Statutory Action

First, Congress could take back by statute some of the sweeping powers handed over to the Office of Management and Budget under the Budget and Accounting Act of 1921. Right now, OMB has the power to set a budget mark for federal agencies. The agencies are legally required to support this funding level in testimony before Congress, regardless of whether it allows them to fulfill their statutory mandates.

Or Congress could reexamine OMB's autonomous authority to limit the number of employees each agency can hire. Mandates without minions to minister to them are useless. Such ceilings often defy or frustrate Congress' own cherished policies and priorities.

Or Congress could move to recover for itself the power exercised by OMB under the Paperwork Reduction Act. Through this measure, OMB effectively controls the collection of vital information by government agencies—even the so-called independents.

Or Congress could rewrite legislation that now permits an administration in power, through the Department of Justice, to influence federal lawsuits. Such statutes confer practical control over the legal and policy positions the government will pursue in litigating such critical issues as the dumping of toxic wastes, broadcast license renewals, women's rights, school prayer, affirmative action, busing, and the like. An administration can decide—Congress be damned—what companies, which industries, and whose PAC contributors will be sued, and which will not.

Of course, any of these possible revisions would require legislation subject to presidential veto. But a Congress truly concerned about the eclipse of its power could, by a two-thirds vote, override the president and impose its legislative will.

More Rigorous Oversight

Alternatively, Congress might choose to make more extensive use of the oversight and appropriations process to guide particular agency decisions. For example, we could see an increased number of amendments or riders to funding bills. These are not ideal substitutes for legislation. But riders would create a problem for a president without line-item veto authority, because rejection of the entire bill could trigger either a politically damaging veto override or a crippling funding cutoff for several departments at a time.

More rigorous oversight would also improve the likelihood of agencies adhering to Congress' priorities. To do this, however, requires untangling and streamlining the current hodgepodge of committees and subcommittees—and their many overlapping jurisdictions. For example, up to 31 committees and subcommittees oversee the actions of the Environmental Protection Agency. Congress must put its own house in order.

Agency Accountability

Third, if Congress still believes it needs some semblance of the legislative veto, it could readily fashion a workable scheme. A bipartisan Agency Accountability Act already has been introduced by Sens. Carl M. Levin (D-Mich.), David L. Boren (D-Okla.), Bob Kasten (R-Wis.), and Dennis DeConcini (D-Ariz.). It proposes a "report-and-wait" review for all "significant" agency rules (e.g., those exceeding a certain dollar value). No rule would take effect for 30 days after being published in the Federal Register. In the interim, a committee of either house with jurisdiction over the rule could report a joint resolution of disapproval. If within 60 days both houses of Congress passed the resolution and the president signed it, the agency rule would not take effect.

Presumably, only highly objectionable rules would be reviewed—and quickly. Expedited procedures, if agreed upon, could prevent these rules from getting tied up in extended floor debate. This approach would meet the Supreme Court's Chadha requirement of approval by both houses and submission to the president.

A variation proposed by Sen. Charles E. Grassley (R-Iowa) would call for a joint resolution of disapproval for minor agency rules but joint approval for major rules within a fixed timeframe. Yet another proposal by Elliott H. Levitas (D-Ga.), would require approval of *every* agency rule before it could take effect. This procedure would mire Congress in a tedious time-consuming examination of even trivial agency matters, at the expense of weightier issues like national security and vital domestic and foreign policy priorities. Just last year, 3000-plus regulations were issued; clearly such review would paralyze Congress as a policy forum.

And what indeed would be the value of agencies whose expertise was consistently ignored? They'd become veritable eunuchs. What top-level executive would take on the task of running a regulatory agency knowing that his every activity was subject to congressional tinkering?

Moreover, the Levitas procedure might even flunk the high Court's test of constitutionality, since mere inaction by either house would constitute a de facto veto of an agency rule.

Just before adjourning in November, Congress wisely voted down an amendment to the Resource Conservation and Recovery Act to make such approval a prerequisite for regulating hazardous wastes. But because this approach wins support from powerful business interests that prefer to stifle regulatory initiatives, it remains very much alive. Right now, it's blocking efforts to renew the mandates of the Federal Trade Commission and the Consumer Product Safety Commission.

Despite Congress' overwrought cries of judicial incursion onto its turf, the Chadha decision hasn't displaced Congress from its preeminent constitutional role. The ruling may temporarily have added to the legislative workload and posed the question of what next. But to bemoan a loss of power would be premature.

Congress has many options for maintaining or even enhancing its influence over presidential and agency activities. It must exercise care and creativity, and develop a response that reflects the intended balance of power among the branches of government. Now is not the time for knee-jerk overreaction in the wake of one of the most far-reaching Supreme Court decisions on the separation of powers in our history.

THE WHITE HOUSE

WASHINGTON

April 18, 1984

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Statement of Theodore B. Olson Concerning the Effect of INS v. Chadha on the Administrative Process, May 10, 1984

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

ID # 220187 CU

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STATEMENT

OF

THEODORE B. OLSON
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

BEFORE

THE

COMMITTEE ON RULES
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

THE EFFECT OF INS V. CHADHA ON THE ADMINISTRATIVE PROCESS

ON

MAY 10, 1984

Mr. Chairman and Members of the Committee:

Thank you for affording me the opportunity to appear before you today on behalf of the Administration to discuss the impact of the Supreme Court's decision in INS v. Chadha, 103 S. Ct. 2764 (1983), on the administrative process, particularly in light of the several across-the-board "regulatory reform" proposals that have been introduced in Congress or discussed since the Chadha decision was handed down on June 23, 1983.

To begin, I would like to note that in many ways the impact of the Chadha case has been considerably less draconian than was predicted by many commentators both prior to and after the Court's decision. Chadha has not resulted in a dramatic shift of power away from Congress and toward the President; nor has Congress acted precipitously to eliminate or circumscribe delegations of authority to the Executive Branch. Rather, both Congress and the Executive Branch have for the most part worked together in a reasoned and deliberate fashion to assess the long-range effect of the Chadha decision, and to determine whether changes should be made to accommodate the legitimate concerns of the three Branches that share power in our form of government. The hearings being held by this Committee are a prime example of this effort, and I am pleased to be able to participate in this thoughtful and responsible process.

More than anything else, Chadha provides a unique opportunity for a badly needed reexamination of the allocation of governmental power and accountability in this country. Now that the Supreme Court has definitively disposed of the constitutional "cloud" created by use of the legislative veto device as a means of retaining Legislative Branch control over Executive discretion, we can address jointly many of the difficult concerns that encouraged resort to the legislative veto device. Before Chadha, that debate was, to a large degree, obscured by constitutional considerations. With that debate behind us, I believe our two Branches can focus on what those underlying concerns are, and whether there are steps that should be taken to improve the efficiency and public accountability of the federal government, consistent with the "single, finely wrought and exhaustively considered, procedure for making laws that is embodied in the Constitution." INS v. Chadha, 103 S. Ct. at 2784.

Much of the current discussion of possible legislative steps to be taken post-Chadha has focused on oversight and control over the rulemaking authority of federal agencies that engage in substantial administrative and regulatory activities. The subject of regulatory reform is, of course, not new, and the Department of Justice has commented in the

past on a number of such proposals. 1/ I can fully appreciate, however, why regulatory reform has a new impetus in the wake of Chadha. While there is no constitutional basis for distinguishing between rulemaking by federal agencies and other actions by those agencies taken pursuant to delegated authority, rulemaking is perceived as a form of "lawmaking" more often than most other methods by which the Executive implements laws. This perception is particularly prevalent if the standards in a statute governing the exercise of rulemaking authority are broad and open-ended. The task the agency must perform is to fill the interstices left by Congress when it passed the statutory scheme -- a task that in many cases requires the agency to make its best guess as to what Congress intended to be done. Such a system understandably will sometimes provoke considerable controversy over whether the agency has reached the correct conclusions regarding legislative intent.

Perhaps even more importantly, the concern with regulatory reform stems from a sense that the federal agencies may be "out of control," exercising considerable authority over the lives of individuals and the conduct of business, without

1/ See Statement of Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy, Before the Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, United States Senate, Concerning S. 1080, the Regulatory Reform Act (Sep. 21, 1983); Statement of Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, Before the Committee on Rules, Subcommittee on Rules, United States House of Representatives, Concerning the Legislative Veto and Congressional Review of Agency Rules (Oct. 7, 1981).

being accountable for how such authority is exercised. 2/ This is a concern that this Administration shares, particularly with respect to the accountability of the independent regulatory agencies and commissions -- the "fourth branch" of Government that exists largely outside the day-to-day control of either the President or Congress. I would like to begin, therefore, by addressing some issues related to the President's control over "independent" regulatory agencies within the Executive Branch. I will then discuss briefly some of the concerns raised by various proposals for enhancing congressional control over those agencies.

Presidential Control over Independent Regulatory Agencies

An issue that the Court's decision in Chadha and its summary affirmances in the FTC "used car rule" and FERC cases 3/ has highlighted is the need for oversight and control over the regulatory authority exercised by the so-called "independent" agencies and commissions. As stated by former Deputy Attorney General Schmults before a subcommittee of the House Committee on the Judiciary on July 18, 1983, "[T]he legislative veto decisions mark an appropriate point in our

2/ See Sierra Club v. Costle, 657 F.2d 298, 405-06 (D.C. Cir. 1981).

3/ Process Gas Consumers Corp. v. Consumers Energy Council of America, 103 S. Ct. 3556 (1983).

history for serious reexamination of the wisdom of the creation of this 'fourth branch of the Government . . . .'" 4/

Central to the Court's analysis in Chadha is the well-founded proposition that the Constitution recognizes only three Branches of Government -- Legislative, Executive, and Judicial -- and that the respective spheres of power of those three Branches are identifiable and distinct:

> Although not 'hermetically' sealed from one another, the powers delegated to the three Branches are functionally identifiable. When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it. When the Executive acts, it presumptively acts in an executive or administrative capacity as defined in Art. II. And when . . . Congress purports to act, it is presumptively acting within its assigned sphere.

103 S. Ct. at 2784 (citations omitted). As the Court recognized in Chadha, the fundamental thrust of the tripartite scheme designed by the Framers was to ensure that each Branch fulfilled the functions for which it is best suited, and that each Branch is accountable for performance of those functions. And, the

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4/ Statement of Edward C. Schmults, Deputy Attorney General, Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary Concerning Legislative Veto, at 5 (July 19, 1983), quoting Process Gas Consumers Group v. Consumers Energy Council of America, 103 S. Ct. at 3558 (White, J., dissenting).

Supreme Court reminded us that the division of powers among the three Branches was to assure

> as nearly as possible, that each Branch of government would confine itself to its original responsibility. 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.

Id.

It is difficult to reconcile this constitutional scheme with the reality of regulation by the mixed assortment of commissions, agencies, government or quasi-government corporations, authorities, institutions, and boards generally referred to as "independent" regulatory agencies. Historically, the premise underlying creation of such "independent" agencies has been that some forms of regulation (primarily adjudication and investigation) should be entrusted to nonpartisan "experts" whose decisions are free from "political" supervision by the President. See H. Bruff, "Presidential Power and Administrative Rulemaking," 88 Yale L.J. 451, 480 (1979). Whatever its original validity, however, that premise now seems questionable. Today, Executive Branch agencies that cannot be characterized as "independent" engage in rulemaking in a functionally indistinguishable fashion from the so-called "independents,"

and many of the responsibilities and functions of the independent agencies overlap considerably with responsibilities and functions placed by Congress in other Executive Branch agencies. In fact, in the recent past Congress has seen fit to transfer to Executive Branch agencies some functions performed by these "independent" agencies. For example, in 1978 Congress transferred a number of functions exercised by the Civil Aeronautics Board with respect to interstate and overseas air transportation to the Department of Transportation and the Department of Justice. Pub. L. No. 95-504, § 40(a), 92 Stat. 1744, 49 U.S.C. § 1551.

By and large, those independent agencies are not cohesive, centrally managed, or, most important from a constitutional standpoint, accountable in any effective way to the Congress or the President, those organs of Government to whom the Founders gave exclusive power to make and to execute the laws. In the wake of Chadha, it is appropriate to reexamine whether responsibility for administrative and regulatory execution and enforcement of our laws should be vested in governmental entities that are not accountable to our elected President. Alexander Hamilton explained in The Federalist No. 70 why he opposed diffusing the executive power in the hands of largely unaccountable individuals, in words that are equally applicable to our system of unaccountable commissions and agencies:

> The plurality of the Executive tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power, first, the restraints of public opinion, which lose their efficacy as well on account of the division of the censure attendant on bad measures among a number, as on account of the uncertainty on whom it ought to fall; and secondly, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office, or to their actual punishment in cases which admit of it.

We believe that some of the energy being expended in seeking alternatives to legislative vetoes should be channeled into efforts to return lawmaking and lawexecuting authority to the political branches of the Government, as intended so clearly by the Framers of the Constitution. As a beneficial byproduct, this process might well expose governmental authority that is not only lodged improperly in various politically unaccountable agencies, but is not even the proper business of the federal government. The primary objective, however, should be to reaffirm that, in our system, governmental power must be allocated in a manner that allows for direct political accountability in the spheres of lawmaking and lawexecuting.

Several of the regulatory reform bills or proposals that have been advanced in the wake of Chadha would enhance, to a greater or lesser extent, the accountability of the independent agencies to the Executive Branch, at least with respect to the rulemaking functions of those agencies. Both S. 1080 and H.R. 3939, for example, would include independent agencies and commissions within the definition of "agency" for the purposes of those bills. Since those bills would give the President the authority to establish procedures for agency compliance with the detailed provisions requiring a regulatory analysis for every "major rule," the authority to monitor, review, and ensure agency implementation of such procedures, and the authority to designate "major rules," the President would have a measure of control over rulemaking by the independent agencies. The Administrative Conference of the United States, which has given much thought to this issue, has discussed the alternative of creating a "super-agency" within the Executive Branch that would be responsible for review of the rules of all agencies, and that would provide a single agency as a focus for oversight of agency rulemaking. I would note that, to a certain extent, this "super-agency" concept already exists in the Office of Management and Budget, under Executive Order 12291, although that Executive Order does not require compliance by independent agencies and commissions.

I do not mean to suggest that the Administration endorses any of the particular proposals that would provide for increased Executive Branch control over the rulemaking of these so-called independent agencies. Nonetheless, I believe the time has come to give very serious consideration to the problems of unaccountability of the independent agencies, which, after all, execute the law and therefore functionally belong as a part of the Executive Branch, and to come up with reasonable, and reasoned, solutions.

Congressional Review of Rulemaking

I would also like to make some general observations about the question of enhancing congressional review of federal agencies' rulemaking in the aftermath of Chadha. Christopher DeMuth, the Administrator for Information and Regulatory Affairs of the Office of Management and Budget, has recently succinctly identified the relevant question: "Should the President and Congress agree, through legislation, to procedures that would approximate the defunct legislative vetoes over some or all agency rules, while avoiding their constitutional pitfalls?" 5/ The Administration has substantial doubts about the viability of some of the proposals presently under consideration to address this question, such as H.R. 3939 and S. 1080. My observations here are general, and I will not

5/ Statement of Christopher DeMuth, Administrator for Information and Regulatory Affairs, Office of Management and Budget, Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, on Legislative Veto (Feb. 8, 1984).

attempt to address each and every facet of the pending regulatory reform proposals.

First, I would like to highlight what I believe to be the fundamental problem that is not addressed by any of the various proposals to give Congress a "second shot" at reviewing agency rules through a joint resolution of approval or disapproval mechanism. While for the most part these mechanisms would satisfy minimal constitutional requirements for legislation, 6/ they fail to ameliorate the basic difficulty confronting agencies that are delegated rulemaking authority, viz., that the statutory criteria under which such authority is granted are in all too many cases not well-defined, are too broad,

6/ H.R. 3939 and S. 1080 (as amended by Chairman Grassley's amendment no. 2655) would both require congressional approval by joint resolution of "major rules" and would authorize congressional disapproval by joint resolution of "nonmajor" rules. The Department of Justice has consistently taken the position that action by joint resolution satisfies the bicameralism and presentment requirements of the Constitution, because joint resolutions are passed by both Houses and presented to the President for signature or veto. However, both bills currently provide that one House may speed up the effective date of a rule, by acting or failing to act on joint resolutions of approval or disapproval prior to expiration of the prescribed waiting period. In Chadha, the Supreme Court held that such action, taken by one House with "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch," would be "essentially legislative in purpose and effect," INS v. Chadha, 103 S. Ct. at 2784, and would therefore "require action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President." Id. at 2787. Because these provisions of S. 1080 and H.R. 3939 conform to neither procedure for legislative action, they are unconstitutional.

and provide only limited guidance to the agencies in the exercise of their discretion. I can only echo the words of former Assistant Attorney General Rose, in a statement transmitted last fall to the Subcommittee on Administrative Practice and Procedures of the Senate Judiciary Committee, on the "Bumpers Amendment" in S. 1080, which raises many of the same concerns that the congressional review provisions of that bill and H.R. 3939 raise:

> While we agree that some agencies have acted beyond the limits of their authority, we believe that the roots of agency activism more often lie in the vaguely-defined objectives and standards found in many regulatory statutes. Of course, general delegations of power to administrative agencies are inevitable, given the sophistication and complexity of the technical areas covered by many regulatory statutes and the institutional constraints upon the time and resources of Congress. However, as the full Senate Judiciary Committee acknowledged in its report last Congress on S. 1080 . . . , Congress has frequently asked the agencies to make the basic, vitally important policy choices that, at least in theory, are more properly for the legislature to make. To the extent that agencies have

misread the direction that Congress intended them to take, we believe that Congress -- and not the courts -- should be responsible for articulating regulatory policies. 7/

To the extent that statutes give the agencies clear, precise guidance as to how, and to what ends, discretion should be exercised, all our jobs would be easier. The Executive Branch would have a clearer view of its responsibility to execute the laws, and therefore would be better able to keep administrative agencies politically accountable; Congress would not be faced with agency rulemaking that distorts or exceeds what Congress intended in the statute; and the courts would be better able to determine whether particular agency action lies within the scope intended by Congress when it delegated the authority in question. Most important, this process would be more fully in accord with the lawmaking and lawexecuting processes envisioned by the Framers of the Constitution, processes that were intended to be political and subject to democratic controls.

By contrast, some of the congressional review proposals that have been advanced, particularly those that would require congressional approval by joint resolution of agency rules,

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7/ Statement of Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy, Before the Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, United States Senate, Concerning S. 1080, The Regulatory Reform Act (Sep. 21, 1983) (footnote omitted).

would not be wholly compatible with the Framers' view of how the Government should work. I do not believe that the Framers envisioned a legislative process in which no issues of national importance (and therefore worthy of congressional attention) could ever be resolved with a reasonable degree of certainty because Congress would reserve to itself an opportunity and a power to redebate its prior decisions on a continuing basis through a veto power over implementing regulations. Rather, what the Framers envisioned was that Congress would make laws with reasonable specificity, reflecting policy judgments and decisions that then would guide the Executive in execution of those laws.

Of course, making the political choices that must be made in order to give clear, precise policy guidance to administrative agencies is not easy. In the past, the legislative veto mechanism has often been rationalized as an attractive substitute for making those difficult choices, by giving Congress leverage to pull back particular agency decisions and take another look, free of Executive Branch input or veto. Yet, I think it is relatively clear that the legislative veto mechanism, in addition to its constitutional infirmities, simply has not been effective in checking agency abuses and has in fact subliminally encouraged the passage of vague and overly-broad delegations of authority. Although there has not been any relevant experience with "regulatory veto" mechanisms, such as those in H.R. 3939 and S. 1080, we

believe that such mechanisms would be similarly counterproductive and would mask, rather than relieve, the fundamental problem of clearly articulating public policies in law.

In addition, we have serious concerns about the workability of the various congressional review mechanisms that have been proposed. Most of these proposals impose rigid timetables upon Congress and its committees to introduce, debate, report upon, and enact literally thousands of resolutions every year. The cumulative burden of such paperwork could overwhelm committee staffs, and the possibilities for stalemate and delay would be virtually endless. Even assuming that Congress could always overcome these obstacles and meet its self-imposed deadlines, I have serious questions about the quality of the decisions that would result from such a process. Would only two hours of debate, for example, give Congress adequate opportunity to explore and evaluate the merits of a complex major rule promulgated after years of agency proceedings pursuant to a statute, such as the Clear Air Act, that itself had been the product of years of congressional deliberation, not to mention the procedural deliberative process prescribed by the Administrative Procedure Act?

The Framers understood that, to the extent Congress as a body were to become seriously involved in the process of reviewing the substance of every detailed, complex, and

elaborate rule, it would likely become hopelessly mired in details. Thomas Jefferson wrote nearly two hundred years ago that:

> Nothing is so embarrassing nor so mischievous, in a great assembly, as the details of execution. The smallest trifle of that kind occupies as long as the most important act of legislation, and takes place of everything else. Let any man recollect, or look over, the files of Congress; he will observe the most important propositions hanging over, from week to week, and month to month, till the occasions have past them, and the thing never done. I have ever viewed the executive details as the greatest cause of evil to us, because they in fact place us as if we had no federal head, by diverting the attention of that head from great to small subjects . . . ." 8/

Although the actual impact may differ with the various proposals that have been advanced, it also seems evident that there is considerable potential for injecting massive

8/ 6 T. Jefferson, The Writings of Thomas Jefferson 228 (A. Bergh, ed. 1903) (letter to E. Carrington, Aug. 4, 1787).

delay, uncertainty, and paperwork into the administrative process without any substantial countervailing benefit, and for creation of difficult problems of interpretation in judicial review of agency rulemaking decisions.

Finally, I think we have to ask whether the various proposed congressional review procedures offer any discernible improvement over the process currently available for reviewing agency rulemaking. I do not think they do. Under Executive Order 12291, the President, through the Office of Management and Budget, maintains considerable oversight over the process of rulemaking by the nonindependent Executive Branch agencies, both to ensure that the agencies scrutinize carefully the legal and factual basis for major rules in order that those rules maximize social benefits and minimize costs to the extent permitted by law, and to ensure a consistent, well-reasoned Administration-wide approach to policies for which the Executive Branch is responsible. Once the agency has done the regulatory impact analysis required by Executive Order 12291 for a major rule and published the rule in the Federal Register, Congress has time to inform itself about, and legislatively to block, offensive rules, as it has done in the past in exceptional cases on an ad hoc basis.

Perhaps more important, there is a constant, informal and ongoing dialogue between every federal agency and Congress. That dialogue serves both to inform Congress of the agency's

plans and interpretations of its statutory authority, and to give the agencies information about congressional concerns and views. This process is supplemented by the considerable political influence that Congress can bring to bear on the agencies, through the authorization and appropriations process and through legislative hearings and inquiries. The process generally works quite well, although I am sure there are many cases in which the Executive Branch could improve the lines of informal communication with the various committees of Congress, and I would hope that we are trying to do so, particularly in the wake of the Chadha decision.

In sum, let me say that there should be no doubt regarding this Administration's concern about excessive and abusive agency actions, and about our interest in taking a hard look at the need for reform. One area in which both Branches can, I believe, successfully focus their attention, is the need to gain control over the so-called independent agencies, and to make those agencies directly accountable for the choices they make in executing and enforcing the law. We look forward to working with you to achieve that end. With respect to the question of enhanced congressional review of rulemaking, however, we would caution against any quick fixes. There is no more reason to believe that the proposed regulatory vetoes would solve any problems or make the Government work better, than to believe that legislative vetoes would be

a panacea for overly broad delegations of rulemaking authority. That is where we should focus our efforts -- on making the hard policy choices required by disciplined law-making. The regulatory veto proposals would only divert that essential effort, and would inevitably complicate, delay, and frustrate operation of the lawmaking and lawexecuting process as the Framers envisioned it.

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Message:

Postscript on the Congressional Veto: Is There Life After Chadha?

JOSEPH COOPER

In the early summer of 1983, the Supreme Court finally confronted the constitutionality of the legislative veto and ruled against both simple and concurrent resolution forms of the device.[1] The Court's position is contained in Chief Justice Warren Burger's opinion in the Chadha case.[2] Burger asserted that actions or decisions taken under simple resolution or one-house forms of the veto are "essentially legislative in purpose and effect."[3] He noted, however, that simple resolutions are neither presented to the president for his approval nor passed upon by the other legislative branch.[4] He therefore concluded that simple resolution forms of the veto violate Article I of the Constitution because they involve the "exercise of legislative power" without "bicameral passage followed by presentment to the President."[5] By strong implication, concurrent resolution or two-house forms of the veto are illegal as well, since they also are not presented to the president. This conclusion was sustained by the Court two weeks after the Chadha decision, when it affirmed without comment

[1] The decision was handed down just as the article on this subject by myself and William West went to press. See "The Congressional Veto and Legislative Rulemaking," *Political Science Quarterly* 98 (1983): 285-304.

[2] Immigration and Naturalization Service v. Chadha, *U.S. Law Week* 51 (21 June 1983): 4907-4918.

[3] Ibid., 4916.

[4] Ibid., 4910.

[5] Ibid., 4917-18.

JOSEPH COOPER is dean of the social sciences and Lena Gohlman Fox Professor of Political Science at Rice University. He coauthored the article on the congressional veto published in the Spring *PSQ*. This postscript was solicited by the editors.

two other circuit court decisions against veto provisions in current laws, one of which involved a concurrent resolution form.[6]

As sweeping and definitive as the Chadha opinion is intended to be, it will neither diminish controversy over the legislative veto nor terminate reliance on the mechanism.

First, the reasoning of the Court in the Chadha case is highly challengeable. If decisions or actions undertaken through simple or concurrent forms of the veto are essentially or inherently "legislative," how can the Court allow them to be exercised by executive or administrative officials in any event? Burger's view is that somehow such decisions or actions become administrative once delegated. But then how can they be essentially or inherently "legislative"? Alternatively, if it is permissible to delegate legislative power within exceedingly broad limits and while specifying certain conditions, why cannot simple and concurrent resolution forms of the veto be accepted as conditions of delegation stipulated in the original enabling act? Indeed, not only has the Court rarely invoked the non-delegation of the legislative power provisions of the Constitution, it has even allowed the vote of a group of farmers to exist as a condition for the implementation of delegated authority.[7] The Court's decision in Chadha is therefore full of logical inconsistencies and appears biased in favor of executive power. Proponents of the veto in Congress are thus likely to continue to contest the constitutional issues, to seek to mobilize allies and support in the legal and academic communities as well as in the media, and to design new test cases when useful and appropriate.

Second, by declaring traditional forms of the legislative veto unconstitutional, the Court has laid the groundwork for heightened conflict between the legislative and executive branches. Immediately, the legal status of dozens of pieces of important legislation, involving substantial delegations of authority, is unclear.[8] Are the vetoes in these laws severable? Whatever the answer, the issue of whether delegated authority is to be continued and how it is to be controlled will have to be confronted in a host of policy areas. With regard to these pieces of legislation as well as to future proposals for legislation, the singular ability of the veto mechanism to accommodate the needs of congressional control and executive performance cannot be compensated for easily. The faith of the veto's critics that Congress need only act more responsibly by exercising its legislative and appropriations powers with greater precision is an illusion. In complex and turbulent areas of policy, attempts to rely on such advice are likely to have highly detrimental effects, such as: impair the ability of majorities to form behind

[6] See Richard E. Cohen, "Passing the Buck," *National Journal*, 9 July 1983, 1461. The two cases involved Federal Trade Commission (FTC) and Federal Energy Regulatory Commission (FERC) rules.

[7] On all points in this section see Justice Byron White's appendix to his dissent in the Chadha case in *U.S. Law Week* 51 (21 June 1983):4930–33.

[8] For a list of current veto legislation, see ibid., 4930–33.

presidential initiatives; result in circumscriptions of authority and limiting provisos that hamstring executive performance without doing much to enlarge Congress's ability to set or attain basic policy objectives; and breed conflict and renew power struggles between the authorizing and appropriating committees in both houses.

Third, since reliance on the veto has been a response to a pressing institutional need, not to a fanciful and unnecessary manifestation of laziness or venality, Congress will not readily give up on the mechanism. As recent events indicate, it will substitute joint resolution and waiting periods forms of the veto for simple and concurrent resolution forms.[9] Neither of these forms directly violates the Chadha decision. Joint resolutions are submitted to the president for his signature. The waiting period form delays the implementation of executive action, but congressional disapproval must take the form of regular legislation. In addition, in the case of rulemaking, the House and Senate may consider establishing special calendars, as the House of Representatives has done with respect to several other classes of legislation. In effect, this would institutionalize and streamline a joint resolution of approval form of the veto. However, since all these alternatives involve costs in terms of time, flexibility, or control that can be avoided under simple or concurrent resolution forms, members may also be expected to invent synthetic versions of or substitutes for traditional forms. Two examples can already be cited. Rep. Charles Pashayan (R-Calif.) has suggested a change in House rules that would allow a point of order to be raised against any appropriation to implement a rule disapproved by House resolution. Similarly, a number of members have suggested the passage of a law that would instruct the federal courts to regard any rule disapproved by either house to be contrary to legislative intent.

In conclusion, the Supreme Court's recent actions with respect to the veto are damaging, but not decisive. The Court cannot destroy by fiat what deeply rooted institutional needs advance. It cannot create a severe imbalance in constitutional interpretation and adaptive capacity and expect the political system to behave as if it had been brought back to equilibrium.

[9] Only a few days after the Chadha decision, the House, in reauthorizing the Consumer Product Safety Commission, subjected its rulemaking to control through both joint resolutions of approval and waiting period review. The intent was to allow the conference to make the choice. See Cohen, "Passing the Buck," 1461.

WALL ST.J.:4-6-84

After the Legislative Veto

By Stuart M. Statler

Hearings last month by both the House Rules Committee and the Senate Judiciary Committee showcased Congress's continuing struggle with its loss of the legislative veto, struck down by the Supreme Court last June. The Federal Trade Commission authorization bill is about to come before the Senate with this critical matter still unresolved. What should Congress do in response? Not overreact.

As a means of congressional oversight, veto authority by one or both houses was applied to a host of government programs and policies—everything from the budget and clean air to war powers, arms sales and even home rule for the District of Columbia. In all, about 200 legislative veto provisions were written into various laws.

Some obvious questions arise: Can the veto provision be removed from any law without fundamentally altering the intentions of the legislators? Would Congress have enacted the legislation anyway, even without the veto? Are actions previously carried out under the aegis of laws with veto provisions now null and void? These issues will most likely be decided on a statute-by-statute basis.

It is imperative now, however, to identify ways for Congress to ensure its proper oversight role in a post-veto setting.

Consider the business of regulating. Congress intended that agency rule making reflect careful deliberation upon all the facts presented, with due process extended to each party involved. But before the court ruled in *Immigration and Naturalization Service vs. Chadha*, the legislative veto occasionally landed such decisions back into Congress's lap. There they fell victim to a tug of war between special interests pleading their special cases, usually behind closed doors, with campaign contributions hanging in the balance. Likewise, presidential decisions were worked over by a few in Congress who sought a piece of the action in implementing policy as well as in making it.

The legislative veto circumvented the orderly plan for making laws, outlined in Article I of the Constitution. It allowed Congress to block an action of the executive branch or an independent agency regulation without the full participation of both houses and the president.

Quick 'Fixes' Offered

The outcry from Capitol Hill following the court's expansive ruling was predictably anguished. Some legislators offered quick "fixes" ranging from a constitutional amendment reversing Chadha, to limiting federal court authority to hear cases on the legitimacy of any such veto, to redrafting each of the 200 statutes.

But in fact, Congress has lost none of its ability to influence the activity of the executive branch. It need only reassert authority it already has at its disposal. For starters, Congress should clarify existing agency mandates and make them more specific. It should eliminate contradictory directives such as those that instruct the Civil Aeronautics Board to regulate and promote the U.S. air-transport industry.

But most important, Congress can also continue to guide regulatory policies by: (1) reclaiming some of the extensive authority it previously delegated to the executive branch; (2) using more effectively the oversight and appropriations process, and only if those methods prove unsatisfactory; (3) forging a viable two-house veto that would pass constitutional muster.

First, by statute Congress could take back some of the sweeping powers handed over to the Office of Management and Budget under the 1921 Budget and Accounting Act. Right now, OMB can set a budget "mark" for agencies, which are legally bound to support this funding level before Congress, regardless of whether it allows them to fulfill their statutory mandates.

Currently, up to 31 committees and subcommittees oversee the actions of the Environmental Protection Agency. Congress must put its own house in order.

Or Congress could reexamine OMB's autonomy in limiting the number of people an agency can hire. Mandates without minions to minister to them are useless. Such ceilings often defy Congress's own cherished policies and priorities.

Or Congress could move to recover for itself powers exercised under the Paperwork Reduction Act, by which OMB controls information collection by agencies—even the so-called "independents."

Or Congress could rewrite legislation that now confers on the Justice Department practical control over what policy positions the government will pursue in litigating such critical issues as the dumping of toxic wastes, broadcast license renewals, women's rights, affirmative action, busing and the like.

Any of these revisions would require legislation subject to presidential veto. But a Congress truly concerned about its eclipse of power could, by a two-thirds vote, override the president.

Second, Congress might choose to make more extensive use of the oversight and appropriations process to guide agency decisions. We could see an increased number of amendments, or riders, to funding bills. These are hardly ideal substitutes for legislation, but they could create a problem for a president without line-item veto authority. Rejection of an entire bill could trigger either a politically damaging veto override or a crippling funding cutoff for several departments at a time.

More rigorous oversight can also improve the likelihood of agencies adhering to Congress's priorities. This requires streamlining the current hodgepodge of committees and subcommittees—and their many overlapping jurisdictions. Currently, up to 31 committees and subcommittees oversee the actions of the Environmental Protection Agency. Congress must put its own house in order.

Meeting the Requirement

Third, if Congress still believes it needs some semblance of a legislative veto, it could fashion a workable scheme. A bipartisan "Agency Accountability Act" already has been introduced by Sens. Carl Levin (D., Mich.), David Boren (D., Okla.), Robert Kasten (R., Wis.) and Dennis DeConcini (D., Ariz.). It proposes a "report and wait" review for all "significant" agency rules (those exceeding a certain dollar value). No rule would take effect for 30 days after issuance. In the interim, a committee of either House with jurisdiction over the rule could report a joint resolution of disapproval. Only if within 60 days both houses passed the resolution and the president signed it, would the agency rule not take effect.

Presumably, only highly objectionable rules would be reviewed. Expedited procedures, if agreed upon, could prevent these rules from getting tied up in extended floor debate. This approach would meet the Supreme Court's Chadha requirement of approval by both houses and submission to the president.

A variation proposed by Sen. Charles Grassley (R., Iowa) seeks a joint resolution of disapproval for minor agency rules but joint approval for major rules within a fixed time frame. A proposal by Rep. Elliott Levitas (D., Ga.) would require approval of every agency rule before it could take effect. This would mire Congress in a tedious examination even of trivial agency matters, at the expense of vital domestic and foreign-policy priorities. With 3,000-plus regulations issued just last year, such review would paralyze Congress.

And what would be the value of agencies whose expertise was consistently ignored? What top-level executive would care to run a regulatory agency knowing that his every activity was subject to congressional tinkering?

Moreover, the Levitas procedure might even flunk the high court's test of constitutionality, since mere inaction by either House would constitute a de facto veto of an agency rule.

Despite Congress's overwrought cries of judicial incursion onto its turf, the Chadha decision hasn't displaced Congress from its pre-eminent constitutional role. The ruling may have temporarily added to the legislative workload and posed the question of what next. But to bemoan a loss of power would be premature.

Mr. Statler is a Carter appointee to the Consumer Product Safety Commission. He had served on the staff of the Senate Committee on Governmental Affairs.

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

AUG 29 1983

MEMORANDUM TO MEMBERS OF THE
LEGISLATIVE VETO WORKING GROUP

Re: September 8, 1983 - 11:00 a.m. Meeting

We have scheduled another legislative veto working group meeting for Thursday, September 8, 1983 at 11:00 a.m. in Conference Room 5505 at Main Justice. We have not met in some time and we ought to get together to discuss the status of any outstanding or anticipated legislative veto issues prior to the return on September 12th of Congress. In addition, there has been a development in an EEOC case which we should discuss. A district court judge has indicated that he intends to dismiss an EEOC complaint on the ground that EEOC's authority was derived from an Executive Branch reorganization pursuant to an unconstitutional reorganization act. David Slate, General Counsel of EEOC will be with us to discuss some thoughts he has regarding a potential legislative solution to the court's decision.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellant Cross Appellee,

v.

The HERNANDO BANK, INC., Defendant-Appellee Cross Appellant.

No. 82-4298.

United States Court of Appeals, Fifth Circuit.

Feb. 13, 1984.

Equal Employment Opportunity Commission sued bank under Equal Pay Act and Civil Rights Act claiming sex discrimination in pay of female assistant cashiers. The United States District Court for the Northern District of Mississippi, L.T. Senter, Jr., Chief Judge, rendered summary judgment dismissing the claims, and agency appealed. The Court of Appeals, Politz, Circuit Judge, held that: (1) unconstitutional one-house legislative veto provision of Reorganization Act of 1977 is severable; (2) acting under the Act the president properly transferred authority from Secretary of Labor to EEOC to enforce the Equal Pay Act; (3) claims were not barred by limitations, notwithstanding that subject female employees were listed in prayer for relief section and not specifically named as plaintiffs; (4) agency is not required to conciliate as precondition for filing suit; (5) it was error to dismiss on basis of employees' affidavit that they were not aware of sex discrimination and did not authorize the agency to represent them.

Reversed and remanded.

1. Statutes ⇐64(2)
United States ⇐29

One-house veto decision of Reorganization Act of 1977 is unconstitutional, but is severable. 5 U.S.C.A. § 906.

2. Statutes ⇐64(1)

Ultimate determination of severability of an invalid provision of an enactment will rarely turn on presence or absence of a severability clause as relevant test is whether Congress would have enacted remainder of the statute absent the invalid provision.

3. Statutes ⇐64(1)

Mere uncertainty about legislative intent, i.e., whether legislature would have enacted remainder of act absent invalid provision, is not determinative of severability issue.

4. United States ⇐29

Reorganization Act of 1977 validly delegated to the president legislative authority to promulgate executive branch reorganization plans. 5 U.S.C.A. §§ 901–912.

5. United States ⇐29

Since president's Reorganization Plan No. 1 of 1978 conformed to substantive provision of Reorganization Act and did not transgress any limitations imposed by Act, the plan was enforceable and effected a valid transfer of governmental authority to enforce the Equal Pay Act from the Secretary of Labor to the Equal Employment Opportunity Commission. Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d); Reorganization Plan No. 1 of 1978, § 1 et seq., 42 U.S.C.A. § 2000e–4 note; 5 U.S.C.A. § 905.

6. Labor Relations ⇐1477

District court had subject-matter jurisdiction of Equal Pay Act suit brought by Equal Employment Opportunity Commission alleging that defendant bank discriminated against several of its female employees by paying them less than it paid males for performance of substantially similar work. Fair Labor Standards Act of 1938, §§ 16(c), 17, as amended, 29 U.S.C.A. §§ 216(c), 217; 28 U.S.C.A. §§ 1331, 1345.

7. Labor Relations ⇐1478

Equal Employment Opportunity Commission's naming of three female assistant cashiers at defendant bank in prayer for relief section of complaint charging sex discrimination in pay in violation of Equal Pay Act satisfied the "named as party" requirement of statute defining when action commenced for limitations purposes, as did reference to the females in agency's answer to bank's interrogatories, notwithstanding that the employees were not specifically named as plaintiffs. Fair Labor Standards Act of 1938, § 16(c), as amended, 29 U.S.C.A. § 216(c); Portal-to-Portal Act of 1947, § 6, 29 U.S.C.A. § 255.

8. Labor Relations ⇐1474

Equal Employment Opportunity Commission is not required to conciliate as a precondition to filing of a suit to enforce substantive provisions of Equal Pay Act. Fair Labor Standards Act of 1938, §§ 6(d), 16, 17, as amended, 29 U.S.C.A. §§ 206(d), 216, 217.

9. Labor Relations ⇐1471

Affidavits whereby three female assistant bank cashiers named in Equal Pay Act complaint filed by Equal Employment Opportunity Commission stated that they were not aware of any sex discrimination and did not desire or authorize the agency to represent them in the action were not dispositive of the factual and legal issues involved in determining whether bank paid male employees greater amount for performing substantially equal work and it was error to dismiss action on basis of the affidavits. Fair Labor Standards Act of 1938, §§ 6(d), 16, 17, as amended, 29 U.S.C.A. §§ 206(d), 216, 217.

10. Labor Relations ⇐1333

Operative test in an Equal Pay Act case is whether a woman is paid less for a job substantially equal to a man's and test relates to job content rather than to job title or description and factored into the determination are such diverse considerations as seniority systems, merit systems, quantity or quality of work activity schemes and differentials based on any factor other than sex. Fair Labor Standards Act of 1938, §§ 6(d)(1), 16(c), 17, as amended, 29 U.S.C.A. §§ 206(d)(1), 216(c), 217.

11. Federal Civil Procedure ⇐2498

Material fact issue existed whether bank paid male employees a greater amount for performing work substantially similar to that performed by female employees, precluding summary judgment in Equal Pay Act case. Fair Labor Standards Act of 1938, §§ 6(d)(1), 16(c), 17, as amended, 29 U.S.C.A. §§ 206(d)(1), 216(c), 217.

Appeals from the United States District Court for the Northern District of Mississippi.

Before CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

The Equal Employment Opportunity Commission (EEOC) brought suit against The Hernando Bank, Inc. under the Equal Pay Act, 29 U.S.C. § 206(d), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e—2000e–17, alleging that the Bank had discriminated against several of its female employees on the basis of sex. Specifically, the EEOC claimed that the Bank paid female assistant cashiers less than it paid male assistant cashiers for the performance of substantially similar work. The EEOC brought its Equal Pay Act claims under sections 16(c) and 17 of the Fair Labor Standards Act, 29 U.S.C. §§ 216(c), 217.

The Bank moved for summary judgment on the basis, *inter alia*, of identical affidavits executed by the three female employees named in the EEOC's initial complaint. The affidavits stated, in pertinent part: "I am not aware of any sex discrimination at Hernando Bank, therefore, I did not request, do not desire, nor have I authorized the Equal Opportunity Commission to represent me in the foregoing civil action."

Relying heavily upon the affidavits, the district court entered a summary judgment dismissing all of the EEOC's claims. The court denied the Bank's request for attorneys' fees.

The EEOC appeals the summary judgment only as it applies to the three female assistant cashiers named in its original Equal Pay Act complaint. It does not appeal the Title VII summary judgment. The Bank cross-appeals, claiming that (1) the EEOC had no power to enforce the substantive provisions of the Equal Pay Act, (2) the district court lacked subject matter jurisdiction, and (3) the district court abused its discretion in denying the Bank's request for attorneys' fees.

This appeal presents several serious questions of far reaching consequences. Concluding that the summary judgment was improvidently granted, we reverse and remand for further proceedings.

Authority of EEOC

A threshold consideration, anticipated in Hernando Bank's brief, is precipitated by the intervening decision of the Supreme Court in *INS v. Chadha*, — U.S. —, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). In *Chadha*, the Supreme Court held that the one-house congressional veto provision in § 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2), was unconstitutional because it violated the doctrine of separation of powers.

Hernando Bank alleges that *Chadha* requires us to hold that the EEOC had no authority to enforce the substantive provisions of the Equal Pay Act. Reorganization Plan No. 1 of 1978, 43 Fed.Reg. 19807, 92 Stat. 3781, *reprinted in* [1978] U.S.Code Cong. & Admin.News 9795–9800, which was promulgated under the authority delegated to the President by the Reorganization Act of 1977, 5 U.S.C. §§ 901–12, transferred the federal government's authority to enforce the Equal Pay Act from the Secretary of Labor to the EEOC. Hernando Bank argues that the Reorganization Act and all reorganization plans promulgated thereunder must be found invalid because the Reorganization Act contains a legislative veto provision similar to the one struck down in *Chadha*, *see* 5 U.S.C. § 906.[1] We do not agree.

1. Subject to certain limitations, the Reorganization Act of 1977 authorizes the President to

[1] After a close analysis of the language and legislative history of the Reorganization Act, we conclude that its unconstitutional one-house legislative veto provision is severable. We further conclude that the remainder of the Reorganization Act is constitutional and that President Carter's Reorganization Plan No. 1 of 1978 effected a valid transfer of Equal Pay Act enforcement authority from the Secretary of Labor to the EEOC.

[2] The Reorganization Act of 1977 does not contain a severability clause. Although we might infer from such legislative silence that Congress intended the provisions of the statute to be nonseverable, "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States v. Jackson*, 390 U.S. 570, 585 n. 27, 88 S.Ct. 1209, 1218 n. 27, 20 L.Ed.2d 138 (1968). Rather, the court must inquire into whether Congress would have enacted the remainder of the statute in the absence of the invalid provision. *Consumer Energy Council v. FERC*, 673 F.2d 425 (D.C.Cir.1982). "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley v. Valeo*, 424 U.S. 1, 109, 96 S.Ct. 612, 677, 46 L.Ed.2d 659 (1976), *quoting Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234, 52 S.Ct. 559, 564, 76 L.Ed. 1062 (1932).

Congressional intent and purpose are best determined by an analysis of the language of the statute in question. What reasons did Congress assign for its enactment of the Reorganization Act? Congress formally declared the Act's policy and purpose in 5 U.S.C. § 901(a):

> The Congress declares that it is the policy of the United States—
>
> (1) to promote the better execution of the laws, the more effective management of the executive branch and of its agencies and functions, and the expeditious administration of the public business;
>
> (2) to reduce expenditures and promote economy to the fullest extent consistent with the efficient operation of the Government;
>
> (3) to increase the efficiency of the operations of the Government to the fullest extent practicable;
>
> (4) to group, coordinate, and consolidate agencies and functions of the Government, as nearly as may be, according to major purposes;
>
> (5) to reduce the number of agencies by consolidating those having similar functions under a single head, and to abolish such agencies or functions thereof as may not be necessary for the efficient conduct of the Government; and
>
> (6) to eliminate overlapping and duplication of effort.

In 5 U.S.C. § 901(b), Congress explained that the policies of § 901(a) could best be accomplished by delegating to the President the legislative authority to reorganize the executive branch. The words of Congress are explicit:

> Congress declares that the public interest demands the carrying out of the pur-

reorganize the executive branch of the federal government by submitting plans of reorganization to both Houses of Congress. Under 5 U.S.C. § 906, a plan becomes effective if neither House objects to it within sixty days of its submission. This one-house legislative veto provision is unconstitutional under *Chadha*.

> poses of subsection (a) of this section and that the purposes may be accomplished in great measure by proceeding under this chapter, and can be accomplished more speedily thereby than by the enactment of specific legislation.

Thus Congress obviously concluded that it would be more efficient and better attuned to the public interest to delegate to the President authority to formulate the specifics of reorganization plans.

The legislative veto provision reflects Congress' desire to vote its approval of any specific reorganization plan. But there is more of relevance to our inquiry in the language of the Act. The Reorganization Act of 1977 is the first such statute in which Congress placed specific limitations upon the authority delegated. Section 905 provides that no plan may create a new executive department, abolish or transfer an executive department or independent regulatory agency, continue an agency or function beyond the time authorized by law, or authorize an agency to exercise a function not already expressly conferred by law. *See* H.R.Rep. 95–105, *reprinted in* [1977] U.S.Code Cong. & Admin.News 41.

A review of the Reorganization Act's legislative history demonstrates congressional awareness of the serious constitutional questions raised by the legislative veto. Congressman Robert Drinan doubted the wisdom of bypassing the normal legislative process and, thereby, of risking a judicial declaration of unconstitutionality. He observed that the Reorganization Act "intentionally does not contain a severability clause. The one House veto provision is deemed to be an integral and necessary part of the legislative scheme for reorganization." *Id.* at 69.

With the exception of Congressman Drinan's comments, nothing in the wording of the Act or in its legislative history indicates that Congress would not have enacted the Reorganization Act without the legislative veto provision or that Congress even considered the issue of severability.

The legislative history is replete with statements calling for efficient change in the organization of the executive branch. The House Report notes that in our constantly shifting society, "[f]unctions change, new methods are developed, bureaucratic structures become obsolete, [and] new laws are passed." *Id.* at 43–44. Congress expected the Reorganization Act to bring about organizational changes in the executive branch that would result in "cost reduction, improved management and better services to the public." *Id.* at 43.

It is clear from the legislative history that Congress undertook several steps in its drafting of the Act to "strengthen the role of Congress and help allay, in part, fears of unconstitutionality." *Id.* The substantive limitations imposed retain for Congress control over the substantive operations of the federal government. The Act does nothing more than delegate to the President the authority to reorganize the complex bureaucratic machinery of the executive branch so as to implement most effectively Congress' substantive policies.[2]

2. We perceive a significant distinction between the exercise of a one-house legislative veto, such as that held invalid in *Chadha*, and the mere presence of an unexercised legislative veto in the Reorganization Act. *Chadha* involved a situation in which Congress delegated to the Attorney General "the authority to allow deportable aliens to remain in this country in certain specified circumstances." 103 S.Ct. at 2786. By its unilateral veto of the Attorney General's deci-

Congress was acutely aware of the ongoing need for flexibility in the reorganization of the executive branch, and it adopted what it perceived to be the most efficient, expeditious means of achieving that end. In so doing, it retained, as the Constitution requires, the ultimate power to establish by legislation the substantive policies of the federal government.

[3] We conclude that the unconstitutional legislative veto provision is severable even though the Reorganization Act of 1977 contains no severability clause, because neither the express language of the statute nor the Act's legislative history makes it "evident that the legislature would not have enacted" the remainder of the Act in the absence of the legislative veto provision. *See Buckley v. Valeo*, 424 U.S. 1, 109, 96 S.Ct. 612, 677, 46 L.Ed.2d 659 (1976). Mere uncertainty about the legislature's intent is insufficient to satisfy the test announced in *Buckley v. Valeo*. We therefore hold that the remainder of the Act "is fully operative as a law." *Id.*

[4, 5] We further find and hold that the Reorganization Act validly delegated to the President the legislative authority to promulgate executive branch reorganization plans. Because President Carter's Reorganization Plan No. 1 of 1978 conformed to the substantive provision of the Act and did not transgress any of the limitations imposed by 5 U.S.C. § 905, the plan is enforceable as law. The plan thus effected a valid transfer of governmental authority to enforce the Equal Pay Act from the Secretary of Labor to the EEOC.

Jurisdiction

[6] Hernando Bank alleges that the district court lacked subject matter jurisdiction. We do not agree. The EEOC brought this action pursuant to sections 16(c) and 17 of the Fair Labor Standards Act, 29 U.S.C. §§ 216(c), 217. Section 17 provides that "[t]he district court ... shall have jurisdiction ... to restrain violations of section 15...."

In addition, the district court had jurisdiction under both 28 U.S.C. § 1331 and 28 U.S.C. § 1345. Section 1331 provides that "the district courts shall have original jurisdiction of all civil actions arising under the constitution, laws or treaties of the United States." A suit brought under the Equal Pay Act is obviously an action arising under a law of the United States. Section 1345 grants the district courts original jurisdiction of civil actions brought by federal agencies, such as the EEOC, that are ex-

sion to allow Mr. Chadha to remain in the United States despite an outstanding deportation order, the House of Representatives "took action that had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch." 103 S.Ct. at 2784. The Supreme Court held that once Congress delegated its legislative authority, it was obliged to honor its delegation "until that delegation is legislatively altered or revoked." 103 S.Ct. at 2786.

In the instant case, there was no congressional delegation and subsequent withdrawal of delegated legislative powers. Further, no action was taken that affected the substantive rights of any person. The challenged executive action did nothing more than transfer the federal government's responsibility for enforcing the Equal Pay Act from one executive agency to another, *i.e.* from the Secretary of Labor to the EEOC. The reorganization plan effected no substantive change in the applicable substantive legislation; indeed, 5 U.S.C. § 905 forbids any such changes.

pressly authorized to sue by an Act of Congress.[3]

Statute of Limitations

[7] The district court held that the statute of limitations [4] bars the EEOC's claims under 29 U.S.C. § 216(c) [5] because, even though employees Harris, Fuquay, and Sullivan were listed in the prayer for relief section of the EEOC's initial complaint, the EEOC did not specifically name the three as plaintiffs before the expiration of the two-year limitation period.[6] However, courts that have considered the "named as party plaintiff" requirement of 29 U.S.C. § 256, a statute very similar to § 216(c), have required merely that the employee be identified in the complaint or in a pleading equivalent to it. *E.g. Donovan v. Crisostomo*, 689 F.2d 869 (9th Cir.1982) (Wisdom, J., sitting by designation), *citing Prickett v. Consolidated Liquidating Corp.*, 196 F.2d 67 (9th Cir.1952); *Ciemnoczolowski v. Q.O. Ordinance Corp.*, 119 F.Supp. 793 (D.Neb.1954), *affirmed*, 233 F.2d 902 (8th Cir.), *cert. denied*, 352 U.S. 927, 77 S.Ct. 226, 1 L.Ed.2d 162 (1956). The EEOC's naming of the three women in the prayer of its complaint satisfies this test, as does the agency's specific references to them in its answers to Hernando Bank's interrogatories. Therefore, the statute of limitations does not bar the EEOC's claims under § 216(c).

Conciliation as a Precondition to Litigation

[8] The district court stated in support of its grant of summary judgment that the EEOC's conciliation efforts prior to commencement of this litigation were grossly inadequate. The trial court thus implicitly

3. 28 U.S.C. § 1345 provides in full:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

Hernando Bank argues that the EEOC may not invoke § 1345 jurisdiction because the Equal Pay Act authorizes the Secretary of Labor and not the EEOC to bring enforcement proceedings. The EEOC assumed its enforcement powers from the President's Reorganization Plan No. 1 of 1978 rather than from an Act of Congress. However, since a presidential reorganization plan that is not rejected becomes law, *Young v. United States*, 212 F.2d 236 (D.C.Cir. 1954), *cert. denied*, 347 U.S. 1015, 74 S.Ct. 870, 98 L.Ed. 1137 (1954), and since the application of the Reorganization Plan No. 1 of 1978 to pending litigation "contradicts neither 'statutory direction [n]or legislative history,'" *United States v. City of Miami*, 664 F.2d 435, 437 (5th Cir.1981) (en banc), *quoting Bradley v. School Bd.*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974), we hold that the EEOC was "expressly authorized to sue" under the Equal Pay Act within the meaning of § 1345.

4. 29 U.S.C. § 255 provides, in pertinent part:

> Any action commenced ... to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended ...
>
> (a) ... may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued ...

5. The EEOC sought remedies under 29 U.S.C. §§ 216(c) and 217. Hernando Bank concedes that the EEOC's § 217 claims were commenced in a timely fashion.

6. 29 U.S.C. § 216(c) provides, in pertinent part:

> In determining when an action is commenced ... under this subsection for the purposes of the statutes of limitations provided in [29 U.S.C. § 255], it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

held that the EEOC must undertake conciliation efforts before it may commence a judicial proceeding to enforce the Equal Pay Act. Although it is undisputed that the EEOC must "endeavor to eliminate any ... alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion" before it may bring a judicial enforcement proceeding under Title VII, *see* 42 U.S.C. 2000e–5(b), the question whether the EEOC must do the same before it may commence such an action under the Equal Pay Act is one of first impression in this circuit. We now hold that the EEOC is not required to conciliate as a precondition to the filing of a suit to enforce the substantive provisions of the Equal Pay Act. It follows *a fortiori* that inadequate conciliation efforts present no bar to judicial proceedings.

We briefly sketch the relevant statutory history. Congress enacted the Equal Pay Act of 1963, 29 U.S.C. § 206(d), as an amendment to the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* By providing that "any amounts owing to any employee which have been withheld in violation of this subsection [*i.e.* the Equal Pay Act] shall be deemed to be unpaid minimum wages or unpaid overtime compensation under [the FLSA]," 29 U.S.C. § 206(d)(3), Congress intended that the Equal Pay Act be enforced in accordance with well established FLSA procedures. H.Rep. No. 309, 88th Cong., 1st Sess., *reprinted in* [1963] U.S.Code Cong. & Admin.News 687. These procedures do not include conciliation. *See* 29 U.S.C. §§ 206(d), 216, 217. When Congress amended the Equal Pay Act in 1974, it did not add a conciliation requirement, an administrative procedure that it had ordained in the intervening years when it first adopted and then expanded Title VII. *Compare* 29 U.S.C. §§ 204(f), 216(b) *with* 42 U.S.C. §§ 2000e–5(b), 2000e–16(c).

The Reorganization Act of 1977 and Reorganization Plan No. 1 of 1978 are at the end of the scenario. We find nothing in the language of the Reorganization Act, the Reorganization Plan, the message of President Carter accompanying the plan, or in the Executive Order implementing it that supports the proposition that the conciliation requirements of Title VII automatically apply to Equal Pay Act claims after the transfer. *See* the Reorganization Act and Reorganization Plan; Executive Order No. 12,144, *reprinted in* 44 Fed.Reg. 37,193 (1979). *See also* S.Rep. No. 750, 95th Cong., 2d Sess. (1978); H.R.Rep. No. 1069, 95th Cong., 2d Sess. (1978).

Our holding today is based upon several considerations. We first note the absence of any reference to a conciliation requirement in the statutory language of the Equal Pay Act. Nothing in the legislative history suggests that this omission was due to congressional oversight or inadvertence. We are persuaded that had Congress wished to require conciliation as a prerequisite to litigation, it would have done so expressly, as it did for actions brought under both Title VII, 42 U.S.C. § 2000e–5(b), and the Age Discrimination in Employment Act, 29 U.S.C. § 626(b).

Further, a conciliation requirement would be inconsistent with the remedial scheme of the Equal Pay Act. The FLSA provides for the payment of unpaid wages, but limits an award to the two-year period (and in some instances three-year period) immediately preceding the filing of the lawsuit. 29 U.S.C. § 255(a). Under Title VII, back pay is available for the two-year period immediately prior to the commencement of administrative proceedings with the

EEOC. 42 U.S.C. § 2000e–5(g). Accordingly, the conciliation requirement of Title VII has no practical adverse effect upon that statute's remedial scheme, but the delay caused by such a requirement under the Equal Pay Act would seriously diminish, or destroy, the back pay claim it would purport to prescribe.

In addition, the legislative history reveals that the Congress considered but declined to adopt a permissive conciliation provision in the Equal Pay Act.[7] Finally, we find instructive the passing observation by the Supreme Court in *County of Washington v. Gunther*, 452 U.S. 161, 175 n. 14, 101 S.Ct. 2242, 2251 n. 14, 68 L.Ed.2d 751 (1981), that "the Equal Pay Act, unlike Title VII, has no requirement of filing administrative complaints and awaiting administrative conciliation efforts."

Our holding today is consistent with the decisions recently reached by our colleagues in the District of Columbia Circuit, *Ososky v. Wick*, 704 F.2d 1264 (D.C.Cir. 1983), and in the Eighth Circuit, *EEOC v. Home of Economy, Inc.*, 712 F.2d 356 (8th Cir.1983).

Affidavits of Discriminatees

In granting Hernando Bank's motion for summary judgment, the district court was obviously impressed by the affidavits of the three female assistant cashiers named in the EEOC's complaint. The affidavits, which were attached to Hernando Bank's motion, stated: "I am not aware of any sex discrimination at Hernando Bank, therefore, I did not request, do not desire nor have I authorized the Equal Employment Opportunity Commission to represent me in the foregoing civil action." The three women also executed supplemental affidavits containing the same statement. The September 2, 1980 affidavit of one of the female assistant cashiers, and her supplemental affidavit dated March 25, 1981, are set out in full in the margin.[8] All three

7. The rejected provision stated in part, "If a violation is found to exist, the Secretary may, before taking further action hereunder, by informal methods of conference, conciliation, and persuasion, endeavor to eliminate ..." S.Rep. 910, 88th Cong., 1st Sess., 109 Cong.Rec. 2886, 2887 (1963).

8. AFFIDAVIT OF IMOGENE HARRIS

STATE OF MISSISSIPPI
COUNTY OF DESOTO

Personally appeared before me the undersigned authority in and for the jurisdiction aforesaid, while within my jurisdiction, Imogene Harris who, after being duly sworn by me, stated to me upon her oath as follows:

1.

My name is Imogene Harris. I am an adult resident citizen of the State of Mississippi, have personal knowledge of the facts stated herein, and, if sworn as a witness, could competently testify thereto.

2.

I am employed by the Hernando Bank. My position with the Hernando Bank is that of Assistant Cashier.

3.

It is my understanding that the Equal Employment Opportunity Commission is presently seeking relief on my behalf in a civil action styled *Equal Employment Opportunity Commission v. Hernando Bank, Inc.*, Civil Action No. DC 80–26–LS–P, on file in the United States District Court for the Northern District of Mississippi, Delta Division. It is my further understanding that said action is founded upon allegations of sex discrimination.

4.

I am not aware of any sex discrimination at Hernando Bank, therefore, I did not request, do not desire nor have I authorized the Equal Employment Opportunity Commission to represent me in the foregoing civil action.

5.

No official officer or other agent of the Hernando Bank has requested or required me to give this affidavit, instead, I initiated the contact with the bank officials regarding the necessary

Note 8—Continued

steps to terminate my involvement in this action. I have freely voluntarily and of my own volition given this affidavit without any coercion or promise of reward by any official, officer or agent of the Hernando Bank. I have been assured by officers of the Hernando Bank that no reprisal will be taken in the event I choose to have the Equal Employment Opportunity Commission continue to pursue this action on my behalf, however, I do not desire the Equal Employment Opportunity Commission to continue to maintain this action on my behalf.

6.

I hereby request that the Court terminate this action as it relates to me.

Dated this 2nd day of September, 1980.

/s/ Imogene Harris
IMOGENE HARRIS

Sworn to and subscribed before me this 2nd day of September, 1980.

/s/ Donna B. Harris
NOTARY PUBLIC

My Commission Expires:
My commission expires June 10, 1981

SUPPLEMENTAL AFFIDAVIT OF
IMOGENE HARRIS

STATE OF MISSISSIPPI
COUNTY OF DESOTO

Personally appeared before me the undersigned authority in and for the jurisdiction aforesaid, while within my jurisdiction, Imogene Harris, who, after being duly sworn by me, stated to me upon her oath as follows:

1.

My name is Imogene Harris. I am an adult resident citizen of the State of Mississippi, have personal knowledge of the facts stated herein, and, if sworn as a witness, could competently testify thereto.

2.

I am employed by the Hernando Bank. My position with the Hernando Bank is that of Assistant Cashier.

3.

I am the same Imogene Harris who previously provided an affidavit in this civil action on September 2, 1980. Furthermore, I am the same Imogene Harris who was deposed by the Equal Employment Opportunity Commission on March 24, 1981. This affidavit was provided to the bank after the March 24, 1981 deposition.

4.

It is my understanding that the Equal Employment Opportunity Commission is presently seeking relief on my behalf in a civil action styled *Equal Employment Opportunity Commission v. Hernando Bank, Inc.*, Civil Action No. DC 80-26-LS-O, on file in the United States District Court for the northern District of Mississippi, Delta Division. It is my further understanding that said action is founded upon allegations of sex discrimination.

5.

I am not aware of any sex discrimination at Hernando Bank, therefore, I did not request, do not desire, nor have I authorized the Equal Employment Opportunity Commission to represent me in the foregoing civil action.

6.

No official, officer, or other agent of the Hernando Bank has requested or required me to give this supplemental affidavit. Instead, I initiated the contact with the bank officials regarding the necessary steps to terminate my involvement in this action. I have freely, voluntarily and of my own volition given this affidavit without any coercion or promise of reward by any official, officer or agent of the Hernando Bank. I have been assured by officers of the Hernando Bank that no reprisal will be taken in the event I choose to have the Equal Employment Opportunity Commission continue to pursue this action on my behalf, however, I do not desire the Equal Employment Opportunity Commission to continue to maintain this action on my behalf.

7.

On March 24, 1981, I discussed this case with the attorneys for the Hernando Bank. My discussions with the bank's attorneys were voluntary. The bank's attorneys explained my involvement in this civil action and I was permitted to ask any questions I wished to ask. I was assured by the attorneys that no reprisal will be taken in the event I choose to have the Equal Employment Opportunity Commission continue to pursue this action on my behalf, however, as I previously stated to the bank's officials, I do not desire the Equal Employment Opportunity Commission to continue to maintain this action on my behalf.

8.

Based on the foregoing facts I hereby reaffirm and renew my request of September 2, 1980, that the Court terminate this action as it relates to me.

Dated this 25 day of March, 1981.

/s/ Imogene Harris
IMOGENE HARRIS

affidavits are identical, as are all three supplemental affidavits.

[9, 10] In finding that these affidavits rendered the EEOC "powerless to prosecute a suit" under either section 16(c) or 17 of the FLSA, 29 U.S.C. §§ 216(c), 217, the district court accorded inordinate weight to them. This was error. The affidavits are material, but they are not dispositive of the factual and legal issues involved in the determination of whether Hernando Bank complied with the congressional directives contained in the Equal Pay Act. Like the affidavits, the Equal Pay Act speaks of discrimination, but it does so in terms that may not appear to be discrimination to a layman. The Equal Pay Act obliges an employer to provide equal pay for "equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1). The operative test is whether a woman is paid less for a job "substantially equal" to a man's; the test relates to job content rather than to job title or description. *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041 (5th Cir.1973). Factored into the court's determination are such diverse considerations as seniority systems, merit systems, quantity or quality productivity schemes, and differentials based on any factor other than sex. 29 U.S.C. § 206(d)(1). The court's inquiry is often complicated and oblique. A proper determination demands far more than the mere conclusional attestation by the alleged discriminatees that they are not aware of any discrimination.

Summary Judgment

Under Fed.R.Civ.P. 56, the district court may grant a summary judgment only if "there is no genuine issue as to any material fact." In determining whether there is a genuine fact issue, the court must review "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." We addressed the specifics of summary judgment in *Keiser v. Coliseum Properties, Inc.*, 614 F.2d 406, 410 (5th Cir.1980), and held:

> The burden of proof falls on the party seeking summary judgment, and any doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. (Citations omitted.) We note that a court can only enter a summary judgment if *everything* in the record—pleadings, depositions, interrogatories, affidavits, etc.—demonstrates that no genuine issue of material fact exists. Rule 56 does not distinguish between documents merely filed and those singled out by counsel for special attention—the court must consider both before granting a summary judgment.

After reviewing all of the record now before us, we find that there was a substantial differential in the pay of male and female assistant cashiers throughout the entire relevant time period. No female assistant cashier at Hernando Bank has ever been paid as much as any male assistant cashier. Indeed, one male assistant cashier who received an unfavorable performance rating and was reassigned to a lower position as "courier," continued to receive a

Note 8—Continued

Sworn to and subscribed before me this 25th day of March, 1981.

/s/ Lola H. Robison
NOTARY PUBLIC

My Commission Expires:
My Commission Expires July 23, 1983.

higher salary than all of the female assistant cashiers.

[11] The record includes several descriptions of the duties of various assistant cashiers. While some were responsible for the general ledger, vault supervision, and customer assistance, others balanced accounts and supervised other employees. All assistant cashiers, male and female, rotated among the various functions. Whether Hernando Bank paid different amounts to females than it paid to males for substantially equal job assignments is a disputed question of fact on the record before us. Because this disputed issue is material to the EEOC's Equal Pay Act claims, the summary judgment should not have been granted.

It necessarily follows that there is no basis for Hernando Bank's cross-appeal for attorneys' fees.

The judgment of the district court is REVERSED, the grant of summary judgment is vacated and the matter is REMANDED for further proceedings consistent herewith.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

Jalal, Ms. Ghislaine Jean-Pierre, Mrs. Chandrika Prasad Katragadda, Ms. Anjum Muzaffar Khan, Mr. Jae Nam Kim, Ms. Jeong Yeon Kim, Joel & Jaimie Kornreich, Miss Melodie Youn-Hee Ksoman, Mr. Jack Sung Kwan Lee, Mr. Mohamed Lamarti, Giancarlo Landi & Son, Mr. Schubert Lartigue, Henry & Samantha Levy, Ms. Remedios So Licup, Mr. Oswald Louis, Ms. Marie Maude Lubin, Mr. Vito Luongo, Mr. Zdenek Machacek, Ms. Catherine Bernadette Magee, Ms. Hosneara Malik, Mr. Muhammed Enamul Malik, Mr. Abraham Mathew.

Ms. Yvette Solange Maurice, Mr. Canio Mauro, Ms. Giuseppina Mauro, Mr. Paul Bernard McGovern, Mr. Morris Glaster McLean, Ms. Varda Mei-Tal, Mrs. Vera Josephine Mendoza.

Miss Stephena Louise Mitchell, Mr. Jose Montenegro, Mr. James Joseph Murray, Mr. Ashok Nagrath, Mr. Jose Andre Olivo, Mrs. Evelyn Paul, Mr. Felix Ramos, Carmen Altagracia Rijo, Mr. Radhames D. Rodriguez, Sherry & Amy Rothberg, Miss Fiona Michelle Joye Rowe, Mr. Sergio Manuel Saiz, Ms. Ann-Marie Sakal, Mr. Alexander Sanchez, Ms. Surinder Pal Kaur Sandhu, Mr Cheddie Sarju, Mr. Khemraj Sarju, Ms. Mildred Sarju, Ms. Sonita Bhaarati Sarju.

Ms. Evelyne Savaria, Ms. Alfonsa Scandura, Mr. Henri Daniel Schnurmann, Ms. Rhoda Flora Schoenberger, Mr. Francesco Scianna, Ms. Juana Alicia Garcia Segura, Linda & Daniel Shaw, Mr. James Franklin Kwok Sheung Wong, Ms. Rivka Aorelia Stern, Ms. Thelma Mariano Talusan, Mr. Mohamed Bassem Tolba, Ms. Nadia Mahmoud Tolba, Mr. Chiapang Steve Tsang, Ms. Jospehine Maricela Vargas, Ms. Kay Elaine Murray Vernon, Mr. Leon Duen-Liang Wang, Patricia & Mervinie Wellington, Mr. Cyril Augustine Wyse, Ms. Clara Carbonell Yabes, Mr. Eligio Fabonan Yabes, Ms. Seema Shabnam Zakiullah, Ms. Emma Zayas, Mr. German Zhitlovsky.●

THE JOINT RESEARCH AND DEVELOPMENT ACT OF 1984

HON. PETER W. RODINO, JR.

OF NEW JERSEY

IN THE HOUSE OF REPRESENTATIVES

Tuesday, February 28, 1984

● Mr. RODINO. Mr. Speaker, I am pleased to join with several of my colleagues in introducing the Joint Research and Development Act of 1984.

The bill is a bipartisan product of the hard work and analysis that have gone on in this area beginning in the 97th Congress, when Mr. EDWARDS introduced the first joint research and development bill. It borrows heavily from the bill introduced earlier this session by the ranking minority member of the committee, Mr. FISH, and from the administration proposal introduced by Congressman MOORHEAD.

The concerns underlying this legislation have been detailed by others. It is sufficient here simply to reaffirm the conviction that joint research and development can be an important tool for maintaining or reasserting our technological leadership in many industries. Rightly or wrongly, the antitrust laws are perceived by many businesses as a threat to legitimate joint research and development activity. We can address this problem through a strong affirmation of the social and economic worth of joint research activity.

The bill has two operative features. It will codify the application of the rule of reason in all antitrust cases involving a joint research and development program as described in the definitions. And it will limit the potential damage exposure of such a joint venture to actual damages if the venture has been properly reported to the antitrust agencies.

This legislation will not be a panacea for the economic and trade problems the United States has encountered in the world marketplace. Despite setbacks, the record suggests that this Nation has continued its technological leadership in many areas. In some industries, the problems we have confronted have been less from outdated technology and more from competitive weaknesses in production and marketing. Nonetheless, I am pleased that we are able to move affirmatively in this area to clear away any unnecessary obstacles to jointly conducted research and development. And, most importantly, we are able to do so without damaging the protections provided by antitrust enforcement—a longstanding national policy that, over the years, has contributed substantially to maintaining the competitive fitness of American industry in international markets.

The Subcommittee on Monopolies and Commercial Law held 2 days of hearings on joint research and development proposals last fall, and received testimony on the subject on two other occasions in the first session. Now it is time to act. The subcommittee plans to mark up this legislation on March 1. I hope that this proposal can move promptly through the full committee and be enacted by the Congress before the end of the summer.●

CONGRESSMAN FISH SUGGESTS CONGRESSIONAL RESPONSE TO CHADHA

HON. TRENT LOTT

OF MISSISSIPPI

IN THE HOUSE OF REPRESENTATIVES

Tuesday, February 28, 1984

● Mr. LOTT. Mr. Speaker, on February 23 our distinguished colleague from New York (Mr. FISH), who is the ranking Republican on the House Judiciary Committee, testified before the Rules Committee on the impact of the Supreme Court's decision in INS against Chadha holding the legislative veto unconstitutional. I found the gentleman's testimony especially useful both from the standpoint of historical background and insight into the growth of the legislative veto. While I differ with the gentleman's concurrence in the Supreme Court's reasoning in Chadha, I think his review of the options for the future is particularly helpful to the House and its committees as we decide what to do about the 200-plus now invalid legislative veto statutes.

I would especially call the attention of my colleagues to his discussion of H.R. 3939, the Regulatory Oversight and Control Act, which I have introduced with 78 cosponsors. The gentleman from New York is one of those cosponsors and urges close consideration of this approach because it would give Congress authority to approve major regulations by the enactment of joint resolutions, and to disapprove nonmajor regulations by the same form. As the gentleman points out, fewer than 100 rules a year are considered major, and therefore Congress would not be overburdened. At the same time, these represent important policy choices which the Congress should consider and agencies should be forced to justify.

Mr. Speaker, at this point I insert the statement of the gentleman from New York and commend it to the reading of my colleagues. The statement follows:

STATEMENT OF HON. HAMILTON FISH, JR., BEFORE THE HOUSE COMMITTEE ON RULES: "CONGRESSIONAL RESPONSE TO THE CHADHA DECISION"

Thank you, Mr. Chairman, I appreciate this opportunity to testify on the legislative veto concept and discuss the issue of how Congress ought properly respond to the recent *Chada* decision.

The "legislative veto," or "Congressional veto" as it has sometimes been called, is not a new idea. It has been the source of controversy and conflict between the legislative and executive branches dating back to the New Deal era. Its use can be traced to 1932—with enactment of the 1933 Fiscal Appropriation bill. Furthermore, the idea is not unique to the Federal level of government, nor even to the United States.

I am advised that some thirty-four State legislatures use some form of a regulations review procedure. Some, but not all of these, permit the repeal of regulations by the legislature or a committee of the legislature. Great Britain, Austrialia, and other countries have also utilized procedures analogous to the legislative veto. But, of course, in parliamentary systems of government the separations of powers principle is not present. Thus, the constitutional infirmities relied on by the Supreme Court in *Chadha* are not present in those countries.

Since 1932 some 210 different statutes, utilizing some form of Congressional review, have been enacted into law. For many years, the most notable Congressional review procedure was that contained in the Reorganization Act of 1935. It required the President to transmit to Congress any plans for the transfer, abolition, consolidation, or coordination of executive branch agencies or functions. Either House of Congress, then, had sixty days to disapprove the proposed reorganization plan.

The use of the legislative veto device by Congress has greatly intensified in recent years. Of the 210 provisions that existed prior to Chadha, more than one-half of these were adopted since 1970. Nearly one-

half of these were adopted in the last five years. Some of the more prominent examples of recently enacted statutes containing a Congressional veto or Committee veto feature, include: (1) the Congressional Budget Impoundment Control Act of 1974 (Public Law 93-334); (2) the War Powers Act (Public Law 93-148); (3) the Natural Gas Policy Act of 1978 (Public Law 95-621); (4) the Federal Trade Commission Improvements Act of 1980 (Public Law 96-252); and (5) the Nuclear Waste Policy Act of 1982 (Public Law 97-425).

The veto, as we know, has manifested itself in different forms. The most common of these being a one-house veto, allowing for disapproval by passage of a simple resolution. Also frequently used was the two-house veto, requiring disapproval through a concurrent resolution. Variations included the committee veto approach and mechanisms requiring affirmative approval (as opposed to disapproval). The Chadha decision found all of the above forms to be constitutionally lacking, except approval requirements which utilize a joint resolution (which is "presented" to the President).

What are the reasons why the legislative veto became so popular in Congress? First, it reflected an institutional reaction to, and frustration with, the growing complexity of the Federal Government itself. Congress felt it was outmatched by the size, power and expertise of the executive branch. Here, I would also include the so-called "Fourth Branch"—the independent regulatory agencies. Second, the veto was used by Congress as a means of retaining a voice in important foreign policy questions (the War Powers Act and the Arms Export Control Act are good examples). Third, the veto was used as an adjunct of our Constitutional appropriations and budget responsibilities. Simply put, the veto has been used as a means of demonstrating the desire to arrest the growth of government spending. Finally, with those vetos focusing on final rules or regulations, it allowed Congress to re-claim a portion of the power it had too broadly delegated to agencies in organic statutes.

On this last point, allow me to elaborate. How often, as Members of Congress, have we heard the frustrated complaints of our constituents about unreasonable or unrealistic bureaucratic regulations? People in all walks of life—education, business, medicine, farmers, senior citizens—continuously express dissatisfaction with over-regulation in our society. Also, as legislators, we came to recognize that the intent of the laws which we had enacted was often altered, distorted, or ignored in the "implementing" regulations.

The legislative veto or Congressional veto represented an institutional effort by Congress to reverse this trend. While all the veto provisions that were enacted into law were issue specific, there also has been strong Congressional interest in legislation to establish a general veto procedure. This was done both in the context of omnibus regulatory reform legislation and in proposals such as that advocated by Congressman Elliott Levitas and others, taking the form of amendments to the Administrative Procedure Act. The broad support for a generally applicable veto procedure reflected and reflects a view, irrespective of politics or philosophy, that the growth of regulatory activity demands closer monitoring. Proponents of legislative veto have argued that administrative rulemaking—I.E., regulation writing—is in the nature of legislation. The legislative veto displayed a valid desire in Congress to recapture or recall a portion of the power delegated.

Perhaps the high-water mark of support for a generally applicable veto procedure in the House of Representatives came in 1976, during the 94th Congress. At that time, the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee gave the Congressional veto idea very thorough consideration. Extensive hearings were held over a two-month period. The Subcommittee heard from Congressional and Administration witnesses, Constitutional-legal scholars, interested private organizations, and members of two State legislative committees which conduct such a review of regulations.

The result of these deliberations was a clean bill—H.R. 12048. It would have applied the Congressional review procedure to all rules and regulations issued by agencies subject to the provisions of the Administrative Procedure Act, 5 U.S.C. Sections 551-559. Under the key procedure of the bill, either House could adopt a concurrent resolution disapproving a proposed rule or regulation within 60 calendar days after its promulgation and prior to its going into effect. Then, unless the second House acted in disagreement with the action of the first House within 30 days thereafter, the regulation was disapproved and did not go into effect.

This "Administrative Rule Making and Reform Act of 1976" was considered in the House, under suspension of the rules, on September 21, 1976. Two hundred sixty-five Members voted "aye" and 135 voted "no". The measure failed to get a two-thirds vote, by just *one* vote! This historic footnote demonstrates the broad, bipartisan support for the veto that had occurred.

As this example demonstrates, the House Judiciary Committee has been in the forefront on this issue for some years. Since our jurisdiction extends to the Administrative Procedure Act and the various regulatory reform proposals, we have spent extensive amounts of time analyzing this problem. At the same time, we are affected by the *Chadha* decision in a more specific way. Three of the vetoes invalidated by the *Chadha* ruling are contained in laws directly under our jurisdiction. These are the National Emergencies Act (Public Law 94-412) and two distinct provisions in the Immigration and Nationality Act (Public Laws 82-414 and 85-316).

The *Chadha* decision has called a halt to use of the veto as a legislative shortcut for reaching otherwise valid congressional goals. The precise issue in Chadha was the constitutionality of section 244(c)(2) of the Immigration and Nationality Act of 1952, providing for a one-House veto of agency suspensions of deportation. But while the case dealt with a particular form of the one-House veto, the opinion is clearly broad enough to negate the two-House veto as well.

The Constitution, the Court said, provided for only one legislative process—passage of legislation by both the House and Senate and "presentment" to the President for his approval or disapproval. The Court took note of the simple but inescapable fact that Article I of the constitution requires that bills must be passed by both Houses of Congress and presented to the President of the United States.

I cannot say that I was surprised by the Court's decision; nor can I fault the Court's reasoning. While the short-term consequences of this ruling have caused some discomfort, I do not see the dramatic alteration of the balance of power between the two branches that some in the media instantly proclaimed. Hearings such as this reflect a calm, responsible Congress—seeking to explore options, alternatives and new approaches. But, clearly, if Congress is to reclaim control over the bureaucracy it has created, and cut back on the vast delegations of authority that we have granted, then it must now do so through the normal legislative process.

Before leaving the Chadha holding itself, two other important aspects of the case should be noted. These are the severability question and the apparent constitutional validity of the "report and wait" approach.

With the large number of laws containing veto provisions, the obvious question is what happens to the remaining provisions of these laws. If Congress does not act specifically to repeal the various veto provisions from these statutes, then the Federal courts will be left to decide which statutes stand and which will fall. Whether or not a particular statute contains a boilerplate severability clause, does not alone dispose of the question. On a case-by-case analysis, the courts will be left to determine whether or not Congress would have enacted the overall statute itself, with or without a legislative veto provision. *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976). As the Court states in the majority opinion this is, at best, an "elusive inquiry." This "elusive" chase after legislative history could result in confusing and mixed results. In my view, each standing Committee of the House should undertake a formal review of those statutes within its jurisdiction and make a recommendation to the whole House regarding the remaining portion of those laws.

A footnote in the majority decision points to another alternative available to Congress, fully consistent with the bicameral action requirement. In footnote 9, the Court appears to look with favor on the so-called "Report and wait" approach upheld in *Sibbach* v. *Wilson*, 312 U.S. 1 (1941). Under this approach, Congress does not unilaterally veto rules. Rather, the effectiveness of administrative action is delayed so as to give Congress the opportunity to review the rules *before* they become effective. Congress can then pass legislation to bar (or further delay) the rules from going into effect if they are found objectionable. This is the exact approach taken in the so-called "Rules Enabling Acts"—28 U.S.C. 2072 (Federal Rules of Civil Procedure); 18 U.S.C. 3771 (Federal Rules of Criminal Procedure); and 28 U.S.C. 2076 (Federal Rules of Evidence).

Senator Levin has introduced legislation (S. 1650) that would institutionalize this report and wait procedure. However, some including the Justice Department caution that even the "report and wait" approach becomes constitutionally suspect if the bill contains procedures allowing a Committee, one or both Houses of Congress to delay the effective date of administrative action. An unencumbered report and wait provision is contained in H.R. 2327—an omnibus regulatory reform bill introduced by Congressman Sam Hall, which is now pending in the House Judiciary Committee.

Unlike some of my colleagues, I do not believe that the *Chadha* decision inevitably means a weaker Congress. What it should mean is that Congress will be much more cautious and explicit in enacting future legislation. Broad delegations of power to the agencies should no longer be the pattern. I feel confident that Congress will react to this decision by becoming a more precise legislative body, more attentive to the detail of legislative language than ever before.

What, specifically, are our options? Well, as with any ruling as to unconstitutionality, a logical first suggestion is a constitutional amendment. Proposed constitutional amendments authorizing one-House vetoes of regulations have been introduced both in the House (H.J. Res. 313—Congressman Jacobs) and in the Senate (S.J. Res. 135—

Senator DeConcini). Constitutional amendments, of course, are referred to the Committee on the Judiciary. Frankly, however, I do not view this option as either advisable or politically practical. The constitutional amendment process is complicated and time consuming. We have other alternatives available to us that are preferable both in terms of time and temperate response.

I have already discussed two other such options—both of which I believe have substantial merit. I refer, first, to an organized review of existing statutes containing invalid veto provisions by the various committees of jurisdiction. This should be undertaken promptly and irrespective of whether other responsive options are explored. We should not, by inaction, leave the severability question on many important laws (such as War Powers and Impoundment Control) solely in the hands of the courts.

The other option, to which I have already alluded, is the "report and wait" approach advocated by Senator Levin and others. This mechanism is fully consistent with the bicameral mandate of the *Chadha* decision. Congress by law can delay the effective date of regulations or other forms of administrative action. Once the proposed regulation or action is made known and studied, we can then pass legislation to prevent or further delay its implementation. Such legislation would have to pass both Houses and be presented to the President. If we choose this route we must be careful not to grant powers solely to committees or solely to Congress that would be inconsistent with the full legislative process requirements of *Chadha*. So, for example, a particular committee could not be allowed to extend the review period. Final disapproval or extension could not occur but through bicameral action and presentment to the President.

Other options also come to mind. In the past, members of this House have urged that Congress set aside one session of Congress, or an entire Congress, to re-examine existing laws. No one argues that over-delegation has, in large part, contributed to the attractiveness of the legislative veto mechanism. Perhaps now is the time for a genuine "oversight Congress" that, aside from the essential budget and appropriations items, takes a critical look backward at what is already on the books. Most committees would have more than enough material to review, and, hopefully, needed revisions and repeals would result. What I am suggesting is analogous to the theory that prompted and continues to prompt support for sunset legislation. It is an idea even more worthwhile in light of *Chadha*.

Another idea deserving of consideration is contained in the "Regulatory Oversight and Control Act of 1983" (H.R. 3939), sponsored by our distinguished colleague, Trent Lott. I am a co-sponsor of this measure, which is currently pending in both the Rules Committee and the Judiciary Committee. H.R. 3939 contains variations on many of the concepts contained in previous regulatory reform bills. This includes: (1) requiring a cost-benefits analysis of "major rules" (a defined term in the bill); (2) a semi-annual regulatory agenda of proposed rules; (3) mandatory agency review of existing rules; and (4) a modified Bumpers amendment.

But, in the context of our discussion, the most interesting provision in H.R. 3939 is contained in section 201. It states that no major rule can take effect unless Congress adopts a joint resolution of approval within 90 days after its transmittal by the relevant agency. This variation on the "report and wait" procedure, mandates an affirmative act by the Congress before a particular regulation can go into effect. (Usually, Congress must act to stop a regulation or other administrative decision.)

This approach merits close consideration for two principal reasons. First, while most major rules present important policy choices, the average annual number of such is not large. Estimates are that, on the average, the Federal Agencies promulgate less than 100 major rules a year. Thus, Congress and its various committees would not be seriously overburdened by this new workload. Second, the burden of proof in justifying the statutory authority and need for specific major regulation would be placed squarely on the agency. Congress would have to be convinced of its merits or else the regulation simply would not take legal effect. This idea deserves further inquiry by both this Committee and the Committee on the Judiciary.

Finally, we can just do a better job as legislators. Better, more exacting drafting of statutes is demanded. Broad delegations of power should be discouraged or carefully considered. We should become even more aggressive in implementing our constitutional taxation and appropriations responsibilities. Oversight is a much discussed element of our role—but all too often it is superficial in nature and lacks follow-up. Quite aside from the availability of the veto, and substitute mechanisms that must pass constitutional muster, we already have in place the powers to achieve parity in the separation of powers struggle.

This completes my prepared remarks. Again, thank you for the opportunity to share my views on this important subject. I would be happy to try and answer an questions you may have.●

WHERE THERE IS SMOKE, THERE IS FIRE

HON. TOM LANTOS

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Tuesday, February 28, 1984

● Mr. LANTOS. Mr. Speaker, recently, my colleagues and I have read accounts in the Washington Post and New York Times of the battle between three leading health organizations and the R. J. Reynolds Tobacco Co. regarding misleading and irresponsible advertising that presented a false picture of the well-established health hazards of smoking.

Reynolds' new advertising campaign contends that the health impact of smoking is still an open question; that there was "significant evidence" to contradict the assumption that smoking causes disease. This new ad campaign states that Reynolds will cite such evidence in the near future. The tobacco giant states that no causal link has been established between smoking and cancer, emphysema, or heart disease.

There is absolutely no question in my mind or in the minds of these distinguished health organizations—the American Heart Association, the American Cancer Society, and the American Lung Associations—that an overwhelming amount of scientific evidence demonstrates beyond reasonable doubt that cigarettes are this country's major health hazard.

Today we know much more about the adverse health effects of smoking than we did when the first report of the Surgeon General was issued in 1964. We know that smoking is our Nation's most preventable cause of premature death and illness. We know that smoking is a major risk factor in cancer, heart disease, and emphysema. We know that cigarettes are directly responsible for the needless and preventable deaths of more than 300,000 Americans each year. The costs in terms of loss of life, unnecessary health care expenses, and lost productivity to our economy is absolutely staggering.

If we are to make smoking prevention a public priority, it is time to tell the full truth about smoking and to characterize cigarettes for what they are—a leading cause of cancer, heart, and lung disease.

I have joined a large number of my colleagues in the House in cosponsoring H.R. 1824, the Comprehensive Smoking Prevention Act to establish a national program to increase the availability of information on the health consequences of smoking and to change the label requirements for cigarettes. It replaces the current cigarette warning label with new, stronger health warnings. Unlike the current label, which 54 million American smokers are familiar with, the new warnings are specific and reflect the most current scientific knowledge about the relationships between smoking and disease. The warnings will rotate among cigarette packages and advertising in a manner to enhance their visibility and to assure the widest dissemination of the health message. In addition, the bill strengthens the smoking prevention activities of the U.S. Department of Health and Human Services, requires the publication of tar, nicotine, and carbon monoxide content of cigarettes, and the disclosure of chemical additives.

The level of public ignorance and misunderstanding about the health effects of smoking is staggering and it is reflected in the trend of smokers to start at younger and younger ages. Steps must be taken to make smokers and potential smokers aware that smoking is a certain and potent killer. Now is the time to develop more effective smoking prevention activities, not smoking promotion activities.●

CHARLES ZEMEL CELEBRATES 100TH BIRTHDAY

HON. PETER W. RODINO, JR.

OF NEW JERSEY

IN THE HOUSE OF REPRESENTATIVES

Tuesday, February 28, 1984

● Mr. RODINO. Mr. Speaker, this Sunday a celebration will be held to honor one of Newark's most impressive and inspiring native sons. The "party of the century" will take place at New York's Waldorf-Astoria Hotel

THE WHITE HOUSE

WASHINGTON

December 20, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: D.C. Chadha Letters

The Department of Justice Office of Legislative Affairs has asked for our views on draft replies to the letters from Mayor Barry and D.C. Council members David Clarke and Wilhelmina Rolark on the Administration's position on H.R. 3932, the D.C. Chadha bill. You will recall that Barry wrote the President and Clarke and Rolark wrote you on November 15 to protest what was at the time our proposed position. You advised Barry on November 17 and Clark and Rolark on November 21 that their letters had been referred to Justice.

The proposed Justice responses, to be sent over Assistant Attorney General McConnell's signature, do little more than thank the correspondents for their views and formally transmit copies of the Justice report on H.R. 3932 as actually sent to Senator Roth. The response to Clarke and Rolark disavows any criticism of the D.C. Council. Both letters express disappointment that the views of the Department were not sought until very late in the game, note that the legislative veto was a compromise vehicle for which an alternative must be found, and express the hope that the issue may be resolved during the intersession recess.

We referred the incoming letters to Justice to keep some distance between the White House and this problem. For the same reason I do not think we should become too involved in redrafting Justice's proposed responses, which are largely unobjectionable in any event. With your approval, however, I will call the attorney at Justice handling this matter and suggest use of a more neutral sobriquet than "the Home Rule Act" in the Clarke and Rolark reply, and some stylistic changes to prevent the last sentence in the Clarke and Rolark letter, which also appears in the Barry letter, from reading as if it were an awkward translation from Bulgarian.

DRAFT

U. S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Marion Barry, Jr.
Mayor
District of Columbia
Washington, D.C. 20004

Dear Mr. Mayor:

As the Counsel to the President, Fred F. Fielding, indicated in his November 17th letter to you, your letter of November 15, 1983 to the President has been referred to me for reply. Your correspondence discusses your position on H.R. 3932, legislation directed to correct the constitutional infirmities in the District of Columbia Self Government and Governmental Reorganization Act raised by the Supreme Court's decision in Immigration and Naturalization Service v. Chadha, __ U.S. __, 103 S.Ct. 2764 (1983).

The Administration appreciates your perspective on this matter and the courtesy your office has extended in advising us of your views. I hope you understand that the Department's position on this legislation was in response to a request for our views from the Chairman of the Senate Committee with jurisdiction over the legislation. As part of the process whereby the Department comments on numerous bills pending before the Congress, our position was determined and reviewed as quickly as possible. It is surprising that neither the House Committee nor the District of Columbia sought the Department's views on this matter, especially since we have always expressed a substantial interest in legislation affecting criminal justice in the District of Columbia.

The issue at stake, the repeal of the legislative veto provisions in current law and determining the proper alternative, is, in a sense, one of first impression. Until the Court's decision in Chadha, the legislative veto was a much used compromise device. It purported to permit Congress to hold in check discretion which had been delegated by law. The Supreme Court's decision, of course, precludes further utilization of this mechanism.

It is the alternatives which our letter attempted to address and what our efforts should be directed toward. Because there is no ready replacement for the legislative veto device, each statute must be carefully examined to determine the appropriate balance of competing interests involved.

Our report to the Senate Committee, a copy of which is enclosed, expresses our position on this issue as it relates to Titles 22, 23 and 24 of the District of Columbia Code. I hope that we can use the inter-session recess period to agree on amendments that we can all support.

Sincerely,

ROBERT A. McCONNELL
Assistant Attorney General

U.S. Department of Justice
Office of Legislative Affairs

DRAFT

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable David A. Clarke
Chairman
Council of the District of Columbia

Honorable Wilhelmina J. Rolark
Chairperson
Committee on the Judiciary
Council of the District of Columbia

Dear Mr. Clarke and Ms. Rolark:

As the Counsel to the President, Fred F. Fielding, indicated in his November 21st letter to you, your correspondence of November 15th has been referred to me for reply. Your letter presented your views on a draft position that the Administration was preparing on H.R. 3932, a bill seeking to correct the constitutional infirmities in the District of Columbia Self Government and Governmental Reorganization Act raised by the Supreme Court's decision in Immigration and Naturalization Service v. Chadha, __ U.S. __, 103 S.Ct. 2764 (1983).

Your views on this significant legislation are important to us. Indeed, it is unfortunate that we were never brought into the debate on the bill until the Chairman of the Senate committee with jurisdiction asked the Department for its views. A copy of our formal report to the Senate committee is attached. Our letter presents amendments that would satisfy our concerns. I am hopeful that we can use the Congressional inter-session recess to reach an agreement on the possible amendments to H.R. 3932.

Before closing, there is one other point I want to make in reply to your letter. I hope that you understand that our position on H.R. 3932 does not imply a criticism of the Council of the District of Columbia or its achievements in the criminal justice area. Rather, our position presents our best efforts to amend the Home Rule Act in the wake of Chadha, a decision that removed from the statute a mechanism that purported to control the degree

DRAFT

of discretion delegated by Congress. This unconstitutional device is no longer a compromise vehicle. It is the alternatives which our letter attempted to address and what our efforts should be directed toward.

Sincerely,

Robert A. McConnell
Assistant Attorney General

THE WHITE HOUSE

WASHINGTON

November 21, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: D.C. Chadha Bill

The D.C. Chadha bill controversy has entered a new round. By letter to Senator Mathias dated November 17, Mayor Barry proposed new legislative language purporting to resolve the bond issue while leaving the Congressional review issues for future consideration. Barry's new proposal would (1) validate previous D.C. Council acts and (2) specify that the existing legislative veto provisions in the Self-Government and Governmental Reorganization Act are severable from the rest of the Act. Barry asserts that this is the "minimum amendment necessary" to obtain an unqualified opinion from bond counsel. Chairman David Clarke of the D.C. Council has endorsed this approach.

The Mayor's latest proposal is clever in that it appears to resolve the bond issue and reserve the Congressional review questions, while in fact it gives the Mayor everything he wants across the board. Justice is convinced that the legislative veto provisions are unconstitutional. Barry's proposed severance clause would mean that the legislative veto provisions are simply dropped from the Act, leaving the provisions authorizing D.C. Council action intact. The net effect would be that Congress would be required to pass legislation disapproving D.C. Council acts to block them -- what the Mayor has wanted all along.

The only risk the Mayor is taking is that the courts will uphold the constitutionality of the legislative vetoes in the Act, on a theory affording Congress special powers over district affairs. Justice has reviewed and rejected such a theory, and the Chadha opinion itself does not seem open to such exceptions.

Attachment

THE DISTRICT OF COLUMBIA

WASHINGTON, D.C. 20004

MARION BARRY, JR.
MAYOR

November 17, 1983

Honorable Charles McC. Mathias
United States Senate
Washington, D. C. 20510

Dear Senator Mathias:

Per our discussion of Wednesday, November 16, 1983, I have met today with counsel representing the District of Columbia and its agencies and instrumentalities concerning the amendments which would be necessary to the District of Columbia Self-Government and Governmental Reorganization Act in order for bond counsel to be able to render unqualified approving opinions with respect to obligations issued by the District of Columbia and its agencies and instrumentalities. During our meeting bond counsel unanimously determined that the following language was the minimum amendment necessary in order to be able to issue their unqualified approving opinions:

Sec. 1. Any law which was passed by the Council of the District of Columbia prior to the date of the enactment of this Act is hereby deemed valid, in accordance with the provisions thereof.

Sec. 2. Part F of title VII of such Act is amended by adding at the end thereof the following new section:

Severability

Sec. 762. If any particular provision of this Act, including any provision of this Act with respect to adoption of resolutions by one or both Houses of Congress disapproving acts of the Council, or the application thereof to any person or circumstances, is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Attached you will find a letter of concurrence signed by bond counsel.

The adoption of this language only resolves the matter of the ability of the District to issue bonds and does not change the procedures for Congressional review of Council acts and defers that issue for future consideration.

I have discussed this approach with the Chairman of the Council, and he and I are in agreement. We strongly urge that this matter be resolved by the Congress prior to the forthcoming recess. Without this legislation, our bond program would continue to be impossible to implement. I also ask that this letter and its attachment be made part of the record of this legislation.

Sincerely,

Marion Barry, Jr.
Mayor

November 17, 1983

Honorable Charles McC. Mathias
Chairman
Subcommittee on Governmental Efficiency
and the District of Columbia
Washington, D. C. 20510

Dear Senator Mathias:

We have reviewed the suggested amendments set forth in Mayor Marion Barry's letter to you, dated November 17, 1983 and as bond counsel to the city and its agencies and instrumentalities, would be willing to render our unqualified approving opinions if such amendments were enacted by the Congress.

Sidley & Austin

By: _____

Kutak, Rock & Huie

By: _____

Finley, Kumble, Wagner,
Heine, Underberg, Manley & Casey

By: _____

Melrod, Redman & Gartlan

By: _____

Reynolds & Mundy

By: _____

Chapman, Norwood & Vaughters

By: _____

COUNCIL OF THE DISTRICT OF COLUMBIA

WASHINGTON, D. C. 20004

17 November 1983

The Honorable Charles McC. Mathias, Jr.
United States Senate
376 Russell Building
Washington, D. C. 20510

Dear Senator Mathias:

I write first to thank you for your steadfast support of Home Rule and of the good-faith agreements which were worked out by the Executive Branch and myself regarding the legislation pending upon the Hill to address the questions raised by the decision of the Supreme Court in INS vs. Chadha. It has been reassuring throughout this process to know of your support.

The Mayor has shared with me the attached draft which he has indicated to me that he is sending to you as a proposed substitute for the legislation now pending. The purpose of this substitute would be to address the issues associated with the issuance of bonds by providing a severability clause in the Home Rule Act which is now absent and by revalidating all prior laws of the Council that might be endangered by the lack of a severability clause.

I further understand that the purpose of this substitute is to address only those questions which are necessary for the procurement of unqualified bond counsel opinions enabling the prompt issuance of bonds by the District of Columbia. I further understand that all issues associated with the character of Congress' review of the Council of the District of Columbia legislation by the Congress as well as issues associated with Council review of Executive Branch actions by resolution will be postponed.

I concur with the Mayor's proposed substitute based upon the foregoing reasons. With respect to the Chadha issue which

would be postponed, I continue to believe that Chadha probably does not apply to the District of Columbia but that if any resolution of the issue is to be undertaken by the Congress, such a resolution of the issues ought to include the language agreed to by the Deputy Mayor and myself and transmitted to Senator Eagleton on September 28, 1983. And, as you would expect, I continue to adamantly recommend that any resolution of the Chadha issue reject the recommendation of the United States Department of Justice that any changes to the review procedures involve an affirmative joint resolution of approval of Council criminal law-legislation. You have been a strong advocate of both of these positions, and I hope that you will continue to be so.

Thank you again for being of assistance to the city in this regard.

Sincerely,

David A. Clarke
Chairman

DAC/bjm

Enclosure

Statement for the Record

The amendments made by S. are intended to establish that any provision of the District of Columbia Self-Government and Governmental Reorganization Act which may be determined to be invalid will be severable from the remaining provisions of that Act, and that all laws of the District of Columbia which became effective prior to the effective date of the amendments made by S. are entitled to the benefit of the amendments as if those amendments had been a part of the original Self-Government and Governmental Reorganization Act.

THE WHITE HOUSE

WASHINGTON

November 17, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Mayor's Response to the Administration Position on H.R. 3932

Mayor Barry has written the President to object to the McConnell letter on H.R. 3932, the D.C. Chadha bill. The mayor attempts to refute the contention that criminal law is accorded special treatment under existing law through highly selective quotation from the legislative history of the Home Rule Act. At no point does he address the basic fact that under existing law Council acts in the criminal area are subject to a one-house veto while all other acts are subject to a two-house veto, the clearest evidence of the "special treatment" referred to in the McConnell letter.

The mayor's letter also maintains that the McConnell letter "relied heavily" on a court decision, Palmore v. United States, 411 U.S. 389 (1973), and criticizes that supposed reliance. In fact, the decision was cited once, in passing, in the course of establishing that the District court system is a federal court system with judges appointed by the President. The mayor's letter does not otherwise respond to the substance of the McConnell letter, although it concludes by criticizing the Administration's delay in presenting its position and maintaining that members of the Administration "misled" Mayor Barry and his staff.

As I mentioned this morning, I think it best to redirect the District's objections to the Justice Department, not only to minimize the fallout but also because Justice (through the U.S. Attorneys Office) originated the position and stands to lose the most if it does not prevail. A referral memorandum and acknowledgment letter is attached. If you agree, I will let OMB know that this is how we are handling the mayor's letter.

Attachment

THE WHITE HOUSE

WASHINGTON

November 17, 1983

Dear Mayor Barry:

Thank you for your letter of November 15 to the President, concerning the Administration's position on H.R. 3932. That position was announced in a letter from Assistant Attorney General Robert A. McConnell.

I have referred your letter to Assistant Attorney General McConnell for consideraton and direct reply. The Department of Justice is most directly involved in these issues and accordingly is in the best position to respond to your expressed concerns.

Thank you for sharing these concerns with us.

Sincerely,

Orig. signed by FFF

Fred F. Fielding
Counsel to the President

The Honorable Marion Barry
Mayor of the
District of Columbia
Washington, D.C. 20004

FFF:JGR:aea 11/17/83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 17, 1983

Dear Mayor Barry:

Thank you for your letter of November 15 to the President, concerning the Administration's position on H.R. 3932. That position was announced in a letter from Assistant Attorney General Robert A. McConnell.

I have referred your letter to Assistant Attorney General McConnell for consideraton and direct reply. The Department of Justice is most directly involved in these issues and accordingly is in the best position to respond to your expressed concerns.

Thank you for sharing these concerns with us.

Sincerely,

Fred F. Fielding
Counsel to the President

The Honorable Marion Barry
Mayor of the
District of Columbia
Washington, D.C. 20004

FFF:JGR:aea 11/17/83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 17, 1983

MEMORANDUM FOR ROBERT A. MCCONNELL
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGISLATIVE AFFAIRS

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

SUBJECT: Mayor's Response to the Administration Position on H.R. 3932

The attached letter from the Mayor, together with a copy of my reply, is referred to you for your consideration and direct reply. As I noted with respect to the similar letter from the D.C. Council, I think it best to keep this matter at the Justice Department to the extent possible.

Attachment
FFF:JGR:aea 11/17/83
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 17, 1983

MEMORANDUM FOR ROBERT A. MCCONNELL
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGISLATIVE AFFAIRS

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Mayor's Response to the Administration Position on H.R. 3932

The attached letter from the Mayor, together with a copy of my reply, is referred to you for your consideration and direct reply. As I noted with respect to the similar letter from the D.C. Council, I think it best to keep this matter at the Justice Department to the extent possible.

Attachment
FFF:JGR:aea 11/17/83
cc: FFFielding/JGRoberts/Subj/Chron

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO	Mike Horowitz	Take necessary action	☐
	Connie Horner	Approval or signature	☐
	John Roberts ✓	Comment	☐
	John Cooney	Prepare reply	☐
	Anna Dixon	Discuss with me	☐
		For your information	☐
		See remarks below	☐
FROM	Jan Fox (x4874)	DATE	11-17-83

REMARKS

For your information, attached is Mayor Barry's response to the Justice report on H.R. 3932, D.C. Chadha amendments. The letter I sent you Tuesday was from the D.C. Council.

OMB FORM 4
Rev Aug 70

LEGISLATIVE VETO WORKING GROUP

Michael Horowitz, General Counsel, OMB

John Roberts, White House Counsel's Office
Randall Davis, White House Legislative Affairs
Bob Kabel, White House Legislative Affairs

Will Taft, General Counsel, DOD

Davis Robinson, Legal Adviser, State
Dan McGovern, State
Mike Matheson, State
Ron Bettauer, State

Robert McConnell, DOJ, AAG, OLA
Michael Dolan, DOJ, OLA
Marshall Cain, DOJ, OLA

Paul McGrath, DOJ, AAG, Civil
Douglas Letter, DOJ, Civil
Carolyn Kuhl, DOJ, Civil

Theodore Olson, DOJ, AAG, OLC
Ralph Tarr, DOJ, OLC
Larry Simms, DOJ, OLC
Robert Shanks, DOJ, OLC
Barbara Price, DOJ, OLC

Mike Uhlmann, White House,
Special Assistant to the President

David Slate, General Counsel, EEOC

THE DISTRICT OF COLUMBIA

MARION BARRY JR.
MAYOR

WASHINGTON, D.C. 20004

November 15, 1983

The Honorable Ronald Reagan
President
United States of America
The White House
Washington, D.C.

Dear Mr. President:

We have been asked to comment on the Administration's draft position statement on H.R. 3932, a bill "to amend the District of Columbia Self-Government and Governmental Reorganization Act, and for other purposes". This legislation is designed to cure possible unconstitutional legislative veto provisions in the District of Columbia's Home Rule Act by changing those veto provisions to joint resolutions of the Congress.

The Administration's position, drafted by the Department of Justice and concurred in by OMB, opposes enactment of H.R. 3932 unless it is amended to provide that laws passed by the Council of the District of Columbia amending Titles 22, 23 and 24 of the D.C. Code, our criminal code, only take effect upon passage of a joint resolution of approval by the Congress.

We are unalterably opposed to the Administration's position. Such an amendment would represent a giant step backward in our quest for Home Rule for the District of Columbia.

The Administration's position is based largely on a theory that the criminal laws of the District would require "special treatment" in any legislation which amends the Self-Government Act to "cure" problems traceable to the decision in Immigration and Naturalization Service v. Chadha 103 S. Ct. 2764 (1983).

Contrary to the Department of Justice's analysis, no reading of the legislative history of section 602(a)(9) of the Self-Government Act or the supporting case law suggests the validity of a theory of "special treatment" of the District's criminal laws under which the jurisdiction and authority of the Council of the District of Columbia over such laws would be curbed drastically or eliminated altogether. The original draft of section 602(a)(9) of the Self-Government Act contained an absolute prohibition on the Council's enacting any law with respect to titles 22, 23 and 24 of the D.C. Code. However, when Public Law 93-198 (the Self-Government Act) was adopted, section 602(a)(9) contained not an absolute prohibition but merely a 24 month postponement of the authority; this was subsequently extended for an additional 24 month period.

Crucial to note, is the fact that the time limitation was just that -- a "time constraint" and not an absolute prohibition. See McIntosh v. Washington, D.C. App., 395 A.2d 744 (1978) and District of Columbia v. Sullivan, D.C. App., 436 A.2d 364, 366 (1981). Congress wanted the Council to have the power to change the criminal laws subject only to a reservation of some time so that it could consider the findings of its Law Revision Commission (for the District of Columbia), which had been asked to examine all the District's criminal laws, before determining whether the Congress itself would amend the District's criminal law. The legislative history and the cases cited above clearly reveal that the Congress of the United States made an affirmative determination that the Council should have this authority, albeit delayed, to enact criminal laws of the District, subject to a one house veto of the Congress.[1]

1/ See House Committee on the District of Columbia, 93d Cong. Home Rule for the District of Columbia, 1973-1974 (Comm. Print 1974):

1. Rep. Adams (House Floor)

> We have said also that there should not be a change in the criminal statutes. The reason for that is that there is proposed before the Committee on the District of Columbia at the present time a commission to review the criminal code. There will be hearings on that, so that for the present time we know where we are with it and can move on that subject without bringing it into this bill, which basically provides a structure of locally elected government. (P. 217)

(footnote continued on next page)

In developing its "special treatment" position, the Department of Justice relies heavily on the case of Palmore v. United States, 411 U.S. 389. Nonetheless, it is instructive to note that Palmore was decided prior to the adoption of the Self-Government Act. But even under Palmore, the Supreme Court of the United States clearly recognized that Congress in the District of Columbia Court Reform and Criminal Procedure Act of 1970 intended "to establish an entirely new court system with functions essentially similar to those of the local courts

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footnote 1/ continued

2. Conference Committee Report:

The Conference Committee also agreed to transfer authority to the Council to make changes in Titles 22, 23 and 24 of the District of Columbia Code, effective January 2, 1977. After that date, changes in Titles 22, 23 and 24 by the Council shall be subject to a Congressional veto by either House of Congress within 30 legislative days. The expedited procedure provided in section 604 shall apply to changes in Titles 22, 23 and 24. It is the intention of the Conferees that their respective legislative committees will seek to revise the District of Columbia Criminal Code prior to the effective date of the transfer of authority referred to. (pp. 3013-3014).

3. Rep. Diggs ("Dear Colleague" letter)

The House passed bill prohibited the Council from making any changes in Titles 22, 23 and 24 of the D.C. Code. It was felt that since the District criminal code has not been substantially reviewed and revised for more than seventy years, this provision would hamper constructive revision of the criminal code. Since the District Committee is expected to act in the very near future on H.R. 7412, a bill which I introduced to create a law revision commission for the District, the Conference compromise was adopted. The law revision commission will be given a mandate to turn initially to revision of the D.C. Criminal Code and report its recommendations to the Congress. The Congress will then have a chance to make the much needed revision of the criminal code. This should take no longer than two years. Subsequent to that action, it seems appropriate and consistent with the concept of self-determination that the Council be given the authority to make whatever subsequent modifications in the criminal code as are deemed necessary. (pp. 3041-3042).

found in the 50 states of the Union with responsibilities for trying and deciding those distinctively local controversies that arise under local law, including local criminal laws having little, if any, impact beyond the jurisdiction." 411 U.S. at 409. Therefore, Congress created local courts designed to handle matters of local concern, including local criminal law.

More importantly, in a later case - clearly decided after the effective date of the Self-Government Act - the Supreme Court of the United States in Key v. Doyle, 434 U.S. 66 (1977), not only clarified its decision in Palmore, but also clearly recognized the District's courts as "local courts" which invariably pass on "a law of exclusively local application," and that such a law cannot be construed as a "statute of the United States." See 434 U.S. at 66, 67 and 69. See also NOTE, "Federal and Local Jurisdiction in the District of Columbia, 92 Yale Law Journal 292 (1982), which states in inter alia:

> In the Home Rule Act, Congress did in fact delegate to the current District local government the power to define local offenses, and there is little doubt that this delegation is constitutional. The nondelegation justification for continuing to categorize local offense as "crimes against the United States", therefore has been removed. 92 Yale Law Journal at 303.
>
> ...Congress acts as a state-like sovereign when enacting local law. D.C. Code matters, therefore, do not "arise under" the "laws of the United States" and D.C. Code offenses are crimes against the District of Columbia, not against the United States. Since the real party in interest in local prosecutions is the District of Columbia, in prosecuting local crimes in the District's United States Attorney acts not in his capacity as a federal officer, but in a local capacity. 92 Yale Law Journal at 294-295.

Finally, one of the arguments advanced for the Adminstration's position is protection of the federal interest. With all due respect, enactment of H.R. 3932 in no way lessens Congress' inherent authority under Article 1, section 8, clause 17 of the Constitution.

What is also disturbing about the Administration's position is that it comes at the last possible moment. The District has actively sought to resolve the issues raised by the Supreme Court decision in INS v. Chadha since August, because the questions about the constitutionality of our Home Rule Charter have effectively precluded the city from issuing revenue bonds. We wanted to have this matter resolved before the Congress adjourned.

In October the House passed legislation, H.R. 3932. Initially, OMB advised the House District Committee that it had no objection to the legislation. On the day of the floor action, it withdrew its no objection, but did not oppose the legislation at that time nor did the Administration object when the Senate Governmental Affairs Subcommittee on Government Efficiency and the District of Columbia considered virtually identical legislation. Upon hearing from OMB about ten days ago that the Administration had problems with the legislation, we repeatedly sought to obtain a clear statement of its position. Quite frankly, Mr. President, I am distressed to say that members of your Administration were less than candid. They misled me and my staff and it was not until last evening at about 6:45 p.m. that I finally received the Administration's position.

As Mayor of the District of Columbia and an ardent supporter of full home rule for the city, I must state unequivocally that I cannot support your Administration's position. I must note also, that because we will be unable to go to the bond market without some legislation, it will be necessary for the city to continue to borrow from the U.S. Treasury to meet our obligations.

In sum, the Administration's position effectively revokes substantial authority granted the city under the Home Rule Act and, at the same time, significantly undermines the financial independence of the District.

I urge you to reconsider the Adminstration's position and to support H.R. 3932.

Sincerely,

Marion Barry, Jr.
Mayor

It is clear that there are circumstances in which Congress has the power to legislate and the States do not. These circumstances include, at a minimum, matters of national concern under the Constitution. Moreover, with regard to legislative authority under the Fourteenth Amendment in particular, the history and purpose of that Amendment demonstrate the intent to expand federal power at the expense of the States. For example, the power of the State itself became more subject to control by Congress pursuant to § 5. See, e.g., Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976)("[W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.")

In the context of S. 139, it is not necessary to explore the full extent of congressional power under § 5 because we do not believe that removing the remedial authority of the inferior federal courts to order reassignment of students and concomitant transportation represents an appropriate exercise of Congress's § 5 power. The authority granted under § 5 is to enforce the provisions of the Fourteenth Amendment. 14/ For purposes relevant here, the essential language of the Amendment is: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." These prohibitions have been consistently interpreted to apply only against state action. See, e.g., Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). Thus, we believe that if the prohibition of student transportation based on race was intended to enforce the right of equal protection under the Fourteenth Amendment, the prohibition would be directed to the States and school districts, and not to the inferior federal courts. The power to legislate to enforce the obligation of the States not to deprive the citizens of equal protection would simply not seem broad enough to encompass legislation regarding the powers of the federal courts.

14/ The discussion, supra, in text that the power to "enforce" cannot be used to "restrict, abrogate, or dilute" Fourteenth Amendment rights as recognized by the Supreme Court is fully applicable here.