THE WHITE HOUSE

WASHINGTON

August 31, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Article on Legislative Acquiescence as a Tool of Statutory Interpretation: An Affront to the Constitution, Logic, and Common Sense

Bruce Fein has asked for our views on a draft article he has authored criticizing the doctrine of legislative acquiescence as a tool for statutory interpretation. The article reflects both the strengths and weaknesses of Bruce's crystalline logic: it is clear and forceful but somewhat brittle in its inflexibility.

When invoking the doctrine of legislative acquiescence, a court confronted with a question of statutory interpretation gives weight to what Congresses subsequent to the enacting Congress have said on the question, or accords significance to the fact that subsequent Congresses have been aware of certain interpretations, by courts or agencies, and have not taken action to overturn these interpretations. Fein persuasively argues that according weight to the views of subsequent Congresses permits those Congresses, in effect, to legislate without adhering to the Constitutional formula for legislation, including, most significantly, passage by both Houses and presentment to the President. Fein stresses the incompatability of the doctrine of legislative acquiescence with the Court's recent pronouncements in Chadha.

While I will not feign objectivity on the point, I do have a strong objection to Fein's citation of Justice Rehnquist's opinion for the Court in Dames & Moore v. Regan, 453 U.S. 654 (1981), as an example of the offensive doctrine of legislative acquiescence. Dames & Moore, the Iranian assets case, considered the constitutionality of an exercise of executive power within the framework of the analysis announced by Justice Jackson in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)(concurring opinion). As noted by Justice Rehnquist, that analysis turns in large measure upon a consideration of whether the challenged action by the President in the uncertain area of concurrent authority with Congress was taken with Congressional acquiescence and approval or in the face of Congressional

opposition. Reliance on evidence of Congressional acquiescence in such a context is a far cry from reliance on such acquiescence as evidence of legislative intent on particular issues of statutory interpretation. Unless Fein is willing to take on Jackson's time-tested analysis in the Steel Seizure case, Dames & Moore should not be included in Fein's rouges' gallery of examples.

I have attached a memorandum for your review and signature. If you are reluctant to become involved, I will be happy to respond directly.

Attachments

THE WHITE HOUSE

WASHINGTON

August 31, 1983

MEMORANDUM FOR BRUCE E. FEIN
GENERAL COUNSEL
FEDERAL COMMUNICATIONS COMMISSION

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

SUBJECT: Article on Legislative Acquiescence as a Tool of Statutory Interpretation: an Affront to the Constitution, Logic, and Common Sense

Thank you for sending us a copy of your draft article. The article presents a forceful case against judicial reliance on the doctrine of legislative acquiescence as a tool of statutory interpretation. I found particularly interesting your exposition of the manner in which the doctrine of legislative acquiescence is fundamentally at odds with INS v. Chadha.

Although I have not been able to review the draft with sufficiently "strict scrutiny" to offer detailed suggestions, it did strike me as inapt to include Dames & Moore v. Regan, 453 U.S. 654 (1981), in the "rogues' gallery" of cases relying on the doctrine of legislative acquiescence as a tool of statutory interpretation. Dames & Moore considered the constitutionality of an exercise of executive power within the framework of the analysis announced by Justice Jackson in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)(concurring opinion). As noted by Justice Rehnquist, that analysis turns in large measure upon a consideration of whether the challenged action by the President in the uncertain area of concurrent authority with Congress was taken with Congressional acquiescence and approval or in the face of Congressional opposition. Reliance on evidence of Congressional acquiescence in such a context is a far cry from reliance on such acquiescence as evidence of legislative intent on particular issues of statutory interpretation. For this reason, the analysis in Dames & Moore strikes me as qualitatively different from that in the other opinions you cite.

FFF:JGR:aea 8/31/83

cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

August 31, 1983

MEMORANDUM FOR BRUCE E. FEIN
GENERAL COUNSEL
FEDERAL COMMUNICATIONS COMMISSION

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cc: FFFielding/JGRoberts/Subj/Chron

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

August 26, 1983

IN REPLY REFER TO:

166176 cu

I would appreciate any comments you would have on the enclosed article.

Bruce E. Fein

LEGISLATIVE ACQUIESCENCE AS A TOOL OF STATUTORY INTERPRETATION: AN AFFRONT TO THE CONSTITUTION, LOGIC, AND COMMON SENSE 1/

In recent years, the Supreme Court has increasingly invoked a doctrine styled legislative acquiescence as an aid to the interpretation of federal statutes. 2/ The doctrine bestows a special presumption of correctness on agency or judicial interpretations of statutes if Congresses subsequent to the enacting Congress have not disapproved of those interpretations by explicit statutory amendment. Justices popularly labelled as conservative, moderate, or liberal have all unfurled the doctrine and accepted its legitimacy. 3/ Reliance on legislative acquiescence has been employed when an agency or court construction of a statute has been the subject of Congressional hearings, 4/ has been disavowed in bills that were not enacted, 5/ or have been deemed otherwise considered by Congresses subsequent to the enacting Congress 6/ without provoking a statutory amendment.

In none of these cases did the Congresses postdating the enacting Congress incorporate the agency or court construction of the statute in a legislative bill that was presented to the President for approval or veto. According to the recent Supreme Court decision in Immigration and Naturalization Service v. Chadha, 7/ a subsequent Congress may create statutory policy that amplifies or varies the policy of an enacting Congress only by following this constitutionally prescribed procedure for the exercise of legislative power.

The Supreme Court has never offered any constitutional or other theory to justify the doctrine of legislative acquiescence. This taciturnity is befuddling because the doctrine collides with constitutional norms that limit the power of Congress to make or interpret laws, either by amending statutes or otherwise.

Under the Constitution, each Congress has a life span of only two years; legislative proposals must be approved by both the House and Senate during a single Congress, and be signed by the President 8/ or his veto overridden, to achieve the status of law. Subsequent Congresses are not extensions of any previous Congress. They have a constitutionally discrete and separate existence regarding the making of statutory law. A bill passed by the House in one Congress does not become law if passed by the Senate in a subsequent Congress and then signed by the President. 9/ Whatever views subsequent Congresses may entertain regarding the meaning of existing laws, those views remain a statutory nullity under the Constitution unless approved by the House and Senate during a single Congress in the form of a bill and presented to the President for his signature or veto.

Moreover, no Congress is authorized to perform the judicial function of interpreting statutes. Separation of powers principles ordain that conclusion. As was explained in Federalist 47, Congress cannot perform any judiciary act, for were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control. This constitutional understanding was endorsed by the

Supreme Court in United States v. Klein. 10/ There the Court held unconstitutional an attempt by Congress to prescribe the evidentiary weight of a pardon in cases pending before the judiciary concerning the interpretation of the Abandoned and Captured Property Act.

In sum, Congress may change the meaning of a statute only by amending it; and, Congress is prohibited from any interpretive powers under separation of powers principles. The doctrine of legislative acquiescence flouts these constitutional rules, however, by conferring special deference to the interpretation of statutes by Congresses subsequent to the enacting Congress when such interpretations have not been presented to the President in the form of legislation and enacted into law.

Legislative acquiescence might nevertheless retain justification as an aid to judicial interpretation of statutes if Congresses subsequent to the enacting Congress were both endowed with exceptional understanding of existing statutes and possessed incentives to rectify any misinterpretation by agencies or courts. But neither of these conditions obtains.

Congresses postdating an enacting Congress ordinarily lack special insight into the intent of the latter. Congressional membership changes every two years. Some incumbents retire, others are defeated at the polls, and others die. In recent decades, the average change in membership from Congress to Congress has approximated fifteen percent. 11/ Furthermore, the chairmanships, compositions, and staffs of House and Senate committees constantly undergo alterations. The 98th Congress,

for instance, witnessed over a 20 percent change in Committee chairmanships when matched with the 97th Congress. 12/ This fact is significant because ordinarily expertise regarding any area of law is acquired by a Member only in Committee work. But because Committee membership is constantly in flux, any general assumption of accumulated expertise by Committee Members as a whole seems dubious. In any event, any expertise that does exist is confined to the Committee, and does not inform the entire membership of Congress. It is the acquiescence of Congress as a whole, however, that triggers the doctrine of legislative acquiescence.

Accordingly, there seems no foundation for believing that subsequent Congresses are possessed of any special insight into or understanding of the intent or meaning of statutes enacted by an earlier Congress. Indeed, the Supreme Court apparently does not assume any special congressional knowledge when it invokes the doctrine of legislative acquiescence because the doctrine is employed even when there is no possibility of such knowledge.

No Members of the 1980 Congress, for example, were alive when the 1871 Civil Rights Act was enacted. The Court, nevertheless, maintained in Patsy v. Board of Regents 13/ that the views of the latter Congress as to the meaning of the 1871 statute was persuasive evidence that no exhaustion of state remedies was intended by the 1871 Congress as a predicate for initiating a federal civil rights suit under 42 U. S. Code 1983. Likewise, no Members of Congress in 1977 occupied a congressional seat in 1929 during the deliberations and enactment

of the Census Act. They thus lacked any unique insight into the meaning of the Act. Chief Justice Burger, speaking for a unanimous court in Baldridge v. Shapiro 14/, nonetheless, insisted that the rejection of the 1977 Congress of proposals to allow local officials circumscribed access to census data was evidence that the 1929 Congress intended confidentiality for the data.

If the philosophy or political coloration of subsequent Congresses diverges from that of the enacting Congress, the subsequent Congress may lack any incentive to disapprove an incorrect agency or court interpretation of an existing statute; such subsequent Congresses might actually applaud an erroneous interpretation that champions a policy that could not successfully surmount the obstacles to legislative enactment if the error were incorporated in a bill. Thus, even assuming Congress possessed unique expertise regarding the meaning of existing statutes, there is no reason to believe that such expertise invariably would be employed to denounce misinterpretations by agencies or courts.

To the contrary, the doctrine of legislative acquiescence lends itself to manipulation by shrewd Congressmen to etch erroneous interpretations of statutes by agencies or courts into law outside the constitutional method for amending statutes. A Committee Chairman can orchestrate hearings or reports that approve of agency or court constructions that are unfaithful to the intent of the enacting Congress yet further policies desired by the Chairman. Any Member of Congress can introduce a bill

that would explicitly repudiate an incorrect interpretation of a statute by an agency or court, but with the intent of killing the proposal in order to establish a basis for invoking the doctrine of legislative acquiescence.

Even if it were invulnerable to manipulation, the doctrine is faulty because it conflicts with common knowledge and common sense. The doctrine assumes that Members of Congress are informed of the 250,000 federal court decisions and countless agency rulings that cascade annually. Every Member, however, would probably testify under oath that their information of such matters is extremely circumscribed. The doctrine assumes that Members are knowledgeable of all bills introduced during a two-year Congress, and thus failure to enact a bill that would alter an agency or court interpretation of a statute signifies agreement with that interpretation. Members, however, ordinarily are cognizant only of bills within the jurisdiction of the Committees on which they sit. The doctrine assumes that views contained in a Committee Report on the meaning of an existing statute represent the views of the entire Congress, although the Report is never put to a vote. Members of Congress, however, frequently disagree or are ignorant of views contained in such Reports.

The doctrine further assumes that the failure of Congress to reject by statute an agency or court interpretation of law indicates agreement with that interpretation. But Congressional inaction can be ascribed with equal plausibility to a consensus among Members that correcting a particular misinterpretation of a

statute is not a high priority, or to the view that a bill that would rectify an error should be rejected for poor draftsmanship 15/, or to a desire to avoid heated dispute or acrimony that could be aroused by Congressional action.

Finally, the doctrine of legislative acquiescence seems fatally flawed because it denies weight to presidential approval or disapproval of interpretations of statutes. To the extent that statutory interpretation is a form of lawmaking, 16/ that power must be shared by Congress and the President. The Supreme Court concluded in Chadha that any lawmaking decisions of Congress must be presented to the President for his approval or veto in order to have the force of law. 17/ This prescription for the exercise of legislative power contained in Art. I, §§ 1, 7 of the Constitution, the Court declared, excludes the use of any other procedure. 18/ Congress, the Court continued, must abide by determinations of policy incorporated in statutes, unless the policies are legislatively altered or revoked. 19/ Furthermore, mere silence or inaction by Congress can never be a constitutional basis for enacting or amending a statute, the Court explained, because otherwise the President would be excluded from the exercise of legislative power. 20/

The doctrine of legislative acquiescence seems flatly contrary to Chadha because it ascribes legislative significance to action or inaction by Congress that is never ultimately presented to the President for his approval or veto. The President, for instance, has no opportunity to veto House or Senate hearings or Committee Reports; nor can the President veto

the failure of Congress to enact a bill which the President thinks would correct a judicial misinterpretation of a statute.

The Court held in Chadha that the President is an indispensable partner with Congress in the exercise of legislative power. The Court's refusal to establish a doctrine of presidential acquiescence in the interpretation of statutes of equal dignity with the doctrine of legislative acquiescence seems a conundrum. 21/ Why should not the views of Presidents who accede to office subsequent to the enactment of a statute as to the correctness of its interpretation by an agency or court be entitled to the same weight in a judicial forum as the views of Congresses subsequent to the enacting Congress?

If, as the Founding Fathers hoped, deliberative forces are to prevail over the arbitrary in the administration of the law, 22/ the Supreme Court owes the people and its sister branches of government a rational explanation for employing the doctrine of legislative acquiescence.

FOOTNOTES

1. The topic addressed in this article is part of a generic problem of canons of statutory interpretation that can be ascribed to the failure of federal courts to announce understandable principles to inform the judicial task, See e.g. Landis, A Note on "Statutory Interpretation," 43 Harv. L. Rev. 886 (1980); Silving, A Plea for a Law of Interpretation, 98 U. Pa. L. Rev. 499 (1950); Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527 (1947); Corry, Administrative Law and the Interpretation of Statutes, 1 U. Toronto L. J. 286 (1936); Radin, Statutory Interpretation, 43 Harv. L. Rev. 836 (1930); McCallum, Legislative Intent, 75 Yale L.J. 754 (1966); Note: Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court, 95 Harv. L. Rev. 892 (1982); Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195 (1983).

2. See e.g., Bob Jones University v. United States, 103 S. Ct. 2017, 2033 (1983); Hillsboro National Bank v. Commissioner of Internal Revenue, 103 S. Ct. 1134, 1153 (1983); Lockheed Aircraft Corp. v. United States, 103 S. Ct. 1033, 1037 n. 6 (1983); Herman & MacLean v. Huddleston, 103 S. Ct. 683, 689 (1983); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 379-382 (1982); Dames & Moore v. Regan, 453 U.S. 654, 678-682 and n. 10 (1981); Haig v. Agee, 453 U.S. 280, 300-301 (1981); United States v. Rutherford, 442 U.S. 544, 554 n. 10 (1979); Lorilland v. Pons, 434 U.S. 575, 580-581 (1978); Board of Governors of the Federal Reserve System v. First Lincolnwood Corp., 439 U.S. 234, 251-252 (1978).

3. Justice Rehnquist invoked the legislative acquiescence doctrine in Dames & Moore v. Regan, supra; Chief Justice Burger utilized the doctrine in Bob Jones University v. United States, supra and Haig v. Agee, supra, and implicitly in Morrison-Knudsen Construction Company v. Director, Office of Worker's Compensation Programs, 103 S. Ct. 2045, 2050-2053 (1983); Justice O'Connor applied the doctrine in Hillsboro National Bank v. Commissioner of Internal Revenue, supra, Director, Office of Worker's Compensation Programs v. Perini North River Associates, 103 S. Ct. 634, 647-649 (1983), and Terrel H. Bell, Secretary of Education v. New Jersey and Pennsylvania, 103 S. Ct. 2187, 2194-2196 (1983); Justice Powell employed the doctrine in Lockheed Aircraft Corp. v. United States, supra; Justice Stevens trumpeted the legislative acquiescence doctrine in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, supra; Justice Marshall has relied upon that doctrine in Herman & MacLean v. Ralph E. Huddleston, supra, United States v. Rutherford, supra, and Lorilland v. Pons, supra; Justice White unfurled this doctrine in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381-383 (1969); Justice Blackmun applied the doctrine in North Haven Board of

Education v. Bell, 102 S. Ct. 1912 (1982); and Justice Brennan recognized the doctrine, although he questioned its particular application, in Haig v. Agee, supra at 313-318 (Brennan, J., dissenting).

4. Bob Jones University v. United States, supra at 2033.

5. Id.

6. Herman & MacLean v. Huddleston, supra; Haig v. Agee, supra; Dames & Moore v. Regan, supra.

7. 103 S. Ct. 2764 (1983)

8. Article 1, Section 7 of the Constitution further provides that a bill shall become law without the President's signature "if [it] shall not be returned by the President within ten days (Sunday excepted) after it shall have been presented to him ... unless Congress by their Adjournment prevents its Return..."

9. For instance, during the 91st and 92nd Congresses several bills were introduced in both the House and Senate to create either a Department of Consumer Affairs or a Consumer Protection Agency. During the 91st Congress, 2nd Session, the Senate passed a Consumer Protection Agency (CPA) bill, S. 4459; a similar bill, H.R. 6037, never left the House Rules Committee. The following year in the 92nd Congress, 1st Session, the House passed a CPA bill, H.R. 10835, while the Senate bill was not reported out of Committee during that session. See, Leighton, The Consumer Protection Agency Bill - Ghosts of Consumerists Past, Present, and Future, 28 Food Drug Committee L. J. 21 (1973); Leighton, Consumer Protection Agency Proposals: The Origin of the Species, 25 Admin. L. Rev. 269 (1973). Neither bill could be signed by the President because the House and Senate had failed to approve the same bill during a single Congress.

10. 13 Wall. 128 (1872). See also, Immigration and Naturalization Service v. Chadha, supra at 2787-2788 (Powell J., concurring).

11. Between the end of World War II and 1970, each Congress has had an average of approximately 78 new members; that figure constitutes 14.58% of Congress' membership. Since 1970, each Congress has had an average of approximately 87.5 new members, or a membership change of 16.36%. See, "Turnover in Membership," Congressional Quarterly Guide to Congress, 3rd. Ed, 1982.

12. A comparison between the chairmanships of the House and Senate subcommittees of the 97th and 98th Congresses reveals that the House had approximately a 21% change while the Senate had a 23% change. These figures do not consider the fact that new subcommittees were formed and old ones abolished.

13. 102 S. Ct. 2557, 2560-2566 (1982).

14. 102 S. Ct. 1103, 1110-1112 (1982)

15. Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195, 205-206 n. 90 (1983).

16. Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J. dissenting).

17. 103 S. Ct. at 2782.

18. 103 S. Ct. at 2784.

19. 103 S. Ct. at 2786.

20. 103 S. Ct. at 2787-2788 n. 22.

21. In Bob Jones University v. United States, supra, the Court relied heavily upon abortive Congressional efforts over a decade to amend a judicial interpretation of Section 501(c)(3) of the Internal Revenue Code as a basis for accepting that interpretation as correct, but failed to consider whether Presidents during that period subscribed to that judicial interpretation.

22. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).