

5 FEB 1981

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Notification to Congress of the Department's
Decision Not to Maintain the Constitutionality
of an Act of Congress.

The most recent Authorization Act for the Department of Justice, Public Law No. 96-397, incorporates § 21 of Public Law No. 96-132, 93 Stat. 1049-1050, which requires the Attorney General to "transmit a report to each House of the Congress in any case in which" he "determines that the Department of Justice will contest, or will refrain from defending, any provision of law enacted by the Congress in any proceeding before any court of the United States, because of the position of the Department of Justice that such provision of law is not constitutional." Your predecessor adhered to the well established position of prior Attorneys General that the Attorney General should contest or refrain from defending Acts of Congress only in exceptionally rare circumstances, such as when no colorable argument supported the Act at issue or when the Act intruded on the constitutional prerogatives of the Executive Branch. See the attached Letter of July 30, 1980, to Chairman Baucus of the Senate Subcommittee on Limitations of Contracted and Delegated Authority, from Attorney General Benjamin Civiletti. Nonetheless, he found it necessary to transmit the reports required by the Department's Authorization Act on several occasions.

The Solicitor General and the Assistant Attorney General, Civil Division, in the case of Will v. United States (N.D. Ill. No. 80-C-6692), determined that Public Law No. 96-369 was unconstitutional under the Supreme Court's decision in United States v. Will, 49 U.S.L.W. 4045 (U.S., December 15,

1980). We agree with that determination. The Congress has not yet been informed of the determination. Attached for your signature are proposed reports to both Houses, transmitting the required information.

Larry L. Simms
Acting Assistant Attorney General
Office of Legal Counsel