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9 JUN 1981

MEMORANDUM FOR MURRAY L. WEIDENBAUM
Chairman
Council of Economic Advisers

Re: Constitutional Principles concerning the
"Legislative Veto" Issue relating to Possible
Statutory Changes in Federal Benefit Programs

This responds to the request of Susan C. Nelson of your staff for a brief discussion of the applicable legal principles relating to the issue of the "legislative veto" that should be borne in mind during discussion of possible statutory changes in federal benefit programs. In particular, we were asked whether the Constitution would place limits on Congress' power to amend existing laws relating to the "indexing" of statutory benefits while reserving to one or both Houses of Congress the power to overrule a Presidential decision to adjust statutory benefits under such an amendment. As we informally advised Ms. Nelson, there are such constitutional limitations, the effect of which in our view would be to render invalid any provision of law purporting to reserve to one House of Congress acting alone, or both Houses acting concurrently and not subject to the President's veto, the power to overrule an Executive decision adjusting benefits under a grant of statutory authority.

The starting point for legal analysis of a "legislative veto" provision in any statute amending existing federal benefit programs is Article I, § 7, of the Constitution, which provides that any bill or resolution before it becomes law must be passed by both Houses of Congress, and presented to the President for his approval or veto. If the President vetoes a bill or resolution, Congress may pass it over his objection by a two-thirds vote. The language and history of Article I, § 7, make clear that all exercises of legislative power having the effect of legislation binding the Executive Branch must follow that specified procedure.

A provision in one or more of the statutes governing federal benefit programs that purported to authorize one House or both Houses of Congress to override a Presidential decision adjusting a particular type of benefit received by covered individuals would, in our view, be subject to the requirements of Article I, § 7, for an exercise of power pursuant to such a provision would be the functional equivalent of legislation. Such an exercise of power would fail the constitutionally prescribed test for valid legislative action since the action, in the circumstances described to us, would not be presented to the President for his approval or veto. Also, in our view the action would contravene the constitutionally prescribed principle of the separation of powers, under which the power to execute the law is reserved to the President and the Executive branch.

As you are aware, the applicability of Article I, § 7, and of the principle of separation of powers to actions of Congress purporting to bind the Executive branch has been the subject of a long-standing dispute between the two political branches. The Department of Justice has sought to achieve judicial resolution of the question. With this in mind, on May 1, 1981, the Department filed in the Supreme Court of the United States a Jurisdictional Statement in the case of Chadha v. Immigration and Naturalization Service, in which the court of appeals ruled that a one-House legislative veto provision in the Immigration and Nationality Act offends the Constitution's principle of the separation of powers and its prescribed procedure for legislative action. 1/

In summary, in our view the Constitution would not permit Congress to reserve to one House of Congress acting alone or both Houses acting concurrently the power to review and override an Executive decision, taken pursuant to law, that a type of federal benefit should be adjusted by a certain amount or in a certain way. Such a Congressional override of Executive action requires compliance with the plenary legislative process and should be in the form of a bill or a joint resolution, not a concurrent resolution, a Senate or House

1/ For your information, a copy of the Jurisdictional Statement is attached.

resolution or a Committee resolution. 2/ Of course, Congress could make recommendations to the President regarding his performance of statutorily authorized functions pertaining to federal benefit programs, but such congressional action would not be legally binding on the President.

We trust that this discussion of legal principles will be of assistance to you and your staff as you consider various policy alternatives. We would be glad to provide further legal advice on this issue as the process of reviewing possible policies continues.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

2/ Joint resolutions and bills are passed by both Houses in identical form and are presented to the President. Concurrent resolutions do not become law, and are not presented to the President; they must be approved by the House and Senate in identical form. A House or Senate resolution also does not become law, and only has the force of the House passing it. See Enactment of a Law-Procedural Steps in the Legislative Process, S. Doc. No. 15, 96th Cong., 1st Sess. (1979).