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Date: 5/26/98

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1. memo	John G. Roberts ro Fred F. Fielding re Legislative Veto in Nuclear Waste Policy Act, 2p.	12/13/82	P5 CB 12/14/00

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]
- P-1 National security classified information [(a)(1) of the PRA].
- P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
- P-3 Release would violate a Federal statute [(a)(3) of the PRA].
- P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA].
- P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA].
- P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA].

C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]
- F-1 National security classified information [(b)(1) of the FOIA].
- F-2 Release could disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA].
- F-3 Release would violate a Federal statue [(b)(3) of the FOIA].
- F-4 Release would disclose trade secrets or confidential commercial or financial information [(b)(4) of the FOIA].
- F-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA].
- F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
- F-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
- F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO John Roberts

White House Counsel's Office

Take necessary action	☐
Approval or signature	☐
Comment	☐
Prepare reply	☐
Discuss with me	☐
For your information	☐
See remarks below	☐

FROM John Cooney DATE 8/24

REMARKS

Reply letter (draft) to Rep. Levitas

A copy of our draft reply is attached for your information.

It has not yet been reviewed by Mike Horowitz.

Attachment

8/25 - May decide not to send Stahmer letter at all, at schmitt request to Administration. (per John Cooney)

OMB FORM 4
REV AUG 70

ltr: Chadha

Honorable Elliott H. Levitas
House Of Representatives
Washington, D. C. 20515

Dear Elliott:

I want to respond to the proposal, described in your thoughtful letter to the President, to convene a Conference on Power Sharing to discuss possible reactions to the Supreme Court's legislative veto decision.

As I have stated on many occasions since the legislative veto decisions were handed down, I fully share the belief that Congress and the Executive Branch should proceed carefully, in a spirit of cooperation and avoiding confrontation, to determine what institutional arrangements, if any, are appropriately modified in the post-Chadha period. As Administration witnesses have testified on numerous occasions before various committees in the past few weeks, the Executive Branch understands the importance of Congress' role in overseeing programs previously subject to legislative veto provisions and will continue to adhere to the parts of those statutes, in particular the Congressional reporting requirements, not invalidated by the Supreme Court decisions.

After careful consideration of your proposal, however, I am not persuaded that convening a formal conference, involving representatives of the two Branches and outside entities, would be a presently useful method of addressing these concerns. Proper institutional arrangements between Congress and the Executive Branch in a post-Chadha environment will, in my opinion, be best worked out by a gradual process of adjustment on a step-by-step basis, not through a formal conference which risks generalizing undue expectations and institutional posturing.

Such a conference, moreover, would be of particular concern if representatives of interest groups were formal participants. Such groups undoubtedly will have much to contribute to the discussion as it evolves, but I believe that it could be counterproductive if their contributions were sought through order for the formal mechanism of the conference you describe.

Although I do not share your enthusiasm for the Conference, you describe, I believe that you know of my continuing interest in this fundamental area of national concern, and of my continuing respect for your leadership role on the issue.

Let's keep talking.

Sincerely,

David A. Stockman
Director

THE WHITE HOUSE

WASHINGTON

August 31, 1983

Dear Stuart:

Thank you for sending me a copy of your recent address before the Kenna Club concerning the effect of the legislative veto decisions. I am looking forward to reading it, and I am certain that it will be helpful to us as we continue our own review of the impact of the decisions.

Thank you again for sharing your views on this important subject.

Sincerely,

Fred F. Fielding
Counsel to the
President

The Honorable Stuart M. Statler
Commissioner
U.S. Consumer Product Safety
Commission
Washington, D.C. 20207

FFF:JGR:aea 8/31/83

cc: FFFielding
JGRoberts
Subj.
Chron

Rec'd DO 8/31/83 aea

ID # 166175 CU

FG108

John

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Stuart M. Statler

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

Subject: His remarks before the Kenna Club
"Much ado about Legislative Veto."

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUHOll		ORIGINATOR	83/08/30			/ /
		Referral Note:				
CUAT18		D DD	83/08/30		S	83/09/09
		Referral Note:				DD
			/ /			/ /
		Referral Note:				
			/ /			/ /
		Referral Note:				
			/ /			/ /
		Referral Note:				

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

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

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
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5/81

U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D.C. 20207

August 26, 1983

166175 CU

Honorable Fred Fielding
Counsel to the President
The White House
Washington, D.C. 20500

Dear Fred:

In light of the recent Supreme Court decisions bearing on the use of legislative veto by the Congress, I have taken the liberty of forwarding a copy of my recent remarks before The Kenna Club in California. The speech details many of the ramifications which may flow from the Court's rulings. It urges that before taking any precipitous action to "get back" any purportedly lost authority, Congress carefully examine and improve upon its existing means of oversight, or consider its past delegations of authority to the Executive branch.

I hope my comments may prove useful to you in your analysis of the complex legislative veto matter.

Sincerely,

Stuart M. Statler
Commissioner

Enclosure: Speech

"MUCH ADO ABOUT...
LEGISLATIVE VETO"

REMARKS OF

COMMISSIONER STUART M. STATLER

U.S. CONSUMER PRODUCT SAFETY COMMISSION

BEFORE

THE KENNA CLUB
UNIVERSITY OF SANTA CLARA

AUGUST 26, 1983

ADEQUATE OPPORTUNITY TO COUNTER A LEGISLATIVE VETO.

OVERVIEW

UNDER THE SUPREME COURT'S LANDMARK RULING ON JUNE 23RD OF THIS YEAR IN IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA, (103 S. CT. 2764 (1983)) ("CHADHA"), LEGISLATIVE VETO -- UNCHECKED VETO AUTHORITY BY EITHER OR BOTH HOUSES -- WAS EFFECTIVELY LAID TO REST. THE CHADHA DECISION SWEPT AWAY A MEANS OF OVERSIGHT BY CONGRESS THAT HAD BECOME COMMONPLACE IN VIRTUALLY EVERY NOOK AND CRANNY OF GOVERNMENTAL ACTIVITY.

LEGISLATIVE VETO CAME TO THE FORE IN 1932, WHEN PRESIDENT HOOVER AGREED TO THE DEVICE IN EXCHANGE FOR BROAD POWERS TO REORGANIZE THE EXECUTIVE BRANCH. SINCE THEN, SEVERAL OTHER PRESIDENTS HAVE SIMILARLY AGREED TO SWAP BROADSCALE AUTHORITY TO REORGANIZE THE STRUCTURE OF GOVERNMENT IN RETURN FOR SHORTCUTS IN EFFORTS BY CONGRESS TO OVERSEE THE EXERCISE OF THAT AUTHORITY. MANY OTHER VETO PROVISIONS AROSE DURING THE WATERGATE PERIOD: WITH SERIOUSLY STRAINED RELATIONS BETWEEN CONGRESS AND PRESIDENT NIXON, NUMEROUS LAWS WERE ENACTED -- NO LONGER LIMITED TO THE MERE STRUCTURING OF THE EXECUTIVE BRANCH -- INCORPORATING LEGISLATIVE VETO IN KEY AREAS RANGING FROM BUDGET POLICY TO ENVIRONMENTAL CONTROLS, WAR POWERS TO ARMS SALES.

IN ITS WAKE.

THE CHADHA CASE BEGAN IN 1974 WHEN JAGDISH RAI CHADHA, AN EAST INDIAN BORN IN KENYA, WON A DECISION FROM THE IMMIGRATION AND NATURALIZATION SERVICE AND THE ATTORNEY GENERAL THEREUPON RECOMMENDED THAT HIS DEPORTATION FOR OVERSTAYING A STUDENT VISA BE SUSPENDED. IN 1975, THE HOUSE OF REPRESENTATIVES, EXERCISING ITS POWER UNDER THE IMMIGRATION AND NATURALITY ACT, VETOED THE SUSPENSION.

CHADHA'S SUIT CHALLENGING THE HOUSE'S ACTION HIT A RESPONSIVE CHORD. IN 1980, THE NINTH CIRCUIT COURT OF APPEALS FOUND THE ONE-HOUSE VETO AN UNCONSTITUTIONAL VIOLATION OF THE SEPARATION OF POWERS DOCTRINE. ON APPEAL, THE SUPREME COURT EMBRACED A MORE SWEEPING RATIONALE IN KNOCKING DOWN THE VETO. THE 7-2 DECISION, DELIVERED BY THE CHIEF JUSTICE, FINDS THAT THE VETO FAILED TO CONFORM TO CONSTITUTIONAL REQUIREMENTS FOR THE EXERCISE OF LEGISLATIVE POWER.

AT THE OUTSET, THE COURT REJECTS ARGUMENTS THAT LEGISLATIVE VETO PER SE CAN BE JUSTIFIED ON GROUNDS OF CONVENIENCE, EFFICIENCY, OR LONG-TIME USE. INSTEAD, THE COURT FOCUSES ON THE NATURE OF THE VETO. TO DETERMINE WHETHER IT REPRESENTS LEGITIMATE LAWMAKING ACTIVITY, THE COURT REVIEWS FIRST THE UNCONSTITUTIONAL DIMENSIONS OF THE LEGISLATIVE PROCESS AND THEN THE DEFINITION OF A LEGISLATIVE ACT.

COURT MAKES CLEAR SUCH AN ACT MUST BE EFFECTED THROUGH CONSTITUTIONALLY-MANDATED PROCEDURES.

AS THE OPINION STATES, THE HOUSE'S VETO AFFECTS OUTSIDE PERSONS, NAMELY, THE ATTORNEY GENERAL, EXECUTIVE BRANCH OFFICIALS, AND MR. CHADHA. OBVIOUSLY, THE VETO OVERRULED THE ATTORNEY GENERAL, AS WELL AS THE INS, AND CHANGED CHADHA'S STATUS. ABSENT THE VETO PROVISION, NEITHER THE HOUSE ACTING ALONE, NOR THE SENATE AND HOUSE ACTING TOGETHER, COULD HAVE REQUIRED THE ATTORNEY GENERAL TO DEPORT CHADHA AFTER HIS DETERMINATION THAT CHADHA SHOULD REMAIN. DEPORTATION WAS POSSIBLE -- IF AT ALL -- ONLY BY A SUBSEQUENT LEGISLATIVE ENACTMENT. THE COURT POINTS OUT THAT IT WAS CONGRESS' DECISION TO DELEGATE AUTHORITY TO THE EXECUTIVE BRANCH TO ALLOW CERTAIN DEPORTABLE ALIENS TO REMAIN IN THIS COUNTRY. DISAGREEMENT WITH THE RULING NOT TO DEPORT, "NO LESS THAN CONGRESS' ORIGINAL CHOICE TO DELEGATE...THE AUTHORITY...INVOLVES DETERMINATIONS OF POLICY THAT CONGRESS CAN IMPLEMENT IN ONLY ONE WAY; BICAMERAL PASSAGE FOLLOWED BY PRESENTMENT...." (ID. AT 2786).

ALTHOUGH THE COURT WAS AWARE THAT ITS DECISION WOULD IMPOSE NEW BURDENS ON CONGRESS, IT MADE NO REAL EFFORT TO LIMIT THE REACH OF ITS LANDMARK OPINION. THE COURT'S RELATED RULINGS ON JULY 6TH SEEM TO DAMN VIRTUALLY ALL CURRENT LEGISLATIVE VETO PROVISIONS. WITHOUT COMMENT, THE COURT AFFIRMED THE DECISION OF LOWER COURTS THAT DECLARED UNCONSTITUTIONAL A ONE-HOUSE LEGISLATIVE VETO IN THE 1978

200-PLUS AFFECTED STATUTES. SEVERAL MORE MODEST PROPOSALS URGE USE OF A JOINT RESOLUTION TO REVIEW AGENCY ACTION. THIS WOULD APPEAR TO PASS CONSTITUTIONAL MUSTER BECAUSE A JOINT RESOLUTION, LIKE ANY OTHER PIECE OF LEGISLATION, REQUIRES PASSAGE BY BOTH HOUSES AND APPROVAL BY THE PRESIDENT. IT ALSO ALLOWS FOR A TWO-THIRD'S VOTE BY CONGRESS TO OVERRIDE A PRESIDENTIAL VETO.

THE MOST TENABLE SUCH PROPOSAL IS CONTAINED IN THE AGENCY ACCOUNTABILITY ACT OF 1983. THIS APPROACH AROSE PRE-CHADHA, DATING BACK TO 1979 WHEN FIRST INTRODUCED BY SENATORS CARL LEVIN (D.-MI) AND DAVID BOREN (D.-OK), AND HAS RECENTLY BEEN REFASHIONED AND CO-SPONSORED BY SENATORS KASTEN (R.-WISC), AND GRASSLEY (R.-IOWA), DECONCINI (D.-ARIZ) AND DIXON (D.-ILL). IT OFFERS A "REPORT AND WAIT" REVIEW FOR ALL "SIGNIFICANT" AGENCY RULES. NO RULE COULD TAKE EFFECT FOR 30 DAYS FOLLOWING PUBLICATION IN FINAL FORM IN THE FEDERAL REGISTER. IN THAT TIME, IF A COMMITTEE OF EITHER HOUSE HAVING LEGISLATIVE JURISDICTION OVER THE RULE VOTES TO REPORT A JOINT RESOLUTION OF DISAPPROVAL, THE RULE COULDN'T TAKE EFFECT FOR AN ADDITIONAL 60 DAYS. DURING THAT PERIOD, BOTH HOUSES MUST PASS THE RESOLUTION AND THE PRESIDENT SIGN IT TO PREVENT THE RULE FROM TAKING EFFECT. THE BILL ALSO SPELLS OUT EXPEDITED PROCEDURES SO THAT A RESOLUTION CANNOT BE BOTTLED UP IN COMMITTEE OR BE FILIBUSTERED TO DEATH.

REACTING IN FURY AND HASTE TO THE CHADHA RULING, THE HOUSE ADOPTED BOTH ALTERNATIVES, LEAVING A FINAL SELECTION TO CONFERENCE COMMITTEE ACTION LATER NEXT MONTH.

THE LEVITAS PROPOSAL IS UNFORTUNATE ALL AROUND. FIRST, IT WOULD ENSURE THAT AN ALREADY OVERBURDENED CONGRESS WOULD BE PLUNGED INTO A MORASS OF TIME-CONSUMING REVIEWS OF CPSC RULES MANY OF WHICH, ALBEIT IMPORTANT IN THEIR CONTEXT, ARE NOT DESERVING OF CONCERTED ATTENTION BY CONGRESS (E.G., LABELING REQUIREMENTS FOR WOOD STOVES, ACCEPTABLE ANGLES FOR CHAIN SAW KICKBACK, BLADE STOP-TIME FOR POWER LAWN MOWERS). IF THE REVIEW WERE APPLIED ACROSS-THE-BOARD TO ALL OR MOST AGENCIES THAT ISSUE RULES, IT WOULD DENY BOTH HOUSES THE TIME NEEDED, AND ALREADY IN SUCH SHORT SUPPLY, TO CONCENTRATE ON THE NATION'S DOMESTIC, NATIONAL SECURITY AND FOREIGN AFFAIRS PRIORITIES AND CRITICAL POLICY INITIATIVES. COMMENTS BY THE HIGHLY REGARDED CHAIRMAN OF THE HOUSE COMMITTEE ON ENERGY AND COMMERCE, CONGRESSMAN JOHN DINGELL (D.-MICH), PERHAPS BEST SUM UP THE INAPPROPRIATENESS OF SUCH A ROLE:

> IF THIS KIND OF AN AMENDMENT IS ADOPTED, THE CONGRESS WILL BE SO OVERLOADED WITH TRIVIA AND PIDDLING MATTERS THAT WE WILL BE INCAPABLE OF CARRYING OUT OUR ESSENTIAL FUNCTIONS, AND WE WILL HAVE, IN EFFECT, BECOME A COURT OF REVIEW...WE WILL SPEND ALL OF OUR TIME ENGAGING IN PIDDLING UNDERTAKINGS AND OUR ATTENTION TO GREAT MATTERS WILL SIMPLY NO LONGER BE AVAILABLE. (129 CONG. REC. H4778 DAILY ED. JUNE 29, 1983).

IT IS YET ANOTHER VERSION OF AN UNCONSTITUTIONAL LEGISLATIVE VETO.

THE APPROACH RAISES OTHER TROUBLESOME UNCERTAINTIES. FOR EXAMPLE, IT IS UNCLEAR WHEN JUDICIAL REVIEW WOULD BE APPROPRIATE FOR A RULE AWAITING CONGRESSIONAL AND PRESIDENTIAL RATIFICATION. THERE ARE ALSO QUESTIONS AS TO WHEN AND WHETHER SUCH A RULE AWAITING APPROVAL WOULD PREEMPT STATE REGULATIONS INCONSISTENT WITH THE PROPOSED FEDERAL ONE.

THE SHEER LUNACY OF THIS APPROACH BECOMES EVIDENT WHEN ONE CONSIDERS APPLYING IT TO AGENCIES ACROSS THE BOARD. REQUIRING SUCH RATIFICATION WOULD CAUSE LEGISLATIVE GRIDLOCK AND REGULATORY PARALYSIS. CONGRESS WOULD BE BURIED UNDER AN AVALANCHE OF AGENCY DOCUMENTS; THE AGENCIES THEMSELVES LEFT TWISTING IN THE WIND UNTIL CONGRESS ACTED. JUST LAST YEAR, A LEAN ONE REGULATION-WISE, THERE WERE OVER 3000 PLUS REGULATIONS PUT INTO EFFECT. (ON AVERAGE, NEARLY 9000 RULES WERE PUBLISHED IN EACH OF THE PRECEDING TWO YEARS.) HOW CONGRESS COULD COPE WITH THIS VOLUME AND STILL ACCOMPLISH ITS VITAL WORK WHICH IS ALREADY HOPELESSLY BACKLOGGED DEFIES COMPREHENSION.

PROLONGED DELAY AND UNCERTAINTY WOULD BECOME THE NAME OF THE GAME. FOR INSTANCE, HOW MUCH MORE TIME WOULD IT HAVE TAKEN FOR THE FDA'S RECENT TAMPERPROOF PACKAGING RULES TO PROTECT CONSUMERS IF CONGRESS HAD THE FINAL SIGN-OFF? HOW MANY

IF, IN FUTURE DELEGATIONS OF AUTHORITY, CONGRESS EVEN CHOOSES TO GO THE ROUTE OF "REPORT AND WAIT" -- HOPEFULLY INCORPORATING EXPEDITED PROCEDURES -- IT SHOULD DECIDE AT THE OUTSET WHAT IS TRULY IMPORTANT, TRULY INTEGRAL TO ITS POLICY ROLE. IT WOULD MAKE SOME SENSE, FOR EXAMPLE, TO AMEND THE ARMS CONTROL ACT TO SPECIFY, NOT ONLY THAT THE PRESIDENT REPORT A PLANNED SALE OF AWACS TO SAUDIA ARABIA OR F-16S TO ISRAEL, OR THE PLACEMENT OF PERSHING MISSILES IN NATO COUNTRIES, BUT ALSO REQUIRE THAT SUCH ACTIONS BE CONTINGENT UPON A POSSIBLE JOINT RESOLUTION OF DISAPPROVAL. THE PRESIDENT COULD ALWAYS EXERCISE HIS VETO RIGHT, BUT CONGRESS WOULD HAVE BEFORE IT THE OPTION TO OVERRIDE. AND IT IS PRECISELY WITHIN THAT DYNAMIC TENSION OF POSSIBILITIES, AND THE CONCILIATION IT EVOKES, THAT CONSENSUS IN ITS BEST SENSE TENDS TO EMERGE IN MATTERS OF OVERRIDING PUBLIC POLICY.

LIFE AFTER CHADHA

THESE VARYING PROPOSALS TO "CONSTITUTIONALIZE" THE LEGISLATIVE VETO DEVICE REFLECT CONGRESS' EXTREME AGITATION AND DESIRE TO RECOUP AUTHORITY PURPORTEDLY LOST AS A RESULT OF CHADHA. BUT AS TIME WILL LIKELY SHOW, THE CONCERN IS OVERBLOWN, AND THE RESPONSE MISDIRECTED. CONGRESS CONTINUES TO HAVE, OR CAN ASSERT ITSELF TO REGAIN, ALL THE AUTHORITY IT COULD CONCEIVABLY WANT. FIRST AND LAST, IT HAS THE ULTIMATE SAY ON

OF CONGRESS."

CONGRESS CAN, AND SOMETIMES DOES, REVISE THE OMB-SUGGESTED FUNDING LEVELS, ALTHOUGH THEY CUSTOMARILY TAKE ON A SPECIAL CONSECRATION OF THEIR OWN. BUT CONGRESS RARELY CHANGES THE PROPOSED STAFFING LEVELS, WHICH CAN BE EQUALLY CRITICAL TO AN AGENCY'S ABILITY TO FULFILL ITS STATUTORY MANDATE. AS A PRACTICAL MATTER, INDEPENDENT AGENCIES, AS OTHERS, ARE STUCK WITH WHATEVER PERSONNEL CEILINGS OMB, AN ARM OF THE ADMINISTRATION IN POWER, ASSIGNS. AND DON'T THINK THAT POLITICS AND IDEOLOGICAL FACTORS DON'T COME INTO PLAY.

SIMILARLY, CONGRESS COULD RECONSIDER ITS DELEGATION TO AN ADMINISTRATION IN POWER, AGAIN, ACTING THROUGH OMB, TO CONTROL THE COLLECTION OF INFORMATION BY GOVERNMENT AGENCIES, AGAIN -- EVEN "THE INDEPENDENTS." THROUGH THE PAPERWORK REDUCTION ACT, OMB IS A KIND OF FEDERAL INFORMATION CZAR, IMPOSING LENGTHY AND STAFF-INTENSIVE CLEARANCE PROCEDURES TO BE MET BEFORE MOST AGENCIES CAN COLLECT THE DATA THEY NEED FROM OUTSIDE SOURCES. OMB EVEN SETS AN INFORMATION COLLECTION BUDGET FOR EACH AGENCY, AND GOVERNMENT-WIDE.

IT IS OMB ULTIMATELY THAT MUST OKAY ANY INDUSTRY-WIDE QUESTIONNAIRE OR EVEN AN INFORMATIONAL TELEPHONE SURVEY WHICH MAY BE ESSENTIAL TO AGENCY RULEMAKING AND ENFORCEMENT ACTIVITY. OMB CAN STOP THAT PROCESS DEAD IN ITS TRACKS. AND ANY AGENCY

"REPORT AND WAIT" PROVISO. IN EITHER EVENT, CONGRESS RETAINS ITS TWO-THIRDS VETO OVERRIDE OPTION WITH WHICH TO IMPOSE ITS LEGISLATIVE WILL -- IF, FROM A INSTITUTIONAL "SEPARATION OF POWERS" PERSPECTIVE, IT REALLY WANTS TO REDRESS AN IMBALANCE OF AUTHORITY, IF ONE EXISTS AT ALL.

NOR SHOULD ONE FORGET THAT CONGRESS HAS OTHER HIGHLY EFFECTIVE WAYS TO KEEP TABS ON PRESIDENTIAL AND AGENCY ACTIVITIES. ALTHOUGH OMB MAKES RECOMMENDATIONS, CONGRESS DOES HAVE FINAL SAY OVER THE GOVERNMENT'S POCKETBOOK. THE PRESIDENT PROPOSES, BUT CONGRESS DISPOSES, IN THEORY AT LEAST. CONGRESS APPROPRIATES THE RESOURCES -- STAFFING AND FUNDING -- WHICH MAKE ALL THE BRANCHES OF GOVERNMENT FUNCTION.

JUST BECAUSE THE LEGISLATIVE VETO DEVICE HAS BEEN DISMEMBERED, IT IS INCONCEIVABLE THAT A PRESIDENT OR AN AGENCY WOULD CONSISTENTLY THUMB ITS NOSE AT CONGRESS BY ISSUING OFFENSIVE ORDERS OR REGULATIONS OR TAKING OTHER ARBITRARY ACTIONS CONTRARY TO THE EXPRESSED INTENT OF ELECTED REPRESENTATIVES. NO AGENCY OR CHIEF EXECUTIVE CAN AFFORD TO RISK THE PROLONGED WRATH OF THE KEEPER OF THE EXCHEQUER. BESIDES, AGENCIES ARE HEMMED IN BY THE FASTIDIOUS REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT AS WELL AS BY THE SPECIFIC TERMS OF THEIR RESPECTIVE ENABLING ACTS. PRESIDENTS ALSO ARE RESTRAINED BY THE VAGARIES OF POLITICS WHICH MANDATE CONCILIATION AND COMPROMISE WITH THE

OVERSIGHT IS YET ANOTHER POTENT WEAPON IN CONGRESS' ARSENAL TO KEEP A TIGHT REIN ON WAYWARD AGENCIES. AND CHADHA MAY BE EXPECTED TO INCREASE THE HILL'S RELIANCE ON THIS TOOL WHICH, UNLIKE THE LEGISLATIVE VETO, CAN BE EXERCISED BEFORE RATHER THAN AFTER AN AGENCY HAS ALREADY RENDERED A DECISION OR EMBARKED ON A COURSE OF ACTION (OR INACTION) THAT CONGRESS DEEMS UNWARRANTED. WE ARE LIKELY TO SEE MORE NUMEROUS AND EXTENSIVE OVERSIGHT HEARINGS, REPLETE WITH HIGH-VISIBILITY MEDIA EXPOSURE, TARGETING DEFENSE DEPARTMENT COST OVERRUNS, SOCIAL SECURITY FRAUDS, DELAYS IN MEETING POLLUTION CONTROL TARGETS, THE DUMPING OF TOXIC WASTES, OR SALES OF SOPHISTICATED TECHNOLOGY TO THE SOVIET UNION.

CONGRESSIONAL OVERSIGHT, PROPERLY CONDUCTED, CAN FOCUS ON WHETHER LEGISLATIVE POLICY AND PRIORITIES IN FACT ARE BEING CARRIED OUT. TO BEST ACCOMPLISH THIS, CONGRESS WOULD DO WELL TO GET ITS OWN HOUSE IN ORDER. THE CURRENT HODGEPODGE OF COMMITTEES AND SUBCOMMITTEES WITH OVERLAPPING JURISDICTIONS VITIATES COORDINATED, COMPREHENSIVE REVIEW BY CONGRESS. FOR INSTANCE, THE ENVIRONMENTAL PROTECTION AGENCY COMES UNDER THE JURISDICTION OF AT LEAST 30 DIFFERENT HOUSE AND SENATE COMMITTEES WHICH ARE OFTEN TRIPPING OVER ONE ANOTHER OR DISPATCHING CONTRADICTORY SIGNALS. AT THE VERY LEAST, CONGRESS SHOULD MOVE TO IMPROVE COOPERATION BETWEEN ITS SUNDRY COMMITTEES

HAVE THE EFFECT OF REVIVING VARIATIONS OF THE SUNSET CONCEPT -- THE PLANNED EXPIRATION OF STATUTORY AUTHORITY -- SO AS TO IMPROVE CONGRESSIONAL OVERSIGHT. FUTURE DELEGATIONS OF AUTHORITY, IF FORMULATED TO EXPIRE AFTER A SET PERIOD OF YEARS, WOULD PLACE THE BURDEN ON THE DESIGNATED AGENCIES TO JUSTIFY RENEWAL OF STATUTES OR FUNCTIONS SLATED FOR DEMISE.

CONCLUSION

THERE IS A WIDE ARRAY OF OPTIONS AVAILABLE TO CONGRESS TO CONTINUE -- NAY, TO ENHANCE -- ITS EFFECTIVE REVIEW OF PRESIDENTIAL AND AGENCY ACTIVITIES. IN TIME, FURTHER REVIEW IS LIKELY TO YIELD EVEN MORE POSSIBILITIES. NOTWITHSTANDING THE MUCH BALLYHOOED CRIES OF JUDICIAL INCURSIONS ON CONGRESS' OWN TURF, THE CHADHA DECISION TEMPORARILY MAY HAVE ADDED TO THE LEGISLATIVE WORKLOAD BUT IT IN NO WAY HAS DISPLACED CONGRESS FROM ITS PREEMINENT CONSTITUTIONAL ROLE.

CONGRESS NEEDS TO GIVE THE LEGISLATIVE VETO ISSUE ITS MOST CAREFUL AND CREATIVE DELIBERATION. ANY RESPONSE SHOULD REFLECT THE MOST THOUGHTFUL, REFINED ANALYSIS OF THE PROPER BALANCE OF POWER BETWEEN THE RESPECTIVE BRANCHES OF GOVERNMENT -- THE THREE ENUMERATED IN THE CONSTITUTION AND THE SO-CALLED "FOURTH BRANCH" OF INDEPENDENT REGULATORY AGENCIES AS WELL. NOW IS NOT THE TIME FOR KNEE-JERK ANTICS OR FOR LEGISLATIVE SHOWBOATING WHILE ASSESSING ONE OF THE MOST FAR-REACHING SUPREME COURT

APPENDIX 1

STATUTES WITH PROVISIONS AUTHORIZING CONGRESSIONAL REVIEW

This compilation, reprinted from the Brief for the United States Senate, identifies and describes briefly current statutory provisions for a legislative veto by one or both Houses of Congress. Statutory provisions for a veto by committees of the Congress and provisions which require legislation (i. e., passage of a joint resolution) are not included. The fifty-six statutes in the compilation (some of which contain more than one provision for legislative review) are divided into six broad categories: foreign affiars and national security, budget, international trade, energy, rulemaking and miscellaneous.

A.

FOREIGN AFFAIRS AND NATIONAL SECURITY

1. Act for International Development of 1961, Pub. L. No. 87–195, § 617, 75 Stat. 424, 444, 22 U. S. C. 2367 (Funds made available for foreign assistance under the Act may be terminated by concurrent resolution).

2. War Powers Resolution, Pub. L. No. 93–148, § 5, 87 Stat. 555, 556–557 (1973), 50 U. S. C. 1544 (Absent declaration of war, President may be directed by concurrent resolution to remove United States armed forces engaged in foreign hostilities.)

3. Department of Defense Appropriation Authorization Act, 1974, Pub. L. No. 93–155, § 807, 87 Stat. 605, 615 (1973), 50 U. S. C. 1431 (National defense contracts obligating the United States for any amount in excess of $25,000,000 may be disapproved by resolution of either House).

4. Department of Defense Appropriation Authorization Act, 1975, Pub. L. No. 93–365, § 709(c), 88 Stat. 399, 408 (1974), 50 U. S. C. app. 2403–1(c) (Applications for export of

D.

ENERGY

17. Act of November 16, 1973, Pub. L. No. 93–153, § 101, 87 Stat. 576, 582, 30 U. S. C. 185(u) (Continuation of oil exports being made pursuant to President's finding that such exports are in the national interest may be disapproved by concurrent resolution).
18. Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. No. 93–577, § 12, 88 Stat. 1878, 1892–1893, 42 U. S. C. 5911 (Rules or orders proposed by the President concerning allocation or acquisition of essential materials may be disapproved by resolution of either House).
19. Energy Policy and Conservation Act, Pub. L. No. 94–163, § 551, 89 Stat. 871, 965 (1975), 42 U. S. C. 6421(c) (Certain Presidentially proposed "energy actions" involving fuel economy and pricing may be disapproved by resolution of either House).
20. Naval Petroleum Reserves Production Act of 1976, Pub. L. No. 94–258, § 201, 90 Stat. 303, 309, 10 U. S. C. 7422(c)(2)(C) (President's extension of production period for naval petroleum reserves may be disapproved by resolution of either House).
21. Energy Conservation and Production Act, Pub. L. No. 94–385, § 305, 90 Stat. 1125, 1148 (1976), 42 U. S. C. 6834 (Proposed sanctions involving federal assistance and the energy conservation performance standards for new buildings must be approved by resolution of both Houses).
22. Department of Energy Act of 1978—Civilian Applications, Pub. L. No. 95–238, §§ 107, 207(b), 92 Stat. 47, 55, 70, 22 U. S. C. 3224a, 42 U. S. C. 5919(m) (Supp. III 1979) (International agreements and expenditures by Secretary of Energy of appropriations for foreign spent nuclear fuel storage must be approved by concurrent resolution, if not consented to by legislation;) (plans for such use of appropriated funds may be disapproved by either House;) (financing in excess of $50,000,000 for demonstration facilities must be approved by resolution in both Houses).
23. Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95–372, §§ 205(a), 208, 92 Stat. 629, 641, 668, 43 U. S. C. §§ 1337(a), 1354(c) (Supp. III 1979) (Establishment by Secretary of Energy of oil and gas lease bidding system may be disapproved by resolution of either House;) (export of oil and gas may be disapproved by concurrent resolution).
24. Natural Gas Policy Act of 1978, Pub. L. No. 95–621, §§ 122(c)(1) and (2), 202(c), 206(d)(2), 507, 92 Stat. 3350, 3370, 3371, 3372, 3380, 3406, 15 U. S. C. 3332, 3342(c), 3346(d)(2), 3417 (Supp. III 1979) (Presidential reimposition of natural gas price controls may be disapproved by concurrent resolution;) (Congress may reimpose natural gas price controls by concurrent resolution;) (Federal Energy Regulatory Commission (FERC) amendment to pass through incremental costs of natural gas, and exemptions therefrom, may be disapproved by resolution of either House;) (procedure for congressional review established).
25. Export Administration Act of 1979, Pub. L. No. 96–72, § 7(d)(B), 7(g)(3), 93 Stat. 503, 518, 520, 50 U. S. C. app. 2406(d)(2)(B), 2406(g)(3) (Supp. III 1979) (President's proposal to domestically produce crude oil must be approved by concurrent resolution;) (action by Secretary of Commerce to prohibit or curtail export of agricultural commodities may be disapproved by concurrent resolution).
26. Energy Security Act, Pub. L. No. 96–294, §§ 104(b)(3), 104(c), 126(d)(2), 126(d)(3), 128, 129, 132(a)(3), 133(a)(3), 137(b)(5), 141(d), 179(a), 803, 94 Stat. 611, 618, 619, 620, 623–26, 628–29, 649, 650–52, 659, 660, 664, 666, 679, 776 (1980) (to be codified in 50 U. S. C. app. 2091–93, 2095, 2096, 2097, 42 U. S. C. 8722, 8724, 8725, 8732, 8733, 8737, 8741, 8779, 6240) (Loan guarantees by Departments of Defense, Energy and Commerce in excess of specified amounts may be disapproved by resolution of either House;) (President's proposal to provide loans or guarantees in excess of established amounts may be disapproved by resolution of either House;) (proposed award by President of individual contracts for pur-

(Supp. III 1979) (Rules and regulations promulgated with respect to the various functions, programs and responsibilities transferred by this Act, may be disapproved by concurrent resolution).

36. Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96–364, § 102, 94 Stat. 1208, 1213 (to be codified in 29 U. S. C. 1322a) (Schedules proposed by Pension Benefit Guaranty Corporation (PBGC) which requires an increase in premiums must be approved by concurrent resolution;) (revised premium schedules for voluntary supplemental coverage proposed by PBGC may be disapproved by concurrent resolution).

37. Farm Credit Act Amendments of 1980, Pub. L. No. 96–592, § 508, 94 Stat. 3437, 3450 (to be codified in 12 U. S. C. 2121) (Certain Farm Credit Administration regulations or delayed by resolution of either House.)

38. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96–510, § 305, 94 Stat. 2767, 2809 (to be codified in 42 U. S. C. 9655) (Environmental Protection Agency regulations concerning hazardous substances releases, liability and compensation may be disapproved by concurrent resolution or by the adoption of either House of a concurrent resolution which is not disapproved by the other House).

39. National Historic Preservation Act Amendments of 1980, Pub. L. No. 96–515, § 501, 94 Stat. 2987, 3004 (to be codified in 16 U. S. C. 470w–6) (Regulation proposed by the Secretary of the Interior may be disapproved by concurrent resolution).

40. Costal Zone Management Improvement Act of 1980, Pub. L. No. 96–464, § 12, 94 Stat. 2060, 2067 (to be codified in 16 U. S. C. 1463a) (Rules proposed by the Secretary of Commerce may be disapproved by concurrent resolution).

41. Act of December 17, 1980, Pub. L. No. 96–539, § 4, 94 Stat. 3194, 3195 (to be codified in 7 U. S. C. 136w) (Rules or regulations promulgated by the Administrator of the Environmental Protection Agency under the Federal Insecticide, Fungicide and Rodenticide Act may be disapproved by concurrent resolution).

42. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97–35, §§ 533(a)(2), 1107(d), 1142, 1183(a)(2), 1207, 95 Stat. 357, 453, 626, 654, 659, 695, 718–20 (to be codified in 20 U. S. C. 1089, 23 U. S. C. 402(j), 45 U. S. C. 761, 767, 564(e)(3), 15 U. S. C. 2083, 1276, 1204) (Secretary of Education's schedule of expected family contributions for Pell Grant recipients may be disapproved by resolution of either House;) (rules promulgated by Secretary of Transportation for programs to reduce accidents, injuries and deaths may be disapproved by resolution of either House;) (Secretary of Transportation's plan for the sale of government's common stock in rail system may be disapproved by concurrent resolution;) (Secretary of Transportation's approval of freight transfer agreements may be disapproved by resolution of either House;) (amendments to Amtrak's Route and Service Criteria may be disapproved by resolution of either House;) (Consumer Product Safety Commission regulations may be disapproved by concurrent resolution of both Houses, or by concurrent resolution of disapproval by either House if such resolution is not disapproved by the other House).

F.

MISCELLANEOUS

43. Federal Civil Defense Act of 1950, Pub. L. No. 81–920, § 201, 64 Stat. 1245, 1248, 50 app. U. S. C. 2281(g) (Interstate civil defense compacts may be disapproved by concurrent resolution).

44. National Aeronautics and Space Act of 1958, Pub. L. No. 85–568, § 302c, 72 Stat. 426, 433, 42 U. S. C. 2453 (President's transfer to National Air and Space Administration of functions of other departments and agencies may be disapproved by concurrent resolution).

THE WHITE HOUSE

WASHINGTON

August 31, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Remarks of Stuart M. Statler Before the Kenna Club: "Much Ado About Legislative Veto"

Stuart Statler, a member of the Consumer Products Safety Commission, has favored you with a copy of his recent address concerning the effect of the Chadha decision. The address contains much with which you will disagree, and one glaring error. Statler indicates he agrees with the Court's decision, but then supports the proposed Agency Accountability Act of 1983. In describing that act on page 8, Statler notes that under it there would be a general "report and wait" period of 30 days, and a committee of either House could delay rules an additional 60 days by reporting out a joint resolution. Statler seems unaware that the latter provision would itself be unconstitutional under Chadha, since it would give legal effect (delaying rules for 60 days) to action taken by a committee rather than by both Houses with presentment to the President.

Statler criticizes the Levitas proposal to require affirmative legislation before any regulation could go into effect, and his critique is sound. He goes on, however, to suggest that Congress could respond to Chadha by taking away certain executive branch controls over "independent" administrative agencies, such as OMB's budget proposal authority and the authority of the Justice Department to represent the agencies in court. Statler then runs far afield and proposes various solutions to the EPA contempt controversy, including letting Congress sue to enforce subpoenas in federal court, fining agency heads who decline to turn over documents, and automatically invoking a special prosecutor. There is so much wrong with so much of what Statler suggests that it is probably best simply to acknowledge receipt of his speech and tell him you look forward to reading it.

Attachment

THE WHITE HOUSE

WASHINGTON

August 31, 1983

Dear Stuart:

Thank you for sending me a copy of your recent address before the Kenna Club concerning the effect of the legislative veto decisions. I am looking forward to reading it, and I am certain that it will be helpful to us as we continue our own review of the impact of the decisions.

Thank you again for sharing your views on this important subject.

Sincerely,

Orig. signed by FFF

Fred F. Fielding
Counsel to the
President

The Honorable Stuart M. Statler
Commissioner
U.S. Consumer Product Safety
Commission
Washington, D.C. 20207

FFF:JGR:aea 8/31/83

cc: FFFielding
JGRoberts
Subj.
Chron

Leg. Veto

THE WHITE HOUSE

WASHINGTON

December 13, 1982

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Legislative Veto in Nuclear Waste Policy Act

Bob McConnell, Assistant Attorney General for the Office of Legislative Affairs, has forwarded for your review a copy of a memorandum he recently wrote to David Stockman, seeking expeditious OMB clearance of a letter advising that a House floor amendment to the pending Nuclear Waste Policy Act is unconstitutional. The amendment, adopted on November 29, provides that if a State or Indian tribe notifies Congress that it disapproves of a Presidential Decision on siting of a nuclear waste repository, either House of Congress may nullify the decision by passage of a resolution. McConnell's proposed letter to Morris Udall, Chairman of the relevant committee, reiterates the Administration position that the legislative veto is unconstitutional, a position successfully argued in Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), cert. pending, Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177, 82-209, and Consumers Union v. FTC, No. 82-1737 (D.C. Cir., Oct. 22, 1982) (en banc) (per curiam), and pending before the Supreme Court in Chada v. INS, Nos. 80-1832, 80-2170, 80-2171.

McConnell acknowledges in his cover letter to Stockman that the Administration has already made its views on this subject known to Congress, but argues that it is necessary to rebut floor arguments that this legislative veto is different from the others. McConnell's letter also makes the related point that the assumption of power by Congress to determine the effectiveness of a siting decision is unconstitutional, quite apart from the legislative veto procedure, since such a determination constitutes executing the law, a task exclusively within the province of the Executive Branch. Finally, the proposed letter discusses the need to address specifically the severability issue, which would arise in the event the legislative veto provision were declared unconstitutional.

Bob Bedell, Deputy General Counsel of OMB, advises that OMB will not only not expeditiously clear the letter, it will not clear it at all. The bill is now in Conference, and since both Houses passed nearly identical legislative veto provisions, the issue is not appropriately subject to Conference action. The Department of Energy, lead agency supporting the bill, persuaded OMB that sending the letter would not only be futile, but may complicate passage of the bill. DOE's opposition to the Justice letter was communicated to Larry Simms, Deputy Assistant Attorney General at OLC, and OMB's decision not to send it was conveyed to Jack Perkins at OLA.

Congress is well aware of the Administration's views on the legislative veto. The real merit to sending the proposed letter would be in making our views on severability in this particular case part of the record. Severability will be the major issue if the legislative veto is struck down, and a negative ruling on severability would jeopardize the entire program DOE so urgently wants enacted. I do not recommend becoming gratuitously involved in the dispute, if Justice is resigned to the OMB ruling. Should Justice want to contest the decision, however, you may want to propose the compromise of limiting the letter so that it only expresses our view on the severability point.

ID # _____ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Roberts

Name of Correspondent: Robert McConnell

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

Subject: H.R 7187 - Nuclear Waste Policy Act of 1982

ROUTE TO: | **ACTION** | **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CW Holland	ORIGINATOR	82/12/03			/ /
	Referral Note:				
CW AT 18	A	82/12/11			/ /
	Referral Note:				
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	Referral Note:				

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

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

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

Comments: _____

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

5/81

U. S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

DEC 02 1982

M E M O R A N D U M

TO: Fred F. Fielding
Counsel to the President
The White House

FROM: Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs

SUBJECT: H.R. 7187 - Nuclear Waste Policy Act of 1982

As you are aware, Congress is presently considering H.R. 7187, the Nuclear Waste Policy Act. On Monday, November 29, 1982, the legislation was amended to include a provision which we believe to be unconstitutional. Pending at the Office of Management and Budget is a proposed communication discussing this issue. Enclosed for your review is a copy of our letter to Director Stockman urging expeditious clearance of this communication as well as the proposed communication.

Enclosure

U. S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 2, 1982

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

Dear Mr. Stockman:

Enclosed for clearance by your Office is a letter to Chairman Udall of the House Committee on Interior and Insular Affairs presenting the views of the Department of Justice on the constitutionality of an amendment to § 115 of H.R. 7187 that was adopted by the House after floor debate on November 29, 1982. For reasons stated below, we believe it would be highly desirable for the Administration's views to be communicated clearly and unequivocally to Congress on the issues raised by § 115 as amended. We particularly recommend this because of what we understand to be the Administration's strong desire for whatever legislation Congress adopts on this subject to establish previously missing certainty in a legislative process that to date has not produced a procedure under which a siting decision can be made by the Executive with a reasonable hope of the decision indeed being final.

We are aware that the Administration's concerns about the unconstitutionality of either a one-House "approval" mechanism or a two-House "disapproval" mechanism already have been communicated, although somewhat obliquely, to the Senate 1/ and

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1/ See Joint Hearings on Nuclear Waste Disposal before the Senate Committee on Energy and Natural Resources and the Subcommittee on Nuclear Regulation of the Senate Committee on Environment and Public Works, 97th Cong., 1st Sess. 235-36 (1981) (one-House veto of Secretary's decision about siting would be unconstitutional).

the House of Representatives 2/ with regard to this legislation. We believe, however, that the Administration's position has not been as clearly articulated as it should be given the importance of legislation on this subject to the Administration's program. In addition, we would note that, as is often the case, Members of the House have argued during debate on this provision that it is somehow constitutionally "different" from other legislative veto devices considered by the Executive to be unconstitutional.

Furthermore, and perhaps most importantly, we would point out that the severability issue presented by inclusion of this one-House approval device is particularly complex and carries with it enormous ramifications for the Administration's program in the area of nuclear power. At present, the bill does have a severability clause. But a holding that the one-House approval provision is unconstitutional could lead to at least three possible results, only one of which would in our view (but not, as explained below, necessarily in the view of attorneys for the House and Senate) clearly be precluded by the presence of that severability clause.

The three possible results are as follows: (1) the power of States and Indian tribes to disapprove a Presidential siting decision would remain intact and would be regarded as legally binding whether or not a one-House resolution were adopted; (2) the power of States or Indian tribes to disapprove

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2/ We are in possession of a draft set of answers to questions regarding H.R. 1993 (a predecessor bill) that was apparently submitted to Represenative Fish in his capacity as a Member of the House by the Department of Energy on or about November 18, 1981. However, we would point out that those comments, which we assume made clear the Administration's position regarding the legislative veto device that was then part of that bill, are not to be found in the hearing record of the House Committee hearings we have been able to locate to date. See Hearings on H.R. 5016 before the Subcommittee on Energy Research and Production of the House Committee on Science and Technology, 97th Cong., 1st Sess. (1981); Hearings on Nuclear Waste Management before the Subcommittee on Energy Conservation and Power of the House Committee on Energy and Commerce, 97th Cong., 1st Sess. (1981).

a Presidential siting decision would fall with the one-House approval mechanism, making the President's final decision binding; or (3) the President's power to make a binding, final siting decision would itself fall because an important element of the overall compromise -- the power of States and Indian tribes to disapprove a siting decision with the concurrence of one House -- would have been stripped from the bill.

Although the third of the possible results listed above would be the one most unlikely for courts to reach, especially given the existence of a severability clause in the bill, that result would appear to follow from the view of severability taken by the Senate and House in two pending legislative veto cases, Chadha v. Immigration and Naturalization Service, 634 F.2d 408 (9th Cir. 1980), reargument set for Dec. 7, 1982 in Supreme Court, and Consumer Energy Council of America v. Federal Energy Regulatory Commission, 673 F.2d 425 (D.C. Cir. 1982), pending before the Supreme Court as Nos. 81-2008 et al. Although the Government has thus far successfully opposed the theory of severability law put forward by the House and Senate in these two cases, the issues have not been insubstantial. It follows from this that at least until the Supreme Court affirms our view of the severability issue as presented in the context of legislative veto devices, and perhaps beyond, 3/ the potential for costly delaying litigation of this issue will be ever present.

Furthermore, based upon our initial reading of the legislative history of this bill to date, one cannot be certain about how the courts would decide between results (1) and (2) listed above. We assume that result (1) would represent an extraordinary set-back to the Administration's program in this area. Although this Department would clearly be prepared to argue in favor of result (2), it would be

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3/ Because severability is an issue that tends to be fact-laden and peculiar to each statute, even a broad pronouncement by the Court on the issue favorable to the Government's position would not necessarily remove the cloud that would be placed over this bill if the one-House approval mechanism were to be enacted into law.

irresponsible for us as the Government's attorneys not to recommend most strongly to you the desirability of setting result (2) into concrete during consideration of this legislation by Congress.

Sincerely,

Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs

Enclosure

U. S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Morris K. Udall
Chairman
Committee on Interior
and Insular Affairs
House of Representatives
Washington, D. C.

Dear Mr. Chairman:

This presents the views of the Department of Justice regarding § 115 of H.R. 7187, the Nuclear Waste Policy Act of 1982, as recently amended. See 128 Cong. Rec. H. 8544-51 (daily ed. Nov. 29, 1982). We are specifically concerned about the provision in § 115 as amended that would purport to authorize either House of Congress to pass a resolution rendering legally effective and binding on the Executive a State's or Indian tribe's disapproval of the President's designation of a repository site for the disposal of nuclear waste:

> If any notice of disapproval of a repository site designation is submitted to the Congress under section 116 [under which States may disapprove of a repository site] or 118 [applying to Indian tribes] after a recommendation for approval of such site is made by the President under section 114 [which sets forth certain requirements for site designation], the designation of such site as suitable for license application as a repository shall be effective upon the expiration of the first period of 90 calendar days of continuous session of the Congress following the date of the receipt by the Congress of such notice of disapproval unless, during such period, either House of the Congress passes a resolution in accordance with this subsection disapproving such site designation. (emphasis added)

The "resolution in accordance with this subsection" referred to in the preceding paragraph is a simple resolution adopted by either House of Congress that would "approve" the State's or Indian tribe's disapproval of a site designation made by the President.

We strongly oppose this amended provision. We believe that, if enacted, it would unconstitutionally evade the procedural requirements governing the exercise of legislative power, as well as the principle of the separation of powers. The amended provison purports to confer on either House of Congress the authority to take action effectively altering the powers and duties of the Executive Branch with respect to repository site designation. Such a provision violates the requirements of Art. I, § 7, cls. 2 & 3, which require that any exercise of legislative power having binding legal effect on the Executive Branch or other persons outside the Legislative Branch must meet with the approval of majorities of both Houses of Congress and must be presented to the President for approval or veto.

These requirements were emphasized recently by the United States Court of Appeals for the District of Columbia Circuit in Consumer Energy Council of America v. Federal Energy Regulatory Commission, 673 F.2d 425 (D.C. Cir. 1982), pending before the Supreme Court as Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209. In that case, a panel of the Court of Appeals, without dissent, ruled that a provision of the Natural Gas Policy Act of 1978 purporting to authorize one House of Congress to invalidate an incremental pricing regulation promulgated by the Federal Energy Regulatory Commission was unconstitutional. As the court noted, "[t]he primary basis of this holding is that the one-house veto violates Article I, Section 7, both by preventing the President from exercising his veto power and by permitting legislative action by only one House of Congress." Id. at 448. See also Chadha v. Immigration and Naturalization Service, 634 F.2d 408, 433 (9th Cir. 1980), pending before the Supreme Court as Nos. 80-1832, 80-2170 and 80-2171. The rationale of the Consumer Energy Council case was recently adopted by a unanimous Court of Appeals sitting en banc in the case of Consumers Union of the United States v. Federal Trade Commission, No. 82-1737 (D.C. Cir., Oct. 22, 1982) (per curiam).

The fact that a one-House approval resolution in this context would be directed at a State's or tribe's "disapproval" of a repository site designation by the President does not serve to distinguish this situation for constitutional purposes from the legislative veto devices at issue in the three cases cited above. In practical effect, a one-House "approval" resolution would transform the State's or tribe's disapproval from an act having no legal force and effect to one having

such force and effect. 1/ Thus, the one-House resolution itself is the critical ingredient in the ultimate "disapproval" of a site designation under § 115. As such, a one-House approval resolution under § 115 as amended plainly would constitute the exercise of legislative power purporting to affect the duties and obligations of the Executive Branch -- which is precisely the sort of action subject to the bicameralism and presentation requirements of Art. I, § 7.

Furthermore, the attempt to confer on a House of Congress power to determine whether a repository site designation shall take effect constitutes an unconstitutional effort to confer on the Houses of Congress power to execute the laws. As Chief Justice Marshall observed, "[t]he difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law." Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825); see also Buckley v. Valeo, 424 U.S. 1, 139 (1976), quoting Springer v. Phillippine Islands, 277 U.S. 189, 202 (1928). Under these principles of the separation of powers, it is unconstitutional as a substantive matter to confer on a legislative branch entity -- such as, in this case, either House of Congress -- power to execute the laws. Accordingly, amended § 115 is unconstitutional for this reason as well.

The constitutionally appropriate method by which to reside power in Congress to "approve" and make effective a State's disapproval of a site designation is by means of a joint resolution. A joint resolution is passed by both Houses of Congress and presented to the President for approval or veto, and thus is in conformity with the requirements of Art. I, § 7. It would not be sufficient, therefore, merely to transform the one-House "approval" provision in § 115 as

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1/ This point was suggested during floor debate on the amendment to § 115 that is the subject of this letter. As Representative Ottinger stated: "Under the amendment offered by the gentleman from North Carolina [quoted at the outset of this letter], the State would have to actively pursue support in the two Houses, because if neither House did anything, the objection would never be effective." 128 Cong. Rec. H 8547 (daily ed., Nov. 29, 1982) (emphasis added). Representative Ottinger's statement makes the obvious point that absent some action by one of the two Houses under this "approval" provision, the disapproval power conferred on States and Indian tribes is a legal nullity.

amended on November 29, 1982, to a two-House "approval" (or a two-House "disapproval") provision -- for any resolution under such a provision would not be presented to the President as required under the Constitution.

In addition to our concerns regarding the unconstitutionality of either a one-House "approval" mechanism or any similar device which would permit Congress to approve or disapprove a State's or tribe's "veto" of the President's siting decision, we are also concerned that the severability of such a provision from the remainder of the statute be more clearly established in order to avoid to the maximum extent possible the delay that could be occasioned by litigation over the severability issue.

The heart of the severability issue presented by this bill as amended by the House is whether the power purportedly given by the bill to States or Indian tribes to disapprove the President's siting decision would be held to survive the unconstitutionality of the legislative veto device. If that power were to fall with the one-House approval provision, an additional question would be whether the power granted to the President in this bill to make the siting decision and to impose that decision on a particular State would also fall. This question arises because the intent of Congress, also expressed in the bill, to give States and tribes some meaningful ability to block the President's decision is in fact illusory in view of the unconstitutionality of the one-House approval mechanism.

The debates on the House floor on November 29, 1982 indicate some appreciation by certain Members of the House of the importance of this issue. 2/ In the short time available for us to review this contemporaneous legislative history and in view of the inclusion in the bill of a severability clause, we believe the President's power to make and implement a site designation under this bill would survive the unconstitutionality of the one-House approval device based on our view of severability law. 3/

2/ See 128 Cong. Rec. H 8547 (daily ed. Nov. 29, 1982) (remarks of Rep. Ottinger).

3/ Our views are set forth in the Solicitor General's brief on the merits filed with the Supreme Court in Chadha v. Immigration and Naturalization Service, supra.

Notwithstanding our belief that the President's power would not fall with the unconstitutionality of the one-House approval mechanism, we nevertheless would observe that a State or Indian tribe would have an argument to the contrary under the positions on the law of severability taken by the House and Senate in briefs filed by their respective attorneys in Chadha v. Immigration and Naturalization Service, supra, and Consumer Energy Council of America v. Federal Energy Regulatory Commission, supra.

Although we have taken the position that the views on the law of severability advanced by counsel for the House and Senate in these two cases are incorrect, we assume that the House and Senate would desire to take the views of their counsel into account in the legislative process and would desire to leave no doubt regarding a crucial point that could later be made an issue in protracted litigation. To this end, we suggest that both Houses of Congress should squarely address this issue in future consideration of this legislation and reach agreement on the precise effect the unconsitutionality of the one-House approval mechanism would have on the power granted to the States and tribes as well as the President. 4/

The Office of Management and Budget has advised that it has no objection to the submission of this report from the standpoint of the President's program.

Sincerely yours,

Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs

4/ For example, the legislative history could clearly indicate an intent by Congress that the State's or tribe's disapproval would be binding on the President. If the legislative veto provision were held unconstitutional, such a result could be reached by the courts even though the statute on its face would appear to require affirmative action by one House as a precondition to making a State's or tribe's disapproval binding on the President. We point this out because of the substantially different policy implications between that result and a result which either guarantees that the President's decision is final or nullifies the President's own power in the bill to make a binding siting determination.

THE WHITE HOUSE

Office of the Press Secretary

FOR RELEASE AFTER BILL SIGNING CEREMONY AT 1:30 PM EST

January 7, 1983

FACT SHEET

NUCLEAR WASTE POLICY ACT OF 1982

- The Act establishes a schedule and associated processes for siting, licensing and constructing geologic repositories for the disposal of nuclear waste.
  - General guidelines for the recommendation of potential repository sites will be issued by July 1983.
  - Three sites for detailed characterization must be recommended to the President no later than January 1985.
  - President will recommend to Congress by March 1987 the site to be designated as the first repository.
  - NRC must act on license application no later than March 1990.
  - President will submit recommendation for second repository site to Congress by March 1990.
  - In return for payment of fees, DOE will dispose of nuclear waste beginning no later than January 1998.
- The Act establishes procedures for participation by States and Indian Tribes.
  - States with potentially acceptable sites will be notified by April 1983.
  - At the request of a State, procedures for consultation and cooperation must be specified in written agreements.
  - Public hearings will be required in States where potential repository sites are located.
  - A State may submit to Congress a notice disapproving of the site finally designated as the repository. Disapproval can only be overridden by a joint resolution.
  - Grants and impact aid will be made available to affected States.
- The Act provides for a program of research and development including an underground Test and Evaluation Facility.
- A program is established for temporary storage for spent fuel.
  - DOE and NRC will expedite utility expansion of on-site storage for spent fuel.

more

(OVER)

- DOE will offer to provide not more than 1900 tons of storage capacity at existing Federal facilities or at reactor sites.

- The Act provides for a Monitored Retrievable Storage (MRS) program.

  - By June 1985 DOE must submit a proposal to Congress for constructing one or more facilities.

- The Act established special funds in the U.S. Treasury for waste disposal and interim storage. These funds are financed by user fees that will pay for all costs of the programs.

  - For electricity generated beginning 90 days after enactment, the fee will be one mill per kilowatt-hour.

  - For waste already generated, DOE will establish a one-time fee.

  - By July 1983, all utilities operating nuclear plants must enter into contracts with DOE who in turn will accept, transport and dispose of spent fuel or high level waste.

  - Adequacy of fee must be reviewed annually and adjusted if necessary.

- Within two years the President will evaluate the use of commercial waste repositories for the disposal of military waste.

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