THE WHITE HOUSE

WASHINGTON

CABINET COUNCIL ON LEGAL POLICY

August 2, 1983

3:00 p.m.

Cabinet Room

AGENDA

1. Victims of Crime (CM#395)
2. Regulatory Reform and Legislative Veto (CM#396)
3. Anti-Crime Initiatives (CM#245)
4. Sharing of Grand Jury Information (CM#397)

THE WHITE HOUSE

WASHINGTON

CABINET COUNCIL ON FOOD AND AGRICULTURE

August 2, 1983

3:30 p.m.

Cabinet Room

AGENDA

1. Meat Import Quotas

THE WHITE HOUSE
WASHINGTON AUG 1 198

CABINET AFFAIRS STAFFING MEMORANDUM

DATE: 8/1/83 NUMBER: 118835CA DUE BY: _____

SUBJECT: Cabinet Council on Legal Policy - August 2, 1983

2:00 pm in the Cabinet Room - With the President

	ACTION	FYI
ALL CABINET MEMBERS	☐	☐
Vice President	☑	☐
State	☑	☐
Treasury	☑	☐
Defense	☐	☑
Attorney General	☑	☐
Interior	☑	☐
Agriculture	☐	☑
Commerce	☑	☐
Labor	☑	☐
HHS	☑	☐
HUD	☑	☐
Transportation	☑	☐
Energy	☐	☑
Education	☐	☑
Counsellor	☑	☐
OMB	☑	☐
CIA	☐	☑
UN	☐	☑
USTR	☐	☑
CEA	☐	☐
CEQ	☐	☐
OSTP	☐	☐
_____	☐	☐
_____	☐	☐

	ACTION	FYI
Baker	☑	☐
Deaver	☐	☐
Clark	☐	☑
Darman *(For WH Staffing)*	☑	☐
Harper	☑	☐
Jenkins	☐	☑
Fielding	☑	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐
CCCT/Gunn	☐	☐
CCEA/Porter	☐	☐
CCFA/Boggs	☐	☐
CCHR/Carleson	☐	☐
CCLP/Uhlmann	☑	☐
CCMA/Bledsoe	☐	☐
CCNRE/Boggs	☐	☐

REMARKS: The Cabinet Council on Legal Policy will meet on Tuesday, August 2, 1983 at 2:00 pm for thirty minutes in the Cabinet Room. There are four items on the agenda, and the briefing papers and agenda are attached. Briefings will be presented on the following issues: Victims of Crime (CM#395); Anti-Crime Initiatives (CM#245); Sharing of Grand Jury Information (CM#397); and Legislative Veto (CM#395).

RETURN TO:

☐ Craig L. Fuller
Assistant to the President
for Cabinet Affairs
456-2823

☑ Tom Gibson
Associate Director
Cabinet Affairs
456-2800

Office of the Attorney General
Washington, D. C. 20530

July 29, 1983

MEMORANDUM FOR: Members of the Cabinet Council on Legal Policy

FROM: William French Smith
Attorney General

SUBJECT: Legislation to Assist Victims of Crime

All too often, discussions of our national crime problem focus upon statistics relating to courts, prosecutors, and investigators, to the total exclusion of the impact of crime upon the people who are its victims. Regrettably, our legal system has neglected the financial, emotional, and physical impact which a criminal offense can have upon the victim. Victims of crime frequently are terrorized and sometimes injured. They turn to the legal system for help and justice, but often find neither.

In recognition of the growing concern over the needs of crime victims, President Reagan established a Task Force on Victims of Crime on April 23, 1982. During 1982, the Task Force held hearings in Washington and in five cities across the country. This past December the Task Force made 68 recommendations to the President setting out a plan for a comprehensive and detailed response to the problem of victims assistance by the federal government, state and local governments, and the private sector.

Victim Compensation Programs

One of the Task Force's major recommendations for federal action was enactment of legislation that would provide funds to the states to assist them to compensate and provide other assistance to victims of crime. Already, thirty-five states (and the District of Columbia and the Virgin Islands) have enacted legislation providing for compensation of victims of violent crime under certain circumstances. These payments are made to claimants from funds the states have established for this purpose; however, approximately half of these states have already found these funds insufficient to meet outstanding eligibility claims.

Because of the shortfalls state governments have encountered in administering their victims compensation funds, the Task Force recommended direct federal assistance to states in this area.

Unless adequate funds are available, victims' claims may have to wait months until sufficient fines have been collected or until a new fiscal year begins and the budgetary fund is replenished. However, while waiting for such funding victims may be sued civilly, harrassed continually, or see their credit rating vanish. Moreover, unencumbered emergency assistance is also critical to victims of violence in other ways. Immediate needs for food, shelter, and medical assistance cannot be deferred for the weeks or months it may take to process paper work.

Federal assistance to states also is needed because states shoulder the burden of compensating victims of federal, as well as state, crimes. Currently, states which have compensation programs make no distinction between victims of federal and state crimes. However, if their compensation programs continue to experience budgetary shortfalls, states soon may have no choice but stop compensating victims of federal crimes. Without federal financial assistance to state compensation programs, therefore, federal crime victims may receive no compensation in some states, or receive compensation in others only when the state elects to prosecute a crime over which there is joint federal and state jurisdiction.

Direct federal assistance to states is preferable to other alternative solutions to replenish the states' compensation funds. The chief alternative that would assure compensation to victims of federal crimes would be the creation of a new federal bureaucracy to provide such assistance directly. However, this approach is likely to be unnecessarily duplicative and cost-ineffective. The Task Force rejected this cumbersome approach, favoring instead an approach which would utilize existing state compensation schemes.

Proposed Legislation

The Department of Justice is currently drafting legislation to provide timely assistance for crime victims. The draft legislation would create a Crime Victims Assistance Fund to assist states in compensating victims of violent crime both financially (e.g., for unreimbursed medical expenses and loss of wages) and with specialized services (such as crisis intervention and mental health counselling). A goal of the legislation would be to provide federal assistance to the states without unduly interjecting the federal government into the working relationships now existing between the states, victim service organizations, and victims. However, the legislation will not call for any additional appropriations; instead, the Crime Victims Assistance Fund will be supported by levies on criminals, revenues already deposited in the Treasury, and other non-appropriated sources of money.

In particular, the possible funding sources include:

-- penalty assessment fees and fines collected from convicted federal defendants;

-- portions of monies paid to working federal inmates parolees and probationers;

-- a percentage of assets seized by the government in forfeiture proceedings;

-- profits offenders realize from the sale of literary or other rights arising from a criminal act; and

-- contributions from the general public (except convicted or incarcerated federal criminals).

In addition, another source of funding would be the revenues the government already receives from the federal excise tax currently imposed on the sale of handguns, which is presently earmarked for a wildlife management fund administered by the Department of the Interior. Although these revenues are already being put to good use, they are another conceivable source of funds for the proposed Victims Assistance Fund.

Office of the Attorney General
Washington, D. C. 20530

July 29, 1983

MEMORANDUM FOR: Members of the Cabinet Council on Legal Policy

FROM: William French Smith
Attorney General

SUBJECT: Briefing on the Administration Crime Bill

In the course of the past two weeks the Senate Judiciary Committee has approved almost all of the proposals in the Administration's comprehensive crime package (S. 829). 1/ In addition to re-approving important reforms that have previously enjoyed general support in the Senate, such as revision of the bail and sentencing systems, the Committee has adopted the more controversial features of our program. These include, for example, restoration of capital punishment, recognizing a "good faith" exception to the exclusionary rule, and limiting the insanity defense.

By agreement of the Committee, the bill has largely been preserved intact, but four of the controversial proposals -- capital punishment, exclusionary rule reform, habeas corpus reform, and Federal Tort Claims Act (FTCA) amendments -- have been deleted from the comprehensive bill and are being considered as four pieces of separate legislation. The separate capital punishment, exclusionary rule, and habeas corpus bills have been voted out by the Committee; the FTCA amendments will be considered shortly. As part of the Committee's agreement these bills will receive floor consideration by the Senate at around the same time as the comprehensive bill but will be voted on as separate measures. Unfortunately, the agreement contemplates that a bill introduced by Senator Biden incorporating the "drug czar" proposal that was vetoed last year will also be brought to the floor at that time.

1/ The Committee has not yet considered the amendments to the Federal Tort Claims Act proposed in Title XIII of the bill. All other titles have been acted on favorably either as part of the comprehensive bill voted out by the Committee or as separate legislation.

The general effect of the Committee's agreement is twofold; first, the controversial proposals which are being treated separately will not impede full Senate approval of the general package, and secondly, the procedure will provide for Senate floor consideration of each of the controversial proposals. Of course this also means that these separate measures will not be "carried" as part of a larger bill and will have to pass the Senate on their own appeal. 2/

The specific measures which are included in our crime package and have been approved by the Committee include the following:

1. Bail Reform

Under current law, a judge in setting pre-trial release conditions is authorized to consider the risk that the defendant will not appear for trial, but is not authorized to consider the danger to the community that may result from a favorable release decision. Hence, when confronted with a demonstrably dangerous defendant, a judge faces the dilemma of releasing him prior to trial despite the danger he poses to public safety, or attempting to find some justification -- such as risk of flight -- to justify a high money bail the defendant cannot meet. Judges thus often find it necessary to choose between protecting public safety or endangering the community by applying the law as presently written.

Title I of S. 829 would correct this situation by authorizing consideration of a defendant's dangerousness in making pre-trial release decisions and authorizing pre-trial detention where no combination of release conditions can reasonably assure the safety of the public and prevention of flight.

Title I would also change the rules governing release of convicted defendants while an appeal is pending. Current law creates a presumption in favor of release on bail after conviction and pending appeal, as if a person were presumed to be innocent even after he has been found to be guilty. The Administration's proposals would reverse this presumption, limiting post-trial release to cases where the defendant can show that he will not flee or endanger the community and that his conviction is likely to be overturned on appeal.

2/ References hereafter to "the bill" or "S. 829" are to the original version of S. 829, incorporating our full legislative crime program. As the accompanying text explains, a few of the titles of the original bill are now proceeding as separate legislation.

2. Sentencing Reform

The second title of the crime bill would carry out a comprehensive revision of the sentencing system. Under current law, individual judges are provided with enormous discretion in the imposition of sentences. A statute may provide, for example, that a person convicted of a given offense may be sentenced to life imprisonment, to imprisonment for any number of years, or to no imprisonment at all, with the choice between these options being entirely left to the discretion of the sentencing judge. Empirical study of current sentencing practices shows that this system has resulted in great disparities in the treatment of similarly situated defendants based on differences in the personal philosophies of individual judges.

Title II of the bill would replace the current system with a system of guided discretion. A sentencing commission would issue guidelines establishing narrow penalty ranges for each combination of offense and offender characteristics, and the sentences actually imposed would normally be within these ranges. If a judge imposed a sentence outside of the guideline range he would have to state specific reasons for doing so and the resulting sentence could be appealed by the adversely affected party.

A second major reform of Title II is the abolition of parole. Currently, prisoners are normally released after serving some part of the sentence imposed at trial through the action of parole boards. This system is based on the now-discredited notion that imprisonment is a therapeutic measure and that it can be determined by observing a prisoner's behavior that at some point he has been "rehabilitated" and can safely be released. Under the Administration's proposals a prisoner would serve the actual sentence imposed on him at trial less a small reduction for good behavior in prison.

3. Limiting Impediments To Successful Law Enforcement

The Administration's proposals include reforms that would limit certain rules that may now perversely protect the guilty or increase the difficulty of successfully prosecuting offenders. The specific proposals in this category are limitation of the exclusionary rule, the insanity defense, and habeas corpus. 3/

3/ As noted earlier, two of these proposals -- exclusionary rule reform and habeas corpus reform -- have been deleted from the comprehensive bill by the Committee but have been approved by the Committee as separate bills.

Under current law, evidence that was obtained by an unlawful search and seizure is excluded from use at trial. Title III of the bill would substitute a more moderate rule under which evidence would not be excluded if it was obtained by a search or seizure which the officer reasonably believed to be lawful. The same change has already been made at the federal level in some parts of the country by judicial decision and has been adopted in a number of states by statute.

Title V of the bill would limit the insanity defense to cases in which a defendant was unable to appreciate the nature or wrongfulness of his actions and would require the defendant to establish insanity in this sense by clear and convincing evidence. This would change current rules under which the alleged inability of a defendant to control his actions may establish the defense and under which the government must establish a defendant's sanity beyond a reasonable doubt to obtain a conviction.

Title VI would limit the availability of federal collateral remedies for state and federal prisoners, including habeas corpus. This would provide a partial corrective to the current inundation of the federal courts with frivolous and harassing prisoner petitions and would limit the drain on state and federal criminal justice resources that results from this litigation.

4. Strengthening Remedies and Sanctions

The Administration's proposals include several measures that would strengthen the basic tools of law enforcement. Title IV of the bill would strengthen criminal and civil forfeiture laws, enhancing our ability to seize the proceeds of crime and to reach the operating capital of criminal enterprises. Title X would reinstate the death penalty in certain homicide, treason and espionage cases. 4/ Various other titles of the bill would increase the penalties applicable to a wide range of offenses, including narcotics offenses, labor racketeering, and currency violations. Titles XIV and XV would create new federal offenses or strengthen or extend existing criminal prohibitions in such areas as murder-for-hire, crimes in aid of racketeering, use of firearms in the course of federal crimes, crimes against federal officials, product tampering, 5/ child pornography, fraud and

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4/ As noted earlier, capital punishment has been removed from the comprehensive bill by the Committee but has been voted out as a separate bill.

5/ Product tampering has been deleted from the comprehensive bill by the Committee because it is near enactment at this point as separate legislation.

bribery related to federal programs and counterfeiting of securities.

5. State And Local Justice Assistance

Two titles of the bill would lend federal support to state and local criminal justice efforts. Title VIII would authorize a modest program of financial assistance to state and local law enforcement to help finance anticrime programs of proven effectiveness. Title IX would facilitate donation of surplus federal property to state and local governments for urgently needed prison space.

* * *

The most basic obligation of government is the protection of the personal security of its citizens. The priority we have assigned to this function in the international context in our national security program finds its parallel domestically in our program of law enforcement and criminal justice reform. The Senate Judiciary Committee's approval of nearly all of the provisions of the Administration's legislative crime program is a major victory in our effort to provide for the domestic defense of the nation against the lawless elements of society. There remains ahead floor consideration by the full Senate and the difficult task of securing action on our proposals in the House of Representatives. I wish to thank all of you for the support and assistance you have provided and to solicit your continued cooperation in the work that lies ahead.

Office of the Attorney General
Washington, D. C. 20530

July 29, 1983

MEMORANDUM FOR: Members of the Cabinet Council on Legal Policy

FROM: William French Smith
Attorney General

SUBJECT: Sharing of Grand Jury Information

On June 30, 1983, the Supreme Court decided two cases that significantly limit the extent to which federal prosecutors may share grand jury materials with civil attorneys within the Department of Justice and with attorneys in other government agencies. These decisions, United States v. Sells Engineering, Inc., No. 81-1032, and United States v. Baggot, No. 81-1938, raise serious law enforcement problems for the Department of Justice and all other federal agencies.

A. Sells Engineering

The central issue in Sells was whether attorneys in the Civil Division of the Department of Justice could obtain automatic disclosure of grand jury materials for use in a civil suit or whether they were required to obtain a court order. The Supreme Court held that Department of Justice civil attorneys must obtain a court order authorizing the disclosure of such materials. Under the federal courts' criminal rules, such an order may be granted only upon a showing of particularized need -- that is, that the materials are needed to avoid a possible injustice in another proceeding, that the need for disclosure is greater than the need for continued secrecy, and that the request only covers the materials needed. This standard is ordinarly difficult to meet.

B. United States v. Baggot

In Baggot, the Supreme Court held that the disclosure of grand jury materials to an administrative agency pursuant to a court order is permissible only "[i]f the primary purpose of the disclosure is . . . to assist in preparation or conduct of a judicial proceeding." Therefore, if the purpose of the disclosure is simply to determine liability, as in a tax audit, or to conduct a mere investigation as to whether a violation of law has occurred, disclosure would not be authorized.

C. The Effect of Sells and Baggot

The Sells and Baggot decisions raise, but do not address, many profound problems for the government as a whole, and for the Department of Justice in particular. On their face, Sells and Baggot may be read to preclude not only the sharing of grand jury information between the Department of Justice and other agencies for investigative and civil purposes, but also the sharing of such information between attorneys in the same office unless there is a court order authorizing such information. In fact, it is possible to argue that Sells and Baggot may prevent an attorney who participates in a grand jury investigation from using even his own knowledge of the grand jury proceedings in a subsequent civil case to which he may be assigned -- even if the civil case is premised on the identical set of facts.

If, in subsequent litigation, these issues are resolved against the government, the government's civil law enforcement efforts could be seriously impaired. Moreover, it may cost the government many millions of dollars in additional costs for attorneys and investigators and in foregone damage claims. For example, the Antitrust Division in the Department of Justice estimates that efforts to obtain information already derived from grand jury proceedings through civil discovery would cost an additional $8.7 million for cases brought or contemplated since January 1, 1981, involving government damage claims of over $25 million. Similarly, the Commercial Litigation Branch of the Civil Division estimates that the lack of access to grand jury materials would result in additional litigation costs of $1 million per year. Furthermore, civil fraud recoveries, which now total $30 million per year, would be substantially reduced.

The Supreme Court decisions may also jeopardize law enforcement operations in other ways. Department of Justice attorneys often rely on the assistance of personnel and the resources of other agencies. For example, the IRS contributes significant resources to assist Department attorneys in grand jury proceedings and complex criminal investigations requiring a careful analysis of thousands of evidentiary items. Because Baggot precludes agencies such as the IRS from using materials uncovered in grand jury proceedings to investigate other possible violations of law, agency officials may be reluctant to continue to assist the Department.

D. Recommendation

The Department of Justice is carefully analyzing the practical effect of Sells and Baggot on the government. However, until the Department has completed this study, it is important that other departments and agencies -- some of whom have independent litigating authority -- do not take litigating positions that may preclude the Department's ability to obtain favorable readings of Sells and Baggot in the courts. Accordingly, every department and agency should clear in advance

with the Department the positions they intend to take in litigation.

Office of the Attorney General
Washington, D. C. 20530

July 29, 1983

MEMORANDUM FOR: Members of the Cabinet Council on Legal Policy

FROM: William French Smith
Attorney General

SUBJECT: Regulatory Reform and Legislative Veto

On June 23, 1983, the Supreme Court issued its decision in INS v. Chadha, striking down as unconstitutional the legislative veto provision found in the Immigration and Nationality Act. Notwithstanding the narrow issue presented, Chief Justice Burger's opinion for the Court was written broadly, striking down the legislative veto concept across the board as an infringement of the President's power to control the actions of the Executive Branch and to participate (by approving or vetoing) actions of Congress that affect the legal rights or duties of Executive Branch officials or private persons.

Since the Supreme Court's decision in Chadha, the Department of Justice has been working closely with other Executive agencies (particularly the Counsel to the President, the Office of Management and Budget, and the State and Defense Departments) to ensure an appropriate and measured response to that decision. (See the attached memorandum for a fuller discussion.) The executive branch has been careful to avoid providing any excuse for ill-considered congressional reaction to the Chadha decision. In addition, the government has stressed the importance of defending, both before Congress and in court, the validity of the remaining provisions of statutes that contained legislative veto provisions.

We have been fortunate that the reaction in Congress to Chadha has been a responsible one. While some members of Congress have indicated their desire to institute radical new forms of congressional review of executive action, most members appear inclined to defer major action until Congress and the executive branch have had more experience with congressional review in the absence of the legislative veto mechanism. Thus, while Congress may well ultimately enact some new form of oversight mechanism, it appears in the short term that Congress will do nothing, unless it appears that the executive branch is attempting a broad reading of Chadha. A group under the leadership of the Cabinet

Council on Legal Policy will be established to examine these long range considerations.

Because Chadha invalidated one of the most common mechanisms for congressional review of administrative action, the future of regulatory reform proposals in the aftermath of Chadha is somewhat uncertain. Nonetheless, it may be appropriate now that Chadha has resolved the question of the constitutionality of the legislative veto to give greater attention to substantially different forms of regulatory reform legislation than the comprehensive regulatory reform package (which contained a sweeping legislative veto provision) that was before Congress last year. In particular, the Administration might wish to give consideration to various "fast track" regulatory reform proposals that would reform the House and Senate rules to insure expedited consideration of legislative initiatives that the President designates as important to achieve policies of deregulation.

The President's Task Force on Regulatory Relief has been considering one such proposal. The draft legislation would authorize the President to submit to Congress "such reports as he deems appropriate" dealing with matters of regulatory reform, including regulatory programs he believes should be modified or repealed. Congressional action on such reports and any proposed legislation contained therein would be expedited in a number of ways under the proposal. For instance, each committee considering a report submitted by the President would have a limited amount of time in which to act upon the report, or be discharged from further consideration of it. Also, once a bill implementing any report had been placed on the calendar of the House of Representatives or the Senate, it would be in order to move to proceed to consider such a bill, and such motion "shall be highly privileged and shall not be debatable." In a number of other ways, the rules of the House and Senate would be amended to require expedited consideration of a bill implementing a Presidential report on regulatory reform. The ultimate aim would be to prevent such a bill from simply dying in Congress as a result of inertia or inaction.

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

JUL 28 1983

MEMORANDUM FOR THE CABINET COUNCIL ON LEGAL POLICY

RE: ANALYSIS OF SUPREME COURT LEGISLATIVE VETO DECISIONS

This memorandum presents a summary analysis of the recent Supreme Court decisions regarding legislative vetoes and their potential impact on existing statutes and other sources of presidential authority.

1. Legislative Vetoes

Legislative vetoes are provisions pursuant to which Congress, or a unit of Congress, is purportedly authorized to adopt a resolution that will impose on the Executive Branch (or the "independent" agencies) a specific requirement to take or refrain from taking an action. The key characteristic of all legislative veto provisions is that a resolution pursuant to such a provision is not presented to the President for his approval or veto.

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

2. The Supreme Court Decisions

Chadha involved a veto by the House of Representatives in 1975 of the Attorney General's statutory decision to suspend, on humanitarian grounds, the deportation of an alien who was otherwise deportable. The Supreme Court decided Chadha on June 23, 1983. The Chief Justice wrote the Court's opinion. Justice White dissented on the merits. Justice Rehnquist dissented on the grounds of severability (discussed infra).

Justice Powell found that Congress had invaded judicial powers and concurred in the Court's decision. Thus, only Justice White actually rejected the analysis in the Chief Justice's opinion.

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

It is significant, perhaps more so in a larger sense than presented in Chadha, that the Court expressly found "beyond doubt" that "lawmaking was a power to be shared by both Houses and the President" and declared that the "Presentment Clauses serve the important purpose of assuring that a 'national' perspective is grafted on the legislative process." The Court expressly reaffirmed an earlier statement that the "'President is a representative of the people just as the members of the Senate and House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide.'" The Court also emphasized the bicameralism requirement of Article I and its extreme importance to the Framers.

The key to the Court's conclusion is that it found that the "veto" of Mr. Chadha's suspension of deportation was legislative in nature because it had the "purpose and effect of altering the legal rights, duties and relations of persons, including . . . Executive Branch officials . . . outside the legislative branch." As such it "involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked."

The Court brushed aside claims that the legislative veto mechanism was a "useful 'political invention,'" a "convenient shortcut" or an "appealing" and "efficient"

"compromise" for the sharing of legislative power with the Executive:

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

On July 6 the Supreme Court summarily affirmed two D.C. Circuit Court decisions in which one- and two-House vetoes of rules issued by independent regulatory commissions had been held unconstitutional. 1/

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

These decisions vindicate the positions regarding legislative vetoes of every President since Hoover, and many Attorneys General, including Attorney General William Mitchell, who in 1933 urged President Hoover to veto a bill, stating "[e]ach President has felt it his duty to pass the executive authority on to his successor unimpaired by the adoption of dangerous precedents. . . . The proviso in this . . . bill may not be important in itself but the principle at stake is vital."

1/ Process Gas Consumers Group v. Consumers Energy Council of America, Nos. 81-2008 et al.

3. Public and Legislative Branch Reaction

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

Some proposals were introduced in the House of Representatives to reduce the power of the Consumer Product Safety Commission (CPSC) in the aftermath of Chadha by requiring affirmative congressional approval of all rules issued by the CPSC by a law before such rules could take effect. However, unless the Executive Branch provokes a confrontation with the Legislature through ill-considered and highly controversial actions or statements, congressional reaction on a broad gauge, i.e., to withdraw legislatively all delegated authority to which a legislative veto is attached, is not likely to develop widespread support. A sweeping and somewhat radical proposal was actually advanced by Mr. Stanley Brand, General Counsel to the Clerk of the House of Representatives, in his testimony before the House Committee on Foreign Affairs on June 19, 1983. His proposal met with a very icy reception by Chairman Zablocki and did not appear to receive any support from other members of that Committee. In addition, Deputy Attorney General Schmults testified before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary on July 18 and the House Committee on Foreign Affairs on June 20 (accompanied by Deputy Secretary of State Dam), and the overall reaction of those committees appeared to be a go-slow, cooperative one. Mr. Dam will testify before the Senate Committee on Foreign Relations on July 29 once again on the import of Chadha in the foreign relations area.

4. Legislation and Presidential Authority Affected

The Office of Legal Counsel has determined that 126 public laws containing 207 separate legislative veto devices will be affected by Chadha.

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

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

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

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

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

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

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

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

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

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

10. Various Reorganization Acts;

11. Federal Pay Comparability Act;

12. District of Columbia legislation;

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

5. Severability

In Chadha, the Chief Justice's opinion appears to have adopted a very strong presumption that legislative veto devices will be stricken by the courts while leaving intact the remainder of the statutory schemes in which these devices were inserted by Congress. That strong presumption was reinforced by the Court's summary affirmance on July 6 of the D.C. Circuit's decision in the natural gas phase II pricing rule case, CECA v. FERC, 673 F.2d 425 (D.C. Cir. 1982). The statute involved in FERC, in contrast to the statute involved in Chadha, did not contain a "severability clause," and its legislative history permitted the House and Senate and a number of intervenors to argue that the legislative veto device was inseverable. As Deputy Attorney General Schmults stated in his testimony on July 18 regarding the significance of the Court's summary affirmance in FERC, "if the Court had wanted to reverse the apparent trend toward 'severability' in the recent cases decided by the D.C. Circuit, it presumably would have used that case as a vehicle to do so."

In Congress, the attitude on the severability issue, at least so far, seems to be one of acceptance of the high likelihood that very few, if any, grants of power to the Executive will be held to fall with the legislative veto devices attached to them. Mr. Brand, in his testimony before House Foreign Affairs, stated his view that "absent an overwhelming record to support [inseverability], I believe the courts will find severability in many cases." The conclusion that Mr. Brand drew from this reality -- "that Congress is better served by wholesale repeal of the delegations effected by these statutes" -- was not well received by the House Foreign Affairs Committee.

In court, the Department of Justice is presently preparing to argue the severability of legislative veto devices in litigation ranging from an attempt by the Exxon Corp. to have set aside a $1.6 billion judgment entered against it in June, 1983, to a suit brought by federal employee unions arguing that the President's power to place in effect an "alternative"

pay plan is inseverable from the one-House veto device attached to that presidential power and seeking substantial back pay based on that argument. All this litigation is being coordinated and supervised by the Civil Division of the Department of Justice.

6. Retroactivity

Some litigation may arise over the validity of past agency actions pursuant to authorities or power which are arguably void because inseverably connected with legislative vetoes. For example, Merrill Lynch is currently arguing that the EEOC's enforcement action against them cannot be maintained because the EEOC acquired its enforcement power pursuant to a reorganization plan that was issued under a statute containing an inseverable one-House veto device. These issues will have to be evaluated as they arise, but it is not likely that the courts will overturn whole regulatory schemes or administrative actions which have created vested rights.

7. Report and Wait Provisions

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

8. Other Developments

The Office of Management and Budget has circulated in draft form and expects to issue in the very near future a bulletin designed to ensure close coordination of all Executive Branch actions to be taken pursuant to statutes containing legislative veto devices. The information gathered in that process, as well as that maintained by the Civil Division regarding litigation, should keep us fully abreast of important developments.

A working group of White House, OMB, Justice, State and Defense officials has monitored developments within and without the Administration since the Chadha decision and has made recommendations where appropriate.

A long range planning group will be organized under the Cabinet Council on Legal Policy to consider long term responses to Chadha including reexamination of the role of "independent" agencies, the delegation doctrine pursuant to which rule-making authority is transferred to agencies, and proposals for "fast-track" legislative review of administrative actions and authorities.

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