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THE WHITE HOUSE
WASHINGTON

12.3.82

Bill -

When you review, talk
w. Boggs & give me
your assessment.



U. S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

DEC 03 1982

M E M O R A N D U M

TO: Michael M. Uhlmann
Special Assistant to the President
for Policy Development

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

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

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 Representative 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

^{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 provision 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 20-2171. 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. Phillipine 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

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 unconstitutionality 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.