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## MEMORANDUM FOR THE ATTORNEY GENERAL

out 1/19/81

Re: The Effect of the Concurrent Resolution Provision of § 126(b) of the Atomic Energy Act of 1954, as amended, on the President's Power to Authorize the Export of Nuclear Material and Equipment

This memorandum presents our views on the President's power to permit the export of nuclear material and equipment.

## I

No person may export nuclear material or equipment from the United States without a license. See, e.g., 42 U.S.C. §§ 2077(a) (special nuclear material), 2131, 2139(b) (utilization and production facilities). Under § 126 of the Atomic Energy Act, as added by the Nuclear Non-Proliferation Act of 1978, 42 U.S.C. § 2155, the Nuclear Regulatory Commission makes the first decision about whether to grant a nuclear export license. Section 126(a) provides that the Commission may not grant a license until two conditions are met. First, the Secretary of State must notify the Commission "that it is the judgment of the executive branch that the proposed export . . . will not be inimical to the common defense and security." 42 U.S.C. § 2155(a)(1). Second, with certain exceptions, the Commission must find that all applicable statutory standards, see, e.g., 42 U.S.C. §§ 2156, 2157, have been met. 42 U.S.C. § 2155(a)(2).

If the Commission does not issue a license because it cannot make this finding, § 126(b) requires it to "submit the license application to the President." The President then reviews the Commission's decision. If he decides that withholding the export "would be seriously prejudicial to the achievement of United States non-proliferation objectives, or would otherwise jeopardize the common defense and security," the President may authorize the export by executive order. 42 U.S.C. § 2155(b)(2).

Section 126(b) further provides, however, that before the export is made the President must submit the executive order to Congress "for a period of sixty days of continuous session (as defined in section 2159(g) of [Title 42])." According to § 126(b), the "proposed export shall not occur if during

such sixty-day period the Congress adopts a concurrent resolution stating in substance that it does not favor the proposed export." 42 U.S.C. § 2155(b)(2).

## II

This Administration, previous Administrations, and this Office have long taken the position that concurrent resolutions of Congress can have no binding legal effect on the executive branch. As you explained in your June 5, 1980, opinion to the Secretary of Education, statutes that purport to authorize Congress to legislate through concurrent resolutions that are not submitted to the President for his approval or veto violate the presentation clauses of article I, section 7 of the Constitution, and seriously infringe the constitutionally prescribed separation of powers.

The Framers of our Constitution designed a carefully balanced system of accountability based on a tripartite separation of power. They invested the power to legislate in Congress, the power to execute the laws in the executive branch, and the power to interpret the law in the courts. None of these powers is absolute in the hands of any one branch. Rather, under the Constitution, the exercise of power by any branch of the government is subject to checks that may be exercised by one or both of the other two branches.

A critical check on the legislative process is the President's power, under article I, section 7, to review all legislation passed by Congress. Clause 2 of that section provides that every bill that passes the House and the Senate shall, before it becomes a law, be presented to the President for his approval or disapproval. At the Philadelphia Convention in 1787, the Framers considered and expressly provided for the possibility that Congress, by passing "resolutions" rather than "bills," might attempt to evade the requirement that proposed legislation be presented to the President. It is precisely for this reason that clause 3 of article I, section 7 extends the requirement of presentation to "[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except a question of Adjournment)."

Resolutions like those authorized by § 126(b) violate the letter and spirit of these constitutional provisions. They purport to enable Congress to legislate without presidential review. Specifically, they would allow Congress, without presidential review, to block the exercise of the authority granted the President to permit nuclear exports.

The same conclusion follows from a more general consideration of the principle of separation of powers. Not every governmental function, of course, is invariably and by its nature either legislative, executive, or judicial. Some activities might be performed by any of the three branches. In such cases it is up to Congress to allocate the responsibility. See, e.g., Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42-43, 46 (1825). But once Congress, by passing a law, has allocated the responsibility, the separation of powers requires that Congress not control the discharge of those functions assigned to the executive or to the judiciary, except by passing another law. To permit otherwise would allow the concentration of executive and legislative power in the hands of one branch, in manifest contravention of the Framers' intent. See The Federalist, No. 47, at 324 (Cooke ed. 1961).

Further, it is not possible to excuse a measure that violates the Constitution on the ground that Congress deems the measure "necessary and proper for carrying into Execution the [legislative] Powers, and all other Powers vested by [the] Constitution in the Government of the United States," art. I, § 8, cl. 18. In Buckley v. Valeo, 424 U.S. 1, 134-35 (1976), the Supreme Court considered the argument that officers of Congress could, under the necessary and proper clause, be empowered to appoint commissioners of the Federal Election Commission, notwithstanding the fact that article II, section 2, clause 2 of the Constitution places the appointment power in the President. The Court explained:

Congress could not, merely because it concluded that such a measure was "necessary and proper" to the discharge of its substantive legislative authority, pass a bill of attainder or ex post facto law contrary to the prohibitions contained

in Section 9 of Article I. No more may it invest in itself, or its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so.

424 U.S. at 135. The Constitution establishes the President's veto power with the same clarity and specificity with which it establishes the appointment power and prohibits bills of attainder and ex post facto laws. Under Buckley, it follows that the necessary and proper clause does not permit Congress to evade, through measures like the concurrent resolution provision of § 126(b), the specific provision that article I, section 7 makes for the President's role in reviewing legislation. For these reasons, we believe that a concurrent resolution of Congress that is not presented to the President cannot constitutionally nullify a statutorily authorized executive order that overrides the Commission and permits the export of nuclear material. The portion of § 126(b) that purports to give legal effect to such a concurrent resolution is therefore, in our view, unconstitutional.

### III

It might be argued, however, that if the portion of § 126(b) permitting Congress to disapprove executive orders is to be disregarded, so must the portion of § 126(b) authorizing the President to issue those orders. The argument would be that these two provisions cannot be severed. If this argument were correct, then the President would lack the authority to issue orders overriding the Commission. We believe, however, for reasons we will explain, that the concurrent resolution provision of § 126(b) is severable from the provision giving the President the power to override the Commission.

Declaring a provision enacted by Congress unconstitutional -- or, in the case of the executive branch, refusing to carry it out because it is unconstitutional -- necessarily thwarts

Congress's intentions to some degree. The objective of the doctrine of severability is to keep this distortion of the legislature's intentions to a minimum; once a portion of a statute is determined to be unconstitutional, the statute must be reconstructed in the way that most closely conforms to the legislature's intentions. In other words, in deciding the extent to which an unconstitutional provision is severable, it is necessary to determine what sort of statutory scheme Congress would have enacted if Congress had recognized that the Constitution precluded some aspect of the precise scheme it chose. See, e.g., Dorchy v. Kansas, 264 U.S. 286, 290, (1924).

In general, "[t]he cardinal principle of statutory construction is to save and not to destroy," even when the statute contains no severability clause. See Tilton v. Richardson, 403 U.S. 672, 684 (1971) (plurality opinion), quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937). The Supreme Court has said:

Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative.

Buckley v. Valeo, 424 U.S. 1, 108 (1976), quoting Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 234 (1932). A severability clause -- such as the one contained in the Atomic Energy Act, see 42 U.S.C. § 2011 note -- enhances the presumption in favor of enforcing as much of the statute as one can enforce without violating the Constitution, see United States v. Jackson, 390 U.S. 570, 585 n.27 (1968); Electric Bond & Share Co. v. SEC, 303 U.S. 419, 434 (1938), although it is not conclusive. <sup>1/</sup> But these principles of severability do not justify introducing

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<sup>1/</sup> A severability clause "provides a rule of construction which may sometimes aid in determining [legislative] intent. But it is an aid merely; not an inexorable command." Dorchy v. Kansas, 264 U.S. 286, 290 (1924).

into a statutory scheme elements that are alien to the legislature's intentions. See Sloan v. Lemon, 413 U.S. 825, 834 (1973). And the Supreme Court has said that "[w]here an excepting provision in a statute is found unconstitutional, courts very generally hold that this does not work an enlargement of the scope or operation of other provisions with which that provision was enacted and which it was intended to qualify, and restrain." Davis v. Wallace, 257 U.S. 478, 484 (1922). On the basis of this language one court of appeals refused to sever a provision comparable to the concurrent resolution provision of § 126(b) -- a provision permitting one house of Congress to override a presidential action -- from the authority for the presidential action. See McCorkle v. United States, 559 F.2d 1258, 1261-62 (4th Cir. 1977).

For several reasons, however, we believe that the concurrent resolution provision of § 126(b) can be severed from the provision giving the President authority to override the Commission. First, while a severability clause does not automatically decide every question of severability, the severability clause of the Atomic Energy Act is unusually broad. It provides:

If any provision of this Act or the application of such provision to any person or circumstances, is held invalid, the remainder of this Act or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

42 U.S.C. § 2011 note. Some severability clauses are not so unequivocal. For example, in Sloan v. Lemon, 413 U.S. 825 (1973), the Supreme Court refused to find severable an application of a provision of a state statute containing a severability clause, but that clause provided only:

If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid, in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Id. at 833 n.10 (emphasis by the Court). A strong argument can be made, in light of the breadth of the Atomic Energy Act's severability clause, that if Congress had intended the various portions of § 126(b) to stand or fall together, it would have said so explicitly when it added § 126(b) to the Act.

In addition, Congress knew that both this President and his predecessor believed the concurrent resolution provision was unconstitutional. Both Administrations specifically informed Congress of their views during the debates leading up to the Non-Proliferation Act. See, e.g., S. Rep. No. 467, 95th Cong., 1st Sess. 48, 60 (1977); S. Rep. No. 1193, 94th Cong., 2d Sess. 49 (1976) (State Department comments on proposed Export Reorganization Act of 1976, a predecessor of the Non-Proliferation Act). See also S. Rep. No. 467, 95th Cong., 1st Sess. 48, 60 (1977). The President reiterated this view when he signed the Non-Proliferation Act. 14 Weekly Comp. of Pres. Doc. 500, 502 (Mar. 10, 1978). Two inferences may be drawn from this. First, Congress must have recognized that substantial questions could be raised about the constitutionality of the concurrent resolution provision of § 126(b). Congress presumably believed that provision was constitutional; but Congress must also have recognized that the courts or the executive branch might disagree. Out of prudence alone, Congress would likely have made some special provision for the various portions of § 126(b) if it had not intended the usual presumption of severability, and the severability clause of the Atomic Energy Act, to govern.

Second, Congress must have recognized that unless the concurrent resolution provision of § 126(b) was severable, the President's constitutional position was inconsistent with his exercising any authority under § 126(b). There is no indication in the legislative history that Congress perceived such an inconsistency. There is no indication, for example, that Congress intended to force the President to choose between abandoning a constitutional position the executive branch has held so firmly, on the one hand, and forgoing the § 126(b) power that the President wanted to have and that Congress clearly wanted to give him. This strongly suggests that Congress saw no conflict between the President's constitutional position on the concurrent resolution portion of § 126(b) and his exercising power under the other portions of § 126(b). In other words, this suggests that Congress assumed the concurrent resolution provision was severable.

The specific legislative history of § 126(b) also shows that Congress intended the concurrent resolution provision to be severable from the President's power. As we have said, in deciding the extent to which an unconstitutional provision is severable, one must ask what choice Congress would have made if it had recognized that the statutory scheme it in fact selected was unconstitutional. In other words, in connection with § 126, in whom would Congress have placed final authority over nuclear exports if it had recognized that the choice it made -- the two houses of Congress, acting by concurrent resolution -- was precluded by the Constitution? Unless the Atomic Energy Act is to be radically rewritten, only four answers are possible, even theoretically. Congress might have placed final authority in the Commission; it might have given it to the President; it might have prohibited nuclear exports entirely, and given no body the power to license them; or it might have left nuclear exports wholly unregulated.

The last two of these possibilities are plainly implausible. Nuclear exports have been regulated since 1946, see Atomic Energy Act of 1946, ch. 724, §§ 5(a)(3)(C), 7(a), 60 Stat. 760, 764, and the Nuclear Non-Proliferation Act reflected Congress's view that more detailed and sensitive regulation was needed. See, e.g., 22 U.S.C. §§ 3201-3202; H.R. Rep. No. 587, 95th Cong., 1st Sess. 1 (1977). But Congress also recognized that many nuclear exports would have to be permitted routinely in order to maintain the United States's reputation as a reliable supplier. That reputation is, as Congress recognized, very important in preventing proliferation. See, e.g., S. Rep. No. 467, 95th Cong., 1st Sess. 40 (1977). Congress clearly recognized that uncertainty about whether an export would be permitted would seriously damage that reputation even if the export were finally allowed. See id. For those reasons, Congress did not consider, and most likely would never have seriously considered, a general prohibition on nuclear exports that would have required legislation in each case.

Thus the question is whether Congress would have given final authority to the President or to the Commission, if it had been faced with that choice. As the concurrent resolution provision shows, Congress was uneasy about giving final authority to the President. But it is clear that, in the view of the Congress that enacted the Nuclear Non-Proliferation Act, the President was a far better choice than the Commission.



Before 1974, final authority to grant or deny nuclear export licenses was vested in the Atomic Energy Commission. The Energy Reorganization Act of 1974 transferred that power to the Nuclear Regulatory Commission. The State Department could advise the Commission of the views of the rest of the executive branch. See Exec. Order No. 11902, 41 Fed. Reg. 4877 (1976). When Congress began to address the problem of nuclear proliferation, it recognized that this procedure was unsatisfactory. In particular, Congress saw that a decision whether to export nuclear material or equipment would sometimes require a judgment about complex questions of foreign affairs -- the sort of judgments traditionally entrusted to the President, not to an agency like the Commission. See *Edlow International Co.*, 7 N.R.C. 436, 444-45 (1978), reprinted in 2 Nuclear Reg. Rep. (CCH) ¶ 30,288.01 (1978) (opinion of Commissioners Bradford and Gilinsky).

For example, permitting an export, and thus maintaining the United States's influence with a recipient, might in some cases be the best way to prevent proliferation. See, e.g., H.R. Rep. No. 587, 95th Cong., 1st Sess. 22 (1977). Or "for foreign policy reasons the ramifications of denying the license" might "far outweigh the risks associated with the export." S. Rep. No. 875, 94th Cong., 2d Sess. 10 (1976). See also 123 Cong. Rec. S 1065 (daily ed. Feb. 2, 1978) (remarks of Sen. Glenn). Congress consistently recognized that there had to be a role for these kinds of judgments in nuclear export licensing. A committee considering a predecessor of the Non-Proliferation Act commented that "it would be unwise for the [Commission] to exercise, in essence, an absolute veto over transactions that the Secretary of State deems important for foreign policy reasons." S. Rep. No. 875, 94th Cong., 2d Sess. 18 (1976). 2/ Another committee reporting a bill

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2/ That committee justified congressional oversight of the President's decision by saying that "the perils of proliferation are severe enough that the Committee thinks it equally unwise to give the final, unilateral decision over nuclear exports to the State Department." S. Rep. No. 875, 94th Cong., 2d Sess. 18 (1976). See p. 12 *infra*. But the committee clearly recognized that complex foreign policy questions are inevitably involved in decisions about licensing nuclear exports; it thought only that Congress should be able to reverse the President's decisions on those questions.

that became the Non-Proliferation Act said that the bill "seeks to maximize the executive branch's flexibility in seeking agreement with all nations on antiproliferation goals." H.R. Rep. No. 587, 95th Cong., 1st Sess. 7 (1977). The Non-Proliferation Act itself, in adding sections 127 and 128 to the Atomic Energy Act, provides several relatively specific criteria that the Commission must apply in deciding whether to grant an export license. See 42 U.S.C. §§ 2156, 2157. But as we have previously advised, these criteria do not bind the President. His decision is governed only by the criteria established in § 126(b); he need decide only the broad foreign policy questions of whether "withholding the proposed export would be seriously prejudicial to the achievement of United States non-proliferation objectives, or would otherwise jeopardize the common defense and security." 42 U.S.C. § 2155(b)(2). 3/ The Supreme Court has said that such judgments about foreign affairs, which "are delicate, complex, and involve large elements of prophecy," see Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948), are best suited to the President, perhaps acting in conjunction with Congress. See id. It is most unlikely that Congress would have refused to give them to the President, and given them instead to the Commission, if it had been faced with that choice. 4/

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3/ See, e.g., S. Rep. No. 467, 95th Cong., 1st Sess. 112 (1977) (statement of Chairman Hendrie of the Nuclear Regulatory Commission).

4/ McCorkle v. United States, 559 F.2d 1258, 1261-62 (4th Cir. 1977), see p. 6 supra, provides a useful contrast. There, the question was whether Congress would have vested authority in the President or retained it in itself, and the function involved -- setting federal salaries -- was one traditionally controlled by Congress. See generally id. at 1262 & n.9. Therefore a much stronger argument could be made in that case that Congress, had it recognized that it could not constitutionally enact the provision allowing one house to override the President, would not have delegated authority to the President at all.

Just as authority to make these judgments is customarily vested in the President, so it would be most unusual and inappropriate to vest it in an independent agency like the Commission. The Constitution may even prohibit Congress from giving final authority over a foreign policy decision to an independent agency; the Supreme Court has said that "the President alone has the power to speak or listen as a representative of the nation . . . . As Marshall said in his great argument . . . , 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.'" United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936). See also Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 109-110 (1948). But whatever the constitutional limits on independent agencies' role in foreign affairs, Congress has consistently denied independent agencies final authority over decisions involving sensitive and complex questions of foreign policy. For example, foreign air carriers must apply to the Civil Aeronautics Board, an independent agency, for a license to operate in the United States; but the Board's decision is only a "recommendation" to the President, who makes the final decision "upon the basis of foreign relations or national defense considerations which are within the President's jurisdiction, but not upon the basis of economic . . . considerations." See 49 U.S.C. §§ 1372, 1461; Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 109-10 (1948). Similarly, the International Trade Commission may investigate unfair import practices by foreign nations and may recommend relief against such practices; but Congress carefully preserved for the President the authority to override the Commission "for policy reasons." See 19 U.S.C. § 1337. The Senate committee that drafted the provision giving this authority to the President explained it by saying that "the granting of relief against imports could have a very direct and substantial impact on United States foreign relations, economic and political." S. Rep. 1298, 93rd Cong., 2d Sess. 199 (1974). Other statutes have a similar structure; Congress has consistently given the President final authority to overrule independent regulatory agencies on issues involving foreign affairs. See, e.g., 47 U.S.C. § 721 (Federal Trade Commission authority under Communications Satellite Act of 1962). We know of no statute giving an independent agency final authority over sensitive foreign affairs issues.

There is no reason to believe that Congress reversed this approach in the Nuclear Non-Proliferation Act of 1978. Undoubtedly, as we have said, Congress was somewhat uneasy about giving the President final authority over nuclear exports. The concurrent resolution provision of § 126(b) itself reflects this uneasiness, and there are scattered suggestions in the legislative history that the ultimate decision had to lie with Congress because the Commission and the President were equally unacceptable. See, e.g. S. Rep. No. 875, 94th Cong., 2d Sess. 18 (1976) (quoted at p. 9 note 2 *supra*); 124 Cong. Rec. S 1067 (daily ed. February 2, 1978) (remarks of Sen. Percy). But the inappropriateness of vesting final authority in the Commission is a far stronger theme throughout the legislative history of the Non-Proliferation Act.

Predecessors of the bill that became the Non-Proliferation Act almost uniformly took away from the Commission final authority to deny a nuclear export license. See, e.g., H.R. Rep. 1613, 94th Cong., 2d Sess. 10 (1976) (proposed § 126 in proposed Nuclear Explosive Proliferation Control Act of 1976). Members of Congress disagreed about whether Congress should be able to oversee this presidential authority, and if so what form the oversight should take. See, e.g., S. Rep. No. 1336, 94th Cong., 2d Sess. 45 (1976). But there was little dispute, first, that final authority should be taken from the Commission; and second, that the President should have a greater role in exercising that authority. See, e.g., Nuclear Non-Proliferation Policy Act of 1977: Hearings on S. 897 and S. 1432 before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources, 95th Cong., 1st Sess. 165-66 (1977). As Senator Glenn, one of those principally responsible for the Non-Proliferation Act, said,

[W]e are admitting that NRC [the Commission] probably could not be set up to perform a mini-State Department function . . .

[W]e put the responsibility in Congress where it should be in foreign policy matters of major import. Either we should do that, or we should withdraw that mission from NRC, one way or the other . . . Some future Chairman of the Nuclear Regulatory Commission might . . . upset foreign policy. We do not want to give him that kind of power.

Export Reorganization Act of 1976: Hearings on S. 1439 before the Senate Comm. on Government Operations, 94th Cong., 2d Sess. 574-75, 652 (1976). This again suggests that Congress, if faced with a choice between vesting final authority in the Commission and vesting it in the President, would have chosen the President.

The Commission's final authority over export licensing was, indeed, always something of an incongruity. Section 201(f) of the Energy Reorganization Act of 1974, 42 U.S.C. § 5841(f), gave the Commission jurisdiction over export licenses by simply transferring to it "all the licensing and related regulatory functions of the Atomic Energy Commission." But other licenses issued by the Commission involve matters of domestic safety and security, such as the operation of reactors and shipment of materials within the United States. See, e.g., 42 U.S.C. §§ 2073(b), 2092, 2133, 2137. The drafters of the Energy Reorganization Act focused almost entirely on the regulation of the domestic nuclear industry and its health and safety risks; they apparently paid little attention to the Commission's role in licensing nuclear exports. See, e.g., H.R. Rep. No. 707, 93rd Cong., 1st Sess. 3 (1973); S. Rep. No. 980, 93rd Cong., 2d Sess. 2, 19, 21 (1974). Moreover, few if any of the Commission's other functions involve foreign affairs. As we said, Congress has consistently denied final authority over sensitive foreign affairs decisions even to independent agencies that have some expertise in foreign policy. There is no reason to believe that the Commission has such expertise.

Finally, at the time Congress was considering the Non-Proliferation Act, the Commission itself unanimously took the position that it should not have final authority over export licenses. The Commission's chairman testified, about the provision permitting the President to override the Commission:

The Commission supports such a provision. We ought frankly to recognize that decisions in matters resting heavily on foreign policy and international security considerations legitimately call for a Presidential perspective and voice.

If the decisive consideration is a political one--as it may well be where foreign relations and national security factors are present--the President should be empowered to implement his judgment. The administration bill's provisions for this necessary Presidential role also preserves [sic] the independent role for the Commission. It requires any Presidential determination of this nature be based on a strict standard relating to overriding national security interests. The President must also act publicly, and only after the Commission has issued its decision.

In our view, this approach adds a desirable and soundly structured dimension to the nuclear export process.

Nuclear Nonproliferation and Export Controls: Hearings on S. 897 and S. 1432 before the Subcomm. on Arms Control, Oceans, and International Environment of the Senate Comm. on Foreign Relations, 95th Cong., 1st Sess. 45 (1977). There is no indication that Congress disagreed with Commission's estimate of its own competence in foreign affairs.

For all these reasons, we believe that if Congress had been forced to choose between giving final authority to deny export licenses to the Commission and giving it to the President, Congress would have given that authority to the President. We therefore believe that the most sound reconstruction of § 126 would sever the concurrent resolution provision, which we believe is unconstitutional, but leave intact the President's authority to overrule the Commission.

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