



ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

United States Department of Justice
Washington, D.C. 20530

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cc: Files
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13 MAR 1981

MEMORANDUM FOR THE ATTORNEY GENERAL

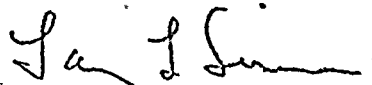
Re: Legislative Veto of Rules Promulgated by
"Independent" Agencies

I am informed that discussions of the legislative veto issue in the last several days have generated a considerable amount of political support for a "compromise" which would have the Administration either concede or not contest the constitutionality of legislative veto devices as applied to decisionmaking by so-called independent agencies. Because I do not believe the Administration can concede this constitutional question in the context of independent agencies without severely undermining our case against the veto in virtually all other circumstances, I must strongly object to any such "concession." Although the question whether the Administration should adopt a policy of simply not appearing in litigation challenging the constitutionality of legislative veto devices as applied to independent agencies is a closer one, I believe that present circumstances cut decisively against the adoption of such a policy.

As indicated in the attached memorandum of October 11, 1977 from this Office to the Attorney General (attached), attempts by Members of Congress to convince the Executive to take a different view of the legislative veto device in the context of independent agencies are not new. Those attempts have been consistently rebuffed. During the Ford Administration, the Department of Justice argued vigorously against the constitutionality of the legislative veto device contained in the organic statute of the Federal Election Commission, one of the so-called independent agencies. The Department of Justice appreciated at that time, and I believe should continue to appreciate, the particular dangers to the power of the President in the creation of these so-called independent agencies. Recognition of a power in Congress to veto, without the participation of the President, actions taken by such agencies would, in the Department's historic view, exacerbate rather than ameliorate the encroachment on the President's power that these independent agencies represent in the first place. I assume the logic of those desiring to accept this "compromise" would run as follows: because the President presently has very little policy control over actions taken by independent agencies,

he should be less concerned that Congress, through legislative veto devices, puts itself in a position to exercise even more control than it presently has through enactment of plenary legislation subject to the President's veto. As I believe should be obvious, the "exception" to the President's power to execute the law under Article II, Section 3 of the Constitution carved out by the Supreme Court in its recognition of the power of Congress to create these independent agencies is something to which the Executive should be at the very least philosophically opposed, even though it is too late in the day to make a sound constitutional argument against their creation. What should be recognized in consideration of this issue is that Congress may, by statute, transfer from the Executive Branch to these independent agencies virtually all rulemaking and adjudicatory functions presently performed in the Executive Branch. The erosion in the President's role of executing the law through a combination of transfers of such power to independent agencies -- a transfer vigorously resisted by the Nixon, Ford and Carter Administration, coupled with recognition of legislative veto power over independent agencies would be enormous.

A policy decision simply to refrain from presenting the views of the Department of Justice on this issue in the context of litigation presenting the legislative veto issue as applied to independent agencies would require the withdrawal of the brief (attached) filed by the Department of Justice on behalf of the United States in a case presently pending before the United States Court of Appeals for the District of Columbia Circuit, Consumer Energy Council of America v. Federal Energy Regulatory Commission, Nos. 80-2184 & 80-2312. We have been informed by the Federal Energy Regulatory Commission, an independent agency, that it does not intend to address the constitutional issue in its brief. The result would be that the constitutional prerogatives of the President would be represented in that case by the attorney for the private plaintiffs and opposed by attorneys for the Senate and House, who have indicated an intention to file briefs in that case, and have been authorized by the Senate and House respectively, to do so. I am disturbed that a policy decision might be made to have this issue determined in litigation in which the position of the Executive was not presented by the Attorney General, and I doubt that the policy would placate those Members of Congress who feel strongly about this issue.



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

Attachments

cc: The Deputy Attorney General