Office of the Attorney General
Washington, D. C. 20530

November 21, 1984

Honorable William S. Cohen
Chairman, Subcommittee on
Oversight of Government
Management
Senate Committee on Governmental
Affairs
Washington, D.C. 20510

Dear Mr. Chairman:

This responds to your letter of October 26, 1984, regarding a legal opinion rendered by this Department's Office of Legal Counsel on October 17, 1984, on the subject of "Implementation of the Bid Protest Provisions of the Competition in Contracting Act." After careful consideration of the issues raised in your letter, and for reasons set forth in some detail below, I concur in the conclusions of the Office of Legal Counsel that certain provisions of the Competition in Contracting Act (CICA) breach the constitutionally mandated separation of powers. Furthermore, I have determined that the legally appropriate course of action for the Executive Branch to follow given this conclusion is to refrain from implementing those unconstitutional provisions of the CICA. This course of action has the incidental effect of facilitating, rather than impeding, a judicial resolution of the constitutional issues in a timely fashion.

I begin by identifying what I believe to be common ground between us on the issues raised in your October 26 letter. First, your letter acknowledges the fact that the disputed provisions of the CICA present a conflict between our respective branches regarding the allocation of power under our Constitution. Thus, this is a situation in which the Executive Branch is

declining to enforce a statute, believed by the Attorney General to be unconstitutional, that trenches on the constitutional prerogatives of the Executive Branch. 1/

Second, I share your belief that a decision by the Executive Branch to refrain from defending or executing an enactment of Congress presents a very serious matter worthy of the most careful consideration and deliberation. Shortly after assuming this Office, I had occasion to reconsider and reverse a 1979 decision of this Department to refrain from defending the constitutionality of a provision of the Public Broadcasting Act of 1967, 47 U.S.C. § 399(a). 2/ As recently as September 5, 1984, I once again considered this general problem and determined that this Department would challenge the constitutionality of the appointment provisions contained in §§ 106 and 121(e) of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. 3/ I can only reiterate my belief that these issues are among the most serious that are ever presented to the Attorney General for resolution and that I take my responsibilities in this regard with equal seriousness.

1/ See letters from Attorney General Civiletti to Honorable Walter F. Mondale, President of the Senate, and Thomas P. O'Neill, Jr., Speaker of the House of Representatives, of January 13, 1981 (informing Congress of Department of Justice policy to refrain from enforcing certain criminal provisions of the United States Code because of their unconstitutionality). I note that Congress has expressly anticipated situations in which the Department declines to enforce or to defend the constitutionality of a statute. In § 21 of Pub. L. No. 96-132, 93 Stat. 1049-50, Congress required the Attorney General to submit a report to the President of the Senate and the Speaker of the House in any case in which the Department determines not to enforce a statute or decides to contest or not to defend a statute based on the position that the statute is unconstitutional.

2/ Letter to Chairman Thurmond and Senator Biden of the Senate Committee on the Judiciary of April 6, 1981.

3/ Letters to Honorable George Bush, President of the Senate, and Thomas P. O'Neill, Jr., Speaker of the House of Representatives, of September 5, 1984.

the Executive would, subsequent to Chadha, observe only the constitutional "report-and-wait" features of legislative veto devices. 5/ Thus, even if the course that was followed by the Executive Branch, including this Administration, pending judicial resolution of the Chadha case were regarded as the only appropriate course of action in all similar situations, as your letter suggests, it is clearly not the course to be followed now that the Court's decision in Chadha has been handed down. 6/

My advice to Executive Branch agencies that they not execute these provisions has the coincidental effect of enhancing the potential for judicial consideration of the constitutional issues. Under appropriate circumstances, a dissatisfied bid protestor may challenge an agency's failure to comply with the stay provisions and thereby test the merits of this constitutional issue. It is not at all clear,

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5/ Hearings on the U.S. Supreme Court Decision Concerning the Legislative Veto, before the House Committee on Foreign Affairs, 98th Cong., 1st Sess. 52 (1983) (statement of Deputy Attorney General Schmults).

6/ Although I believe that the decision of Attorney General Bell to enforce the unconstitutional legislative veto device at issue in Chadha until held unconstitutional by the courts was not inappropriate, I note that in 1955, almost three decades before Chadha was decided, President Eisenhower instructed the Secretary of Defense to ignore another legislative veto device contained in the Department of Defense Appropriation Act, a so-called "committee approval" provision, by stating in a signing statement that that provision "will be regarded as invalid by the Executive Branch of the Government . . . unless otherwise determined by a court of competent jurisdiction." Public Papers of the Presidents: Dwight D. Eisenhower 689 (1955). In 1963, President Kennedy stated that the unconstitutional features of another committee approval device would be ignored, with the provision to be treated as a "request for information." Public Papers of the Presidents: John F. Kennedy 6 (1963). President Johnson also made clear that the unconstitutional aspects of legislative veto devices would be ignored. Public Papers of the Presidents: Lyndon B. Johnson 104, 1250 (1963-64). President Johnson instructed the Secretary of Agriculture, in connection with the making of loans under an amendment to the Bankhead-Jones Farm Tenant Act, 7 U.S.C. §§ 1010-12, "to refrain from making any loans which would require committee approval." 2 Weekly Comp. Pres. Doc. 1676 (1966).

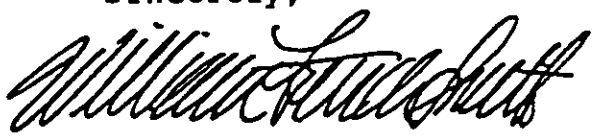
however, that the constitutionality of this provision could be tested if the Executive Branch complied with the disputed provision. Therefore, ultimate determination of the constitutional issue by the Judicial Branch -- a value that you embrace in your letter and with which I am in complete agreement -- is enhanced by our action, but would be greatly frustrated if the Executive Branch fully implemented the Act.

Similarly, were the Executive Branch to implement fully the provisions of the CICA purporting to authorize the Comptroller General to assess reasonable attorneys' fees and bid preparation costs, no litigation could be brought to contest the constitutional issue successfully. If the procuring agency were to pay out an "award" as directed by the Comptroller General, there would be no aggrieved person with sufficient standing under Article III of the Constitution to challenge the payment of that award. In short, by fully executing the law as passed by Congress, the procuring agency would have effectively eliminated the potential for judicial consideration of the constitutional issue.

In taking my oath of office as Attorney General of the United States, I promised to support and defend the Constitution. I strongly believe that my advice to the Executive Branch not to execute these two unconstitutional provisions, and my determination that the Department of Justice will refrain from defending these provisions in any court, administrative or other proceeding in which such execution is sought, are consistent with that promise.

Thank you for your letter of October 31, 1984, and the opportunity to explain my position on this issue.

Sincerely,



William French Smith
Attorney General