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THE WHITE HOUSE
WASHINGTON

January 23, 1992

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ACTION

MEMORANDUM FOR THE PRESIDENT

THROUGH: THE EXECUTIVE CLERK *Just for*

FROM: BRENT SCOWCROFT *B*
C. BOYDEN GRAY *CB*

SUBJECT: Unconstitutional Restrictions on Issuance of
Official and Diplomatic Passports to U.S.
Government Officials

Purpose

To direct the Secretary of State not to comply with unconstitutional restrictions on the issuance of official and diplomatic passports to U.S. Government officials.

Background

On Monday, October 28, you signed Public Law 102-138, the "Foreign Relations Authorization Act, Fiscal Years 1992 and 1993," and Public Law 102-140, the "Commerce, Justice, State, the Judiciary and Related Agencies Appropriations Act, Fiscal Year 1992." Both of these bills contain provisions purporting to forbid the issuance of more than one official or diplomatic passport to U.S. Government officials for the purpose of enabling those officials to comply with the policy of some Arab countries of denying admission to persons whose passports reflect travel to Israel. These provisions will go into effect on Sunday, January 26, 1992, unless you direct otherwise prior to that time.

The State Department has advised (Tab B) that "the inability to issue more than one official or diplomatic passport might well interfere with the ability of United States officials to engage in diplomacy and could upset delicate and complex negotiations." In view of the apparent unconstitutionality of the restrictions, State asks for guidance on whether and how to implement them. The Justice Department has issued an opinion (Tab C) concluding (1) that the restrictions unconstitutionally infringe on your authority to conduct foreign policy by attempting to prevent you from giving U.S. diplomats the documentation they need to do

cc: Vice President
Chief of Staff

*Noted:
Wm. 9/16*

THE WHITE HOUSE

WASHINGTON

January 23, 1992

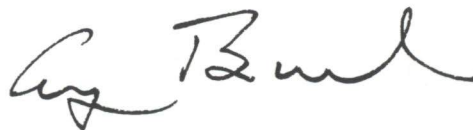
MEMORANDUM FOR THE SECRETARY OF STATE

SUBJECT: Issuance of Official and Diplomatic Passports to
U.S. Government Officials

Section 129 of Public Law 102-138, the "Foreign Relations Authorization Act, Fiscal Years 1992 and 1993," and section 503 of Public Law 102-140, the "Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Fiscal Year 1992," both purport to forbid the issuance of more than one official or diplomatic passport to U.S. Government officials for the purpose of enabling those officials to acquiesce in or comply with the policy of some Arab League nations of rejecting passports of, or denying entrance visas to, persons whose passports reflect travel to Israel.

I strongly object to the policy of some Arab League nations of denying admission to persons whose passports reflect travel to Israel, and it has been a part of this Administration's diplomacy in the Middle East to persuade those nations to abandon that policy. Nevertheless, insofar as section 129 of Public Law 102-138 and section 503 of Public Law 102-140 purport to constrain my ability to provide documentation to diplomats and other U.S. Government officials necessary for them effectively to perform their work, they intrude impermissibly on my constitutional authority to conduct the foreign relations of the United States. Full adherence to these sections could create obstacles to travel by U.S. officials in the Middle East.

Accordingly, I direct you to continue and, where appropriate, step up diplomatic efforts aimed at persuading Arab League nations to abandon the policy of denying admission to persons whose passports reflect travel to Israel. Further, consistent with the Constitution, I shall treat section 129 of Public Law 102-138 and section 503 of Public Law 102-140 as not imposing any binding legal obligation with respect to the issuance of more than one official or diplomatic passport to U.S. Government officials. So as not to hamper the conduct of U.S. diplomacy, I direct you to continue providing U.S. Government officials with as many official and diplomatic passports as their work requires, notwithstanding section 129 of Public Law 102-138 and section 503 of Public Law 102-140.





United States Department of State

Washington, D.C. 20520

October 29, 1991

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MEMORANDUM FOR BRENT SCOWCROFT
THE WHITE HOUSE

Subject: Proposed Legislation Prohibiting Multiple
Official or Diplomatic Passports

Section 129 of H.R. 1415, the "Foreign Relations Authorization Act, Fiscal Years 1992 and 1993," would provide that "The Secretary of State shall not issue more than one official or diplomatic passport to any official of the United States Government for the purposes of enabling that official to acquiesce in or comply with the policy of the majority of Arab League nations of rejecting passports of, or denying entrance visas to, persons whose passports or other documents reflect that the person has visited Israel." Section 503 of H.R. 2608, the "Commerce, Justice, State, the Judiciary and Related Agencies Appropriations Act, Fiscal Year 1992," would similarly provide that "None of the funds provided in this Act shall be used by the Department of State to issue more than one official or diplomatic passport to any United States Government employee for the purpose of enabling that employee to acquiesce in or comply with the policy of the majority of Arab League nations of rejecting passports of, or denying entrance visas to, persons whose passports or other documents reflect that person has visited Israel."

The Department of State is sympathetic to the goals of this legislation; we strongly object to the policy of some Arab nations of denying admission to persons whose passports reflect travel to Israel. It has been a goal of this Administration's diplomacy in the Middle East to persuade those nations to abandon that policy. Indeed, because the Arab boycott technically precludes admittance to travellers from Israel on a second passport, our practice of issuing second passports has itself been a challenge to this aspect of the boycott.

However, the proposed legislation as explained in its legislative history would consider issuance of a second passport for these purposes to be a form of "acquiescence" in

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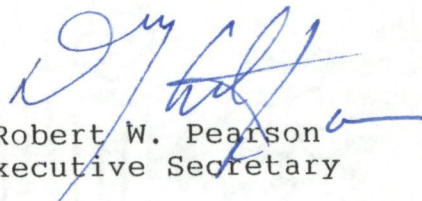
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the boycott, which is prohibited. The resultant inability to issue more than one official or diplomatic passport might well interfere with the ability of United States officials to engage in diplomacy and could upset delicate and complex negotiations. A current example is the intensified travel anticipated in order to participate in the peace conference process.

We have examined a variety of possibilities for carrying out diplomatic functions without the issuance of more than one official or diplomatic passport and been unable to identify a satisfactory alternative in a significant number of cases that would be affected by this legislation. The result of this legislation, therefore, could be a substantial impediment to the conduct of the foreign relations of the United States.

In our view, the proposed legislation would present significant constitutional concerns. We understand that the Department of Justice is evaluating this question and we have made our concerns known directly to that agency. In addition to the effect on immediate foreign policy objectives of the Administration, the longer term effect of the legislation on the constitutional authorities of the President will need to be considered.

In the event the proposed legislation is enacted, the Department will require guidance on how to carry out our responsibilities. In particular, it will be necessary to decide whether it would be consistent with the policies and constitutional responsibilities of the President for the Department to continue to issue more than one official or diplomatic passport to U.S. government officials where necessary for the conduct of U.S. diplomacy and foreign relations, notwithstanding the terms of the proposed legislation.


Robert W. Pearson
Executive Secretary

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U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

January 17, 1992

MEMORANDUM FOR C. BOYDEN GRAY
Counsel to the President

Re: Issues Raised by Section 129 of Pub. L. No.
102-138 and Section 503 of Pub. L. No. 102-140

This memorandum responds to your request for our opinion on several issues raised by the nearly identical provisions of section 129(e) of Pub. L. No. 102-138, 105 Stat. 647 (1991), the Foreign Relations Authorization Act for fiscal years 1992 and 1993, and section 503 of Pub. L. No. 102-140, 105 Stat. 782 (1991), an act making appropriations for the State Department and other agencies. Specifically, you asked whether these provisions are unconstitutional to the extent that they purport to prohibit the issuance of more than one official or diplomatic passport to United States government officials, whether they are severable from the remainder of the two bills, and whether the President may decline to enforce them.¹ For the reasons explained below, we conclude that the relevant portions of section 129(e) and section 503 are unconstitutional to the extent that they limit the issuance of official and diplomatic passports and that those sections are severable from the remainder of the two statutes. Under the circumstances, we further conclude that the President is constitutionally authorized to decline to enforce these provisions.

I.

Section 129 of Pub. L. No. 102-138 provides in part:

(e)(1) REQUIREMENT OF SINGLE PASSPORT. -- The Secretary of State shall not issue more than one official or diplomatic passport to any official of the United States Government for the purpose of enabling

¹ Memorandum from C. Boyden Gray, Counsel to the President, to Timothy E. Flanigan, Acting Assistant Attorney General, Office of Legal Counsel (Oct. 23, 1991) (Opinion Request).

that official to acquiesce in or comply with the policy of the majority of the Arab League nations of rejecting passports of, or denying entrance visas to, persons whose passport or other documents reflect that the person has visited Israel.

(2) IMPLEMENTATION OF POLICY OF NONCOMPLIANCE. -- The Secretary of State shall promulgate such rules and regulations as are necessary to ensure that officials of the United States Government do not comply with, or acquiesce in, the policy of the majority of Arab League nations of rejecting passports of, or denying entrance visas to, persons whose passport or other documents reflect that the person has visited Israel.²

The relevant portion of section 503 of Pub. L. No. 102-140 is nearly identical:

[Ninety] days after the enactment of this Act, none of the funds provided in this Act shall be used by the Department of State to issue more than one official or diplomatic passport to any United States Government employee for the purpose of enabling that employee to acquiesce in or comply with the policy of the majority of Arab League nations of rejecting passports of, or denying entrance visas to, persons whose passports or other documents reflect that that person has visited Israel.³

² 105 Stat. at 662. By virtue of section 129(e)(3)(A), section 129(e) is effective January 26, 1992.

Because you have requested our opinion only as to those provisions that "purport to forbid the issuance of more than one official or diplomatic passport to U.S. officials for the purpose of enabling those officials to acquiesce in" the Arab League policy described in section 129, we have so limited our review and will for ease of reference refer to the operative portion of section 129, section 129(e). See Opinion Request.

We note, however, that section 129 also prohibits issuance of "any passport that is designated for travel only to Israel." Pub. L. No. 102-138, § 129(d)(1), 105 Stat. at 661. To the extent that this prohibition applies to official and diplomatic passports, it suffers from the same constitutional defects as the prohibition on multiple passports.

³ 105 Stat. at 820. Like section 129 of Pub. L. No. 102-138, section 503 also prohibits the issuance of Israel-only passports: "None of the funds provided in this Act shall be used
(continued...)

These provisions purport to effect a change in the State Department's current practice in issuing official and diplomatic passports to government personnel sent to the Middle East, which is described in the conference report on Pub. L. No. 102-138: "Officials of the U.S. Government traveling in the Middle East are, as a general practice, issued two passports so that they can travel to Israel and to Arab countries in compliance with the passport and visa policy of the majority of Arab League nations." H.R. Conf. Rep. No. 238, 102d Cong., 1st Sess. 107 (1991). You have asked our opinion whether legislation banning continuation of this practice is unconstitutional.

The State Department has concluded that section 129(e) and section 503 would unconstitutionally intrude on the President's authority to conduct diplomacy on behalf of the United States.⁴ In the State Department's view, these provisions would "directly interfere with the President's ability to send his diplomats abroad to negotiate with foreign governments," id. at 7, and "interfere with the discretion and flexibility needed by the President to carry out the exclusively executive function of foreign diplomacy," id. at 12.⁵ Accordingly, the State Department concludes that these provisions are unconstitutional. Id. at 14.

³(...continued)
by the Department of State to issue any passport that is designated for travel only to Israel" Our discussion of section 503 is limited to the provision that forbids the issuance of more than one official or diplomatic passport to United States government officials. See supra note 2. References to section 503 in this memorandum should be understood to be so limited.

⁴ Memorandum from Jamison M. Selby, Deputy Legal Adviser, Department of State, to Timothy E. Flanigan, Acting Assistant Attorney General, Office of Legal Counsel (Jan. 3, 1992) (Selby Memorandum).

⁵ The State Department also disputes Congress' view, expressed in the text of section 129(e) and section 503, that issuing multiple passports to accommodate travel to the Middle East constitutes a practice of "acquiesc[ing] in" or "comply[ing] with" the Arab League policy. Selby Memorandum at 2. In State's view, the issuance of multiple passports is "rather a challenge to [that policy], because the rules of the boycott forbid the use of second passports to evade the policy." Id. Nevertheless, the State Department recognizes that "Congress considers the issuance of second passports as compliance with the Arab League policy." Id.

As part of its analysis, the State Department "examined a variety of possibilities for carrying out diplomatic functions without the issuance of more than one official or diplomatic passport," but it was "unable to identify a satisfactory alternative in a significant number of cases that would be affected by this legislation." Id. at 5. These alternatives included: (1) "travelling to either Israel or Arab League nations without presenting a passport;" (2) "ask[ing] Israel not to stamp the passports of U.S. officials;" (3) "seek[ing] advance permission from the receiving Arab country every time a U.S. official would be entering that country with a passport reflecting travel to Israel;" (4) "cancelling a diplomatic or official passport that reflected travel to Israel whenever the holder needed to travel to an Arab League nation, and reissuing a new passport;" and (5) "arranging negotiations so that travel to Israel followed travel to the Arab countries." Id. at 5-6. The State Department rejected all of these alternatives.⁶ After reviewing these options, it concluded:

Thus, in order to carry out [the single-passport requirement] in all cases, the President would have to make the abolition of the Arab League passport policy the first item on his negotiating agenda and succeed in having that policy abolished before proceeding with substantive negotiations of great importance to all parties concerned. . . . [W]e believe that such an effort would not succeed at this time.

Id. We defer to the State Department's expertise with respect to the practical effects of sections 129(e) and 503 and concur in its legal conclusions.

⁶ Option (1) was rejected because travel without a passport "would probably not be permitted by receiving states, would adversely impact U.S. bilateral relations in the region, and, if permitted, would expose U.S. officials to unacceptable personal risk." Selby Memorandum at 6. Option (2) was rejected because "even to propose it could adversely affect our relations with Israel, and, in any event, any such request would likely be rejected by Israel." Id. Option (3) was unacceptable because it "would put our diplomatic travel at the pleasure of Arab governments." Id. The State Department concluded that option (4) would cause "logistical problems" and might be viewed as inconsistent with the legislation. Id. Finally, option (5) was rejected because it would be "unacceptable to Israel" and because it would "only resolve the problem for a single trip." Id. More importantly, "it would be impossible in complex negotiations involving rapid, repeated travel between Israel and Arab countries." Id.

II.

The necessary background for our analysis of the particular issues presented here is the well-settled recognition of the President's broad authority over the Nation's foreign affairs. That authority flows from his position as head of the unitary Executive and as Commander-in-Chief. See, e.g., U.S. Const. art. II, §§ 1-3; Haig v. Agee, 453 U.S. 280, 291-92 (1981); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936). In addition, Section 2 of Article II of the Constitution specifically grants the President the "Power . . . to make Treaties" and to "appoint Ambassadors, other public Ministers and Consuls." These constitutional provisions authorize the President to determine the form and manner in which the United States will maintain relations with foreign nations and to direct the negotiation of treaties and agreements with them. See Memorandum from William P. Barr, Assistant Attorney General, Office of Legal Counsel, to C. Boyden Gray, Counsel to the President, Re: Issues Raised by Section 102(c)(2) of H.R. 3792 [the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991] 2 (Feb. 16, 1990) (Barr Memorandum).

In exercising the "federal power over external affairs," the President is not subject to the interference of Congress:

[T]he President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As [John] Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."

Curtiss-Wright, 299 U.S. at 319 (quoting 10 Annals of Cong. 613 (1800)) (emphasis in original). In other words, the President possesses "very delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations." Id. at 320. See also Barr Memorandum at 2-3.

The President himself emphasized these principles in his signing statement on Pub. L. No. 102-138:

Article II of the Constitution confers the Executive power of the United States on the President alone. Executive power includes the authority to receive and appoint ambassadors and to conduct diplomacy. Thus, under our system of government, all decisions concerning the conduct of negotiations with

foreign governments are within the exclusive control of the President. . . .

The Constitution . . . vests exclusive authority in the President to control the timing and substance of negotiations with foreign governments and to choose the officials who will negotiate on behalf of the United States.

Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, 27 Weekly Comp. Pres. Doc. 1526, 1526-27 (Oct. 28, 1991) (Presidential Signing Statement).

From the Executive's plenary authority to conduct the Nation's foreign affairs flow a number of specific executive powers that are of particular relevance to the issue at hand. These include control over the issuance of passports, power to determine the content of communications with foreign governments, authority to conduct diplomacy, and authority to define the content of foreign policy. As we explain in more detail below, we conclude that the infringement on these powers worked by section 129(e) and section 503 would be unconstitutional.

First, these provisions conflict with the long-accepted principle that the President, through delegates of his choosing, has authority over issuance of passports for reasons of foreign policy or national security. Prior to the enactment of the first passport legislation, it was generally understood that the

issuance of a passport was committed to the sole discretion of the Executive and that the Executive would exercise this power in the interests of the national security and foreign policy of the United States. This derived from the generally accepted view that foreign policy was the province and responsibility of the Executive.

Haig, 453 U.S. at 293.

From the outset, "Congress endorsed not only the underlying premise of Executive authority in the areas of foreign policy and national security, but also its specific application to the subject of passports." Id. at 294. In the earliest passport statutes, Congress expressly recognized the Executive's authority in that regard. See, e.g., Act of Feb. 4, 1815, ch. 31, § 10, 3 Stat. 195, 199 (prohibiting travel to enemy country without passport issued by officer "authorized by the President"). Passport legislation enacted in 1856, which authorized the Secretary of State to grant and issue passports "under such rules as the President shall designate and prescribe," reinforced the established power of the Executive in this area. See Haig, 453

U.S. at 294 (citing Act of Aug. 18, 1856, ch. 127, § 23, 11 Stat. 52, 60). As noted by the 1960 Congress, the 1856 Act

merely confirmed an authority already possessed and exercised by the Secretary of State. This authority was ancillary to his broader authority to protect American citizens in foreign countries and was necessarily incident to his general authority to conduct the foreign affairs of the United States under the Chief Executive.

Staff of Senate Comm. on Government Operations, 86th Cong., 2d Sess., Reorganization of the Passport Functions of the Department of State 13 (Comm. Print 1960) (Passport Reorganization). The Passport Act of 1926, ch. 772, 44 Stat. 887, adopted the pertinent language of the 1856 Act. The legislative history of the 1926 Act indicates congressional recognition of Executive authority with respect to passports. See Validity of Passports: Hearings on H.R. 11947 before the House Comm. on Foreign Affairs, 69th Cong., 1st Sess. 5, 10-11 (1926). As the 1960 Senate staff report concluded: "[T]he authority to issue or withhold passports has, by precedent and law, been vested in the Secretary of State as a part of his responsibility to protect . . . what he considered to be the best interests of the Nation." Passport Reorganization at 13.

Executive action to control the issuance of passports in connection with foreign affairs has never been seriously questioned. For example, in 1861, the Secretary of State issued orders prohibiting persons from departing or entering the United States without passports, denying passports to individuals who were subject to the military service unless they were bonded, and denying passports to individuals who were engaged in activities that threatened the Union. See 3 John B. Moore, A Digest of International Law 920 (1906). In 1903, President Theodore Roosevelt promulgated a rule authorizing the Secretary of State to refuse to issue passports to persons who the Secretary believed desired a passport "to further an unlawful or improper purpose." Exec. Order No. 235, § 16 (1903), quoted in Moore at 902.⁷ On a number of occasions the President, acting through the Secretary of State, has exercised his foreign affairs power by refusing to issue a passport or by revoking one already issued. For example, in 1948, the Secretary of State, pursuant to his "discretionary authority . . . to conduct and be responsible for foreign policy," refused to issue a passport to a congressman who sought to go abroad to attend a Paris conference to aid Greek guerrilla forces. Passports Again an Issue, N.Y. Times, Apr. 11, 1948, at E9, discussed in Haig, 453 U.S. at 302.

⁷ See also Exec. Order No. 654 (1907); Exec. Order No. 2119-A (1915); Exec. Order No. 2519-A (1917).

More recently, the Supreme Court upheld the authority of the Secretary of State to revoke a passport on grounds of national security pursuant to a regulation, 22 C.F.R. § 51.70(b)(4), promulgated under section 1 of the Passport Act of 1926, codified as amended at 22 U.S.C. § 211a. See Haig, 453 U.S. at 289-310. Although Haig was decided on statutory grounds, id. at 289 n.17, the Supreme Court noted with approval the vesting of authority over passports in the Executive based on the Executive's constitutional authority in the area of foreign affairs, id. at 294.⁸ By purporting to regulate the issuance of official and diplomatic passports, section 129(e) and section 503 infringe upon this constitutional authority.

Second, section 129(e) and section 503 would interfere with the President's communications to foreign governments in the conduct of the business of the United States Government abroad. In interfering with the issuance of official and diplomatic passports, Congress infringes on the President's plenary authority "to speak or listen as a representative of the nation." Curtiss-Wright, 299 U.S. at 319.

In general, passports are representations by the President to a foreign government on behalf of the United States. See Haig, 453 U.S. at 292 ("A passport is . . . a letter of introduction in which the issuing sovereign vouches for the bearer and requests other sovereigns to aid the bearer."); id. (quoting Urtetiqui v. D'Arcy, 34 U.S. (9 Pet.) 692, 699 (1835)) ("A passport is a document, which, from its nature and object, is addressed to foreign powers . . . and is to be considered rather in the character of a political document").

More particularly, official and diplomatic passports are documents addressed to foreign powers in which the President vouches for United States officials and diplomats.⁹ They carry

⁸ Haig v. Agee provides two other examples of Executive authority over passports. In 1954, the Secretary revoked a passport held by an individual who was involved in supplying arms to foreign groups whose interests were contrary to United States policy. Id. at 302. Similarly, in 1970, the Secretary revoked passports held by two persons who sought to travel to the site of an international airplane hijacking. Id.

⁹ State Department regulations describe the types of passports issued by the United States Government:

(a) Regular passport. A regular passport is issued to a national of the United States proceeding abroad for personal or business reasons.

(continued...)

the Secretary of State's endorsement: "The bearer is abroad on an official [or diplomatic] assignment for the Government of the United States of America." According to the Passport Office of the State Department, such passports have at least two purposes:

(1) to represent to the foreign government that the bearer is in fact an official or employee of the United States Government proceeding abroad on [United States Government] business; [and] (2) to facilitate the accomplishment of that business (clothing diplomats with diplomatic immunity, by issuing a separate diplomatic passport falls within this category).

Memorandum from William B. Wharton, Director, Office of Citizenship Appeals and Legal Services, to Harry L. Coburn, Deputy Assistant Secretary for Passport Services 4-5 (Sept. 21, 1984).

Because of the communicative nature of official and diplomatic passports, section 129(e) and section 503 may be read as an attempt to dictate to the President the scope of permissible communications with foreign governments by means of passports. They would prevent him from issuing, in the case of a United States official or diplomat who has visited Israel, "a letter of introduction," Haig, 453 U.S. at 292, to Arab League nations that does not also document the bearer's visit to Israel. Indeed, in certain cases, the single-passport requirement might positively compel the President to issue, on behalf of government officials and diplomats, letters of introduction that would offend the recipients and cause the bearers to be turned away or subjected to retaliation and harassment. For example, the State Department predicts that "U.S. officials travelling to the Middle East could be expected to face obstacles to their entry to many Arab League countries if their passports reflect travel to Israel." Selby Memorandum at 5 (footnote omitted). Just as

⁹(...continued)

(b) Official passport. An official passport is issued to an official or employee of the United States Government proceeding abroad in the discharge of official duties. . . .

(c) Diplomatic passport. A diplomatic passport is issued to a Foreign Service Officer, [to] a person in the diplomatic service or to a person having diplomatic status either because of the nature of his or her foreign mission or by reason of the office he or she holds. . . .

22 C.F.R. § 51.3 (1991).

Congress may not directly intrude upon the President's "power to speak . . . as a representative of the nation," Curtiss-Wright, 299 U.S. at 319, it cannot indirectly, by means of section 129(e) and section 503, effect the same intrusion.

Third, the single-passport requirement would impair the President's ability to conduct foreign affairs by denying his diplomats the documentation necessary for entry into certain Arab League nations. It has long been recognized that "[a]s 'sole organ' [of the federal government in the field of international relations], the President determines also how, when, where and by whom the United States should make or receive communications, and there is nothing to suggest that he is limited as to time, place, or forum." Louis Henkin, Foreign Affairs and the Constitution 47 (1972). Section 129(e) and section 503 impermissibly attempt to limit the President's authority to make such determinations.

Congress itself has given heed to these principles since the founding of the Republic. As the Supreme Court has noted, the Senate Committee on Foreign Relations declared in 1816:

The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety.

Curtiss-Wright, 299 U.S. at 319 (quoting 8 Reports of the Committee on Foreign Relations 24 (1816)).

It is clear that the single-passport requirement would interfere with, and perhaps foreclose altogether, the President's ability to conduct diplomacy involving certain Arab League countries. The policy of these countries is to deny entrance to those persons whose passports reflect previous travel to Israel. See H.R. Conf. Rep. No. 238, 102d Cong., 1st Sess. 107 (1991).¹⁰ The State Department believes that "[b]ased on prior experience and recent efforts to have the [Arab League policy] repealed,

¹⁰ In addition, the State Department advises that certain non-Arab League countries with large Muslim populations, such as Senegal, have occasionally refused to honor travel documents that reflect travel to Israel. Selby Memorandum at 5 n.2.

. . . at least in some instances the [policy] will be enforced against U.S. officials." Selby Memorandum at 12. The State Department has avoided the application of this policy to United States official and diplomatic personnel by issuing dual official or diplomatic passports to United States government employees whose responsibilities require travel to both Israel and Arab League nations. See id. at 4; The Anti-Boycott Passport Act of 1991: Hearing Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs, 102d Cong., 1st Sess. 48, 54, 67 (1991) (testimony of Elizabeth M. Tamposi, Assistant Secretary of State, Bureau of Consular Affairs). To date, "[t]his practice has been successful in keeping the Arab travel boycott from interfering with the conduct of U.S. diplomacy in the region and from raising bilateral tensions." Selby Memorandum at 4.

If official and diplomatic personnel were forced to carry only a single passport, they would face barriers to entering these Arab countries if they had visited Israel anytime within the period of the passport's validity -- a period as long as five years. See 22 C.F.R. § 51.4(c), (d).¹¹ State Department officials have predicted that -- at the very least -- the single-passport requirement is likely to result in "incidents of reciprocation, retaliation and harassment of both officials and Congressmen, . . . either as a matter of policy in certain countries or simply as a manifestation of anti-Israeli zealotry among airport officials." U.S. Dep't of State, The Operational Impact of Anti-Boycott Passport Legislation 3 (June 17, 1991). In addition, "[q]uite apart from the question of entry, difficulties might also arise when an individual bearing evidence of prior or future travel to Israel is stopped at one of the many internal checkpoints in Lebanon and other Arab countries, and asked to produce a passport. At this juncture, evidence of travel to Israel might spark other, more serious, problems than denial of an entry visa." Selby Memorandum at 5. Such difficulties would clearly "interfere with the ability of United States officials to engage in diplomacy and could upset delicate and complex negotiations" and "would place our officials at personal risk." Id. As the President similarly declared in his signing statement on Pub. L. No. 102-138:

A purported blanket prohibition on the issuance of more than one official or diplomatic passport to U.S. Government officials could interfere with my ability to

¹¹ The authority of the President to grant exceptions for citizens to enter or depart the United States without a passport, see 8 U.S.C. § 1185(b), would not overcome these barriers imposed by the operation of section 129(e) and section 503. By its terms, section 1185(b) applies only to travel to and from the United States. It would have no effect on the ability of the President's representatives to gain entry into a foreign country.

conduct diplomacy by denying U.S. diplomats the documentation necessary for them to travel to all countries in the Middle East and could upset delicate and complex negotiations.

Presidential Signing Statement at 1527.¹²

Finally, Congress declared in section 129 that it was "the purpose of this section . . . to prohibit United States Government acquiescence in" the Arab League passport and visa policy. Pub. L. No. 102-138, § 129(a)(2), 105 Stat. at 661. To the extent that the single-passport requirement is an attempt, by indirect means, to dictate the substance of United States policy toward Arab League governments, it suffers from an additional constitutional defect. As the "'sole organ of the nation in its external relations,'" Curtiss-Wright, 299 U.S. at 319 (quoting 10 Annals of Cong. 613 (statement of Rep. John Marshall)), it is for the President alone to articulate the content of the Nation's response to the Arab League passport policy. By interfering with the President's foreign policy determinations, section 129(e) and section 503 attempt to intrude into a sphere in which the Constitution gives Congress no role. See Barr Memorandum at 4-5.

In sum, the single-passport requirement interferes with the "plenary and exclusive" power of the President to conduct foreign affairs. The current policy of issuing more than one passport to officials of the United States Government traveling to the Middle East is a proper exercise of that power. Into this field, "the Senate cannot intrude; and Congress itself is powerless to invade it." Id. Thus, to the extent that section 129(e) and section

¹² As the State Department has noted, the single-passport requirement, had it been in effect, might have upset the recent negotiations leading up to the long-sought Middle East Peace Conference. Memorandum from Robert W. Pearson, Executive Secretary, Department of State, to Brent Scowcroft, Re: Proposed Legislation Prohibiting Multiple Official or Diplomatic Passports 2 (Oct. 29, 1991). In addition to the Secretary of State himself, other State Department personnel were involved in shuttle diplomacy between Israel and the Arab League nations of Jordan, Syria, Egypt, and Saudi Arabia, among others. The single-passport requirement would have disrupted the intensified travel necessary to facilitate the peace conference process. Id. Similarly, the complex process of obtaining the release of the American hostages in Lebanon might have been imperiled if United States diplomats were unable to make responsive consultations with Israeli and Arab League diplomats because of a single-passport requirement. In general, "to carry out [the requirement] in all cases, the President would have to . . . [postpone] substantive negotiations of great importance to all parties concerned." Selby Memorandum at 6.

503 would interfere with the President's ability to conduct diplomacy with certain nations and limit the content and nature of his speech to foreign governments as the representative of the United States by limiting issuance of official and diplomatic passports, they do not comport with the Constitution.¹³

That section 503 was enacted as a condition on the appropriation of money for the State Department does not save it from constitutional infirmity. As we have said on several prior occasions, Congress may not use its power over appropriation of public funds "'to attach conditions to Executive Branch appropriations requiring the President to relinquish his constitutional discretion in foreign affairs. . . . [T]he

¹³ This analysis has proceeded from the President's broad authority over the Nation's foreign affairs and has relied on specific applications of that authority. The analysis applies self-evidently to the issuance of diplomatic passports, which are furnished to Foreign Service Officers, persons in the diplomatic service, and persons having diplomatic status due to their missions or offices. See 22 C.F.R. § 51.3(c), quoted supra note 9. The Department of State has also asked for our views on the constitutionality of the single passport requirement "as applied to non-Executive branch officials, such as members of Congress and the federal judiciary, who often carry diplomatic passports, and Congressional staff, who frequently travel on official passports." Selby Memorandum at 14. We have received the informal advice of the State Department that it believes the provisions are also unconstitutional as applied to these non-Executive Branch officials. Telephone Conversation between Jamison M. Selby, Deputy Legal Adviser, Department of State, and Timothy E. Flanigan, Acting Assistant Attorney General, Office of Legal Counsel (Jan. 17, 1992).

Without the benefit of the State Department's formal views on this question, we offer the following views. To the extent that members of the legislative and judicial branches travel on diplomatic passports our analysis, of course, applies to such passports. In general, we also believe that the President's authority over foreign affairs applies equally to the issuance of official passports. To receive an official passport, a person must be "an official or employee of the United States Government proceeding abroad in the discharge of official duties." 22 C.F.R. § 51.3(b), quoted supra note 9. Such persons are necessarily representing the United States in its dealings with foreign nations. Indeed, they travel with the Secretary of State's endorsement that they are "abroad on an official assignment for the Government of the United States of America." Accordingly, we believe that our analysis would apply with equal force to all official passports, whether issued to members of the Executive Branch or to members of a coordinate Branch.

President cannot be compelled to give up the [constitutional] authority of his Office as a condition of receiving the funds necessary to carrying out the duties of his Office.'" Barr Memorandum at 5 n.3 (quoting Memorandum from William P. Barr, Assistant Attorney General, Office of Legal Counsel, to Dick Thornburgh, Attorney General, Re: The Constitutionality of the Proposed Limitation on the Use of the CIA Reserve for Contingencies 5 (July 31, 1989)).

The Supreme Court has recently endorsed this conclusion. In some spheres, it has said, "the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly." South Dakota v. Dole, 483 U.S. 203, 209 (1987); cf. U.S. Const. art. I, § 8, cl. 1. But in Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, 111 S. Ct. 2298, 2309 (1991), the Supreme Court found Dole "inapplicable" to issues (such those raised by section 129(e) and section 503) that "involve separation-of-powers principles." In accordance with this decision, therefore, our analysis is not affected by the fact that the single-passport requirement of section 503 is in the form of a condition on appropriations.¹⁴

For all these reasons, we conclude that section 129(e) and section 503 are unconstitutional to the extent that they purport to limit the President's ability to issue more than one official or diplomatic passport to United States government personnel.

III.

We now turn to the question whether section 129(e) and section 503 may be severed from the authorization act and the appropriations act.

The Supreme Court has explained the basic approach to severability questions on many occasions: "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 as a law." Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932), quoted in Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987). Thus, absent evidence that the statute without the unconstitutional provision will not function "in a manner consistent with the intent of Congress," Alaska Airlines, 480 U.S. at 685 (emphasis in original), the unconstitutional provision will be found to be severable.

¹⁴ The State Department agrees that "if Congress cannot directly prohibit the issuance of multiple diplomatic passports, it cannot do so indirectly through its appropriations power." Selby Memorandum at 13 (emphasis and capitalization omitted).

The single-passport requirement of section 129(e) operates independently of the remainder of Pub. L. No. 102-138, which contains 144 substantive sections related to one another only by the fact that they involve some aspect of foreign relations. See, e.g., § 121 ("Childcare facilities at certain posts abroad"); § 225 ("Eastern Europe student exchange endowment fund"); § 301 ("Persian Gulf war criminals"); § 359 ("Human rights abuses in East Timor"); § 402 ("Multilateral arms transfer and control regime"); § 507 ("Sanctions against use of chemical or biological weapons"). There is no textual evidence that Congress would not have enacted this wide-ranging bill if the isolated provision regarding issuance of multiple passports had not been included.¹⁵ Nothing in the legislative history undermines this conclusion.¹⁶ The absence of section 129(e),

¹⁵ The absence of a severability provision is not dispositive, for "[i]n the absence of a severability clause . . . , Congress' silence is just that -- silence -- and does not raise a presumption against severability." Alaska Airlines, 480 U.S. at 686.

¹⁶ The Senate Foreign Relations Committee gave this provision no special attention that would indicate its centrality to the legislation as a whole. The portion of the Committee's 134-page report devoted to what later became section 129 consumed only a single page, and was merely a synopsis of the provision's text. See S. Rep. No. 98, 102d Cong., 1st Sess. 55 (1991). The House bill did not even contain a single-passport requirement. See H.R. Rep. No. 53, 102d Cong., 1st Sess. 62 (1991).

On the Senate floor, the Chairman of the Foreign Relations Committee (Senator Pell) did not mention the single-passport requirement as he summarized the bill, see 137 Cong. Rec. S11,121 (daily ed. July 29, 1991), and only one speaker discussed the passport provision. See id. at S11,189-90 (statement of Sen. Lautenberg).

The conference committee adopted almost verbatim the language of the Senate bill. See H.R. Conf. Rep. No. 238, 102d Cong., 1st Sess. 107 (1991). The conferees devoted no more attention to section 129 than to many other provisions. Nor did the conferees give any indication that this provision of the bill was so central to its adoption that the bill would fail without it.

When the bill came back from conference, the passport provision merited only a single sentence of discussion on the Senate floor. See 137 Cong. Rec. S14,438 (daily ed. Oct. 4, 1991) (statement of Sen. Kerry). In the House, the Democratic

(continued...)

moreover, would in no way impair the execution of the remainder of the statute in a manner fully consistent with the intent of Congress. There is, in short, no reason to conclude that Congress would have declined to enact Pub. L. No. 102-138 had it known that section 129(e) would not pass constitutional muster. We therefore conclude that the single-passport requirement is severable from the remainder of Pub. L. No. 102-138.

The appropriations bill, Pub. L. No. 102-140, contains an express severability clause. Section 604 provides:

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

105 Stat. at 823. The Supreme Court has held that the inclusion of a severability clause "creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision. In such a case, unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute." Alaska Airlines, 480 U.S. at 686 (citations omitted). In the case of Pub. L. No. 102-140, there is no strong evidence -- indeed, there is no evidence at all -- that Congress intended the validity of the statute to depend on the validity of section 503. The single-passport requirement did not even appear in the House bill, but was added by the Senate. See S. Rep. No. 106, 102d Cong., 1st Sess. 114 (1991). The Conference Report did not discuss the provision at all. See H.R. Conf. Rep. No. 233, 102d Cong., 1st Sess. 87 (1991) (noting only that the Senate's amendment adding the single-passport requirement was "[r]eported in disagreement"). Finally, the respective committee reports gave no indication that the severability clause was to be given anything but its natural construction. See S. Rep. No. 106, supra, at 123; H.R. Rep. No. 106, 102d Cong., 1st Sess. 97 (1991).¹⁷

¹⁶(...continued)

floor manager spoke about the provision at greater length, but gave no indication that it was in any sense the keystone of the entire bill. See 137 Cong. Rec. H7638 (daily ed. Oct. 8, 1991) (statement of Rep. Berman).

¹⁷ Although the severability clause of Pub. L. No. 102-140 is couched in terms of provisions of the act being "held to be invalid," and thus arguably might be read to contemplate a court decision on validity of portions of the act, it remains an

(continued...)

Thus, we conclude that the single-passport requirements of Pub. L. No. 102-138 and Pub. L. No. 102-140 are severable from the remainder of those bills.

IV.

The final issue we address is whether the President may refuse to enforce the single-passport requirements.¹⁸ The Department of Justice has consistently advised that the Constitution provides the President with the authority to refuse to enforce unconstitutional provisions.¹⁹ Both the President's obligation to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and the President's oath to "preserve, protect and defend the Constitution of the United States," *id.* § 1, vest the President with the responsibility to decline to enforce laws that conflict with the highest law, the Constitution. We recognize, however, that the judicial authority addressing this issue is sparse and that our position may be controversial.

¹⁷(...continued)
accurate indicator of whether Congress would have enacted the bill, and desired its other provisions to stand, if any particular section were not enforced.

¹⁸ The analysis of this question does not turn on the fact that the President has signed the two bills. As the Supreme Court has observed, "it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds." INS v. Chadha, 462 U.S. 919, 942 n.13 (1983). That the President has signed a bill in no way estops him from later asserting the bill's unconstitutionality, in court or otherwise. See Letter from William French Smith, Attorney General, to Peter W. Rodino, Jr., Chairman, House Judiciary Committee 3 (Feb. 22, 1985) (Attorney General Smith Letter) ("[T]he President's failure to veto a measure does not prevent him subsequently from challenging the Act in court, nor does presidential approval of an enactment cure constitutional defects."); Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, to Robert J. Lipshutz, Counsel to the President 1 (Sept. 27, 1977) (Harmon Memorandum) ("[P]rior to a definitive judicial determination of the question of constitutionality a President may decline to enforce a portion of a statute if he believes it to be unconstitutional, even if he or one of his predecessors signed the statute into law.").

¹⁹ Our most recent consideration of this issue is set forth in the Barr Memorandum. The following discussion is drawn in large part from that memorandum.

Among the laws that the President must "take Care" to faithfully execute is the Constitution. This proposition seems obvious, since the Constitution is "the supreme Law of the Land." U.S. Const. art. VI, § 2 (emphasis added). As the Justice Department has stated previously,

the Executive's duty faithfully to execute the law embraces a duty to enforce the fundamental law set forth in the Constitution as well as a duty to enforce the law founded in the Acts of Congress, and cases arise in which the duty to the one precludes the duty to the other.

Constitutionality of Congress' Disapproval of Agency Regulations by Resolutions Not Presented to the President, 4A Op. Off. Legal Counsel 21, 29 (1980) (Opinion of Attorney General Benjamin R. Civiletti). See also, e.g., Constitutionality of GAO's Bid Protest Function: Hearings Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations, 99th Cong., 1st Sess. 23 (1985) (Bid Protest Hearings) (statement of Professor Mark Tushnet) ("[T]he President is required faithfully to execute the laws of the United States, which surely include the Constitution as supreme law."). Where an act of Congress conflicts with the Constitution, the President is faced with the duty to execute conflicting "laws" -- a constitutional provision and a contrary statutory requirement. The resolution of this conflict is clear: the President must heed and execute the Constitution, the supreme law of our Nation.

Thus, the Take Care Clause does not compel the President to execute unconstitutional statutes. An unconstitutional statute, as Chief Justice Marshall explained in his archetypal decision, is simply not a law at all: "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added). As Alexander Hamilton had previously explained, "[t]here is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid." The Federalist No. 78, at 467 (Clinton Rossiter ed., 1961).²⁰ Obviously, if a statute is

²⁰ This proposition is hardly a novel one. See, e.g., Frank H. Easterbrook, Presidential Review, 40 Case W. Res. L. Rev. 905, 920 (1990) ("The Supreme Court has said more times than one can count that unconstitutional statutes are 'no law at all.'")

(continued...)

"void" or "no law," it cannot be one of the "Laws" that the President must faithfully execute.

We are aware that the Constitution provides that a bill enacted pursuant to the procedure described in Article I, Section 7 "shall become a Law." Only laws "made in Pursuance" of the Constitution, however, "shall be the supreme Law of the Land." U.S. Const. art. VI, § 2; see also Marbury, 5 U.S. (1 Cranch) at 180. In order to be a valid "Law," therefore, a statute must comport with the substance of the Constitution, as well as with its procedures. When confronted with a suggestion to the contrary, the Supreme Court dismissed it in a footnote: "The suggestion is made that [a legislative veto provision] is somehow immunized from constitutional scrutiny because the Act containing [the provision] was passed by Congress and approved by the President. Marbury v. Madison resolved that question." INS v. Chadha, 462 U.S. 919, 942 n.13 (1983) (citation omitted).

The President's constitutional oath of office is further authority for the President to refuse to enforce an unconstitutional law. The Constitution requires the President to take an oath in which he promises to "preserve, protect and defend the Constitution of the United States." U.S. Const. art. II, § 1. As Chief Justice Chase asked, "How can the President fulfill his oath to preserve, protect, and defend the Constitution, if he has no right to defend it against an act of Congress sincerely believed by him to have been passed in violation of it?" Chief Justice Chase Letter at 578 (emphases in original). He had already answered the question: "[I]n the case where [an act of Congress] directly attacks and impairs the Executive power confided to him by the Constitution . . . it seems to me to be the clear duty of the President to disregard the law" Id. at 577. Just as the Take Care Clause requires the President to faithfully execute the laws, including the Constitution as the supreme law, the oath to defend the Constitution allows the President to refuse to execute a law he believes is contrary to that document.

²⁰(...continued)
(citing Norton v. Shelby County, 118 U.S. 425, 442 (1886) ("An unconstitutional act is not a law; . . . it is, in legal contemplation, as inoperative as though it had never been passed.")); Letter from Salmon P. Chase, Chief Justice of the United States, to Gerrit Smith (Apr. 19, 1868), quoted in J.W. Schuckers, The Life and Public Services of Salmon Portland Chase 577 (New York, D. Appleton and Company 1874) (Chief Justice Chase Letter) ("Nothing is clearer to my mind than that acts of Congress not warranted by the Constitution are not laws."); 11 Op. Att'y Gen. 209, 214 (1865) ("If any law be repugnant to the Constitution, it is void; in other words, it is no law.").

Although the Supreme Court has not squarely addressed the issue, four Justices have recently endorsed the proposition that a President may decline to enforce unconstitutional laws. In Freytag v. Commissioner, 111 S. Ct. 2631 (1991), Justice Scalia, in an opinion joined by Justices O'Connor, Kennedy, and Souter, observed that "the means [available to a President] to resist legislative encroachment" upon his power included "the power to veto encroaching laws, or even to disregard them when they are unconstitutional." Id. at 2653 (Scalia, J., concurring in part and concurring in the judgment) (citation omitted and emphasis added). The Court's opinion did not take issue with this observation.²¹

Justice Scalia's opinion is the latest in a long line of authority dating back to the framing of the Constitution. For instance, James Wilson, a key drafter and advocate for the ratification of the Constitution, addressed the President's authority to refuse to enforce unconstitutional laws in the Pennsylvania ratifying convention. He equated Presidential review of statutes with judicial review:

I had occasion, on a former day to state that the power of the Constitution was paramount to the power of the legislature, acting under that Constitution. For it is possible that the legislature . . . may transgress the bounds assigned to it, and an act may pass, in the usual mode, notwithstanding that transgression; but when it comes to be discussed before the judges -- when they consider its principles and find it to be incompatible with the superior power of the Constitution, it is their duty to pronounce it void. . . . In the same manner, the President of the United States could shield himself and refuse to carry into effect an act that violates the Constitution.

² The Documentary History of the Ratification of the Constitution 450-51 (Merrill Jensen ed., 1976) (statement of Dec. 1, 1787) (second emphasis added).

²¹ The Supreme Court has considered several controversies that arose because of a President's decision to ignore statutes that he believed were unconstitutional without suggesting that the President had acted illegitimately. For example, as Attorney General Benjamin R. Civiletti has observed, the Court in Myers v. United States, 272 U.S. 52 (1926), upheld the President's decision to fire a postmaster despite a statute preventing him from doing so and did not question the propriety of the President's action that gave rise to the case before it. See The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. Off. Legal Counsel 55, 59 (1980).

Wilson's understanding illustrates the Framers' profound structural concern about the threat of legislative encroachments on the Executive and the Judiciary. James Madison observed that "[t]he legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." The Federalist No. 48, at 309 (Clinton Rossiter ed., 1961). The Supreme Court has said that: "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." Chadha, 462 U.S. at 951. Presidential decisions not to enforce statutes that violate the separation of powers have been justified by the need to resist legislative encroachment. In 1860, for example, Attorney General Black advised President Buchanan that he could refuse to enforce an unconstitutional condition in a law:

Congress is vested with legislative power; the authority of the President is executive. Neither has a right to interfere with the functions of the other. Every law is to be carried out so far forth as is consistent with the Constitution. . . . You are therefore entirely justified in treating this condition (if it be a condition) as if the paper on which it is written were blank.

9 Op. Att'y Gen. 462, 469-70 (1860).²²

More recently, the Department of Justice, under both Democratic and Republican Administrations, has consistently advised that the Constitution authorizes the President to refuse to enforce a law that he believes is unconstitutional. Thus, Attorney General Smith explained that the Department's decision not to enforce or defend the Competition in Contracting Act was

based upon the fact that in addition to the duty of the President to uphold the Constitution in the context of the enforcement of Acts of Congress, the President also has a constitutional duty to protect the Presidency from encroachment by the other branches. . . . An obligation to take action to resist encroachments on his institutional authority by the legislature may be

²² Cf. Raoul Berger, Executive Privilege: A Constitutional Myth 309 (1974) ("Agreed that a veto exhausts presidential power when the issue is the wisdom of the legislation. But the object of the Framers was to prevent 'encroachment' I would therefore hold that the presidential oath to 'protect and defend the Constitution' posits both a right and a duty to protect his own constitutional functions from congressional impairment.").

implied from [his oath to "preserve, protect and defend" the Constitution]

Attorney General Smith Letter at 3; see also Letter from Benjamin R. Civiletti, Attorney General, to Thomas P. O'Neill, Jr., Speaker of the House 3 (Jan. 13, 1981) ("[T]he Executive's independent [constitutional] obligation to 'take care that the laws be faithfully executed permits the Attorney General not to initiate criminal prosecutions that will undoubtedly prove unsuccessful on constitutional grounds.'" (citation omitted); Harmon Memorandum at 16 ("[T]he President's duty to uphold the Constitution carries with it a prerogative to disregard unconstitutional statutes.").

This Office has given the same advice, particularly when the statutes in question would blur the separation of powers between the Congress and the President, as do section 129(e) and section 503. See, e.g., Harmon Memorandum at 13 ("We have said that Myers [v. United States, 272 U.S. 52 (1926)], by implication, stands for the proposition that the President may lawfully disregard a statute that trenches upon his constitutional powers. We would be disposed to accept that proposition even in the absence of Myers."); Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, to the Attorney General 17 (Aug. 27, 1984) ("[T]he President need not blindly execute or defend laws enacted by Congress if such laws trench on his constitutional power and responsibility."). See also Barr Memorandum at 15-16. The Department has consistently maintained that these principles apply whether or not the President signed the law that he intends not to enforce. See supra note 18.

We recognize that opponents of the specific Presidential authority to refuse to enforce unconstitutional statutes draw support for their views from the same constitutional texts we have cited, especially the Take Care Clause. See, e.g., Arthur S. Miller, The President and Faithful Execution of the Laws, 40 Vand. L. Rev. 389, 396 (1987) ("To say that the President's duty to faithfully execute the laws implies a power to forbid their execution is to flout the plain language of the Constitution."); Bid Protest Hearings at 89 (letter of Professor Eugene Gressman) ("[I]t would be a novel and 'entirely inadmissible' construction of the Constitution to contend that the President's obligation to see the laws faithfully executed implies a power to forbid their execution."). These conclusions appear to rest on the argument that the Executive Branch is not the institution within the federal government that is authorized to determine whether a law is unconstitutional. Accordingly, Professor Gressman has stated that "despite a Presidential belief that a duly enacted statute invades Executive powers, he must comply with and execute that statute until it is definitively invalidated by the courts." Bid Protest Hearings at 88 (emphasis added). As the Justice Department has acknowledged, "until a law is adjudicated to be

unconstitutional, the issue of enforcing a statute of questionable constitutionality raises sensitive problems under the separation of powers." Id. at 318-19 (statement of Acting Deputy Attorney General D. Lowell Jensen).

We reject, however, the argument that the President may not treat a statute as invalid prior to a judicial determination, but rather must presume it to be constitutional. This would subtly transform the proposition established in Marbury v. Madison -- in deciding a case or controversy, the Judiciary must decide whether a statute is constitutional -- to the fundamentally different proposition that a statute conflicts with the Constitution only when the courts declare so. Professor Sanford Levinson explained why this cannot be so:

If one believes that the judiciary "finds" the [law] instead of "creating" it, then the law is indeed "unconstitutional from the start." Indeed, the judicial authority under this view is derived from its ability to recognize the constitutionality or unconstitutionality of laws, but, at least theoretically, the constitutional status [of statutes] is independent of judicial recognition. To argue otherwise is ultimately to adopt a theory that says that the basis of law -- including a declaration of unconstitutionality -- is the court's decision itself. Among other problems with this theory is the incoherence it leads to in trying to determine what it can mean for judges to be faithful to their constitutional oaths.

Bid Protest Hearings at 67.

Still others have argued that the veto power is the only tool available to the President to oppose an unconstitutional law. Although we recognize that the veto power is the primary tool available to the President, we disagree with the contention that the Framers intended it to be the only tool at the President's disposal. James Wilson's statement, quoted above, demonstrates that the idea that the President has the authority to refuse to enforce a law he believes is unconstitutional was familiar to the Framers. The Constitution limits the President's formal power in the legislative process to the exercise of a qualified veto, but it places no limit on his authority to take care that the laws are faithfully executed.²³

²³ We emphasize that this conclusion does not permit the President to determine as a matter of policy discretion which statutes to enforce. The only conclusion here is that he may refuse to enforce a law that he believes to be unconstitutional.
(continued...)

Conclusion

For the reasons given above, we conclude that section 129(e) of Pub. L. No. 102-138 and section 503 of Pub. L. No. 102-140 are unconstitutional to the extent that they purport to prohibit the issuance of more than one official or diplomatic passport to United States government officials. We also conclude that these provisions are severable, and that the President is constitutionally authorized to decline to enforce them.

Please let us know if we can be of further assistance.


Timothy E. Flanigan
Acting Assistant Attorney General
Office of Legal Counsel

23(...continued)

Given this distinction, the Supreme Court's decision in Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838), has no relevance to the question whether the President may refuse to enforce a law because he considers it unconstitutional. There, the Supreme Court stated: "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." Id. at 613. The Court, however, took pains to deny that the President had made such an argument, as the case involved the Postmaster General's refusal, with no support from the President, to comply with a statute that ordered him to pay two contractors for mail carrying services. Because the case did not involve a claim by the President that he would not enforce an unconstitutional law, the Court had no occasion to examine the unique considerations presented by such a claim.

THE WHITE HOUSE
WASHINGTON

February 16, 1990

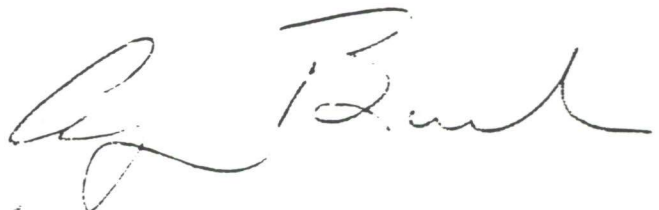
MEMORANDUM FOR THE SECRETARY OF STATE

SUBJECT: Composition of U.S. Delegation to Meetings within
the Framework of the Conference on Security and
Cooperation in Europe

Section 102(c)(2) of H.R. 3792, the "Foreign Relations Authorization Act, Fiscal Years 1990 and 1991," purports to prohibit the use of funds authorized by section 102(c)(1) to send any U.S. delegation to any meeting within the framework of the Conference on Security and Cooperation in Europe -- including the ongoing Conventional Forces in Europe negotiations -- unless individuals representing the Commission on Security and Cooperation in Europe, an entity controlled by the legislative branch, are included in the delegation.

That provision impermissibly interferes with my authority under the Constitution in two ways: it purports to condition the use of funds on a requirement that officials representing a commission controlled by the legislative branch participate in the conduct of certain negotiations, and it would constrain my authority to conduct those negotiations through the appointment of individuals of my choosing.

Consistent with the Constitution, I therefore construe section 102(c) to express the sense of the Congress and not to impose any binding legal obligation. I have further determined that the current composition of our delegations to the Conventional Forces in Europe negotiations and other meetings within the framework of the Conference on Security and Cooperation in Europe serves the Nation's interests and should not be changed as a result of the enactment of section 102(c). I direct that the participation of these delegations in meetings within the framework of the Conference on Security and Cooperation in Europe be continued notwithstanding the prohibition contained in section 102(c)(2).





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U.S. Department of Justice

Office of Legal Counsel

Boyd Gray

Office of the
Assistant Attorney General

Washington, D.C. 20530

February 16, 1990

MEMORANDUM FOR C. BOYDEN GRAY
Counsel to the President

Issues Raised by Section 102(c)(2) of H.R. 3792

This memorandum is in response to your request for this Office's opinion on several issues raised by Section 102(c) of H.R. 3792, the foreign relations authorization bill for fiscal years 1990 and 1991. Specifically, you asked whether Section 102(c)(2) is unconstitutional; whether it is severable from the rest of H.R. 3792; and whether the President may decline to enforce it. As set forth in greater detail below, we believe that Section 102(c)(2) is plainly unconstitutional. We further believe that it is severable from Section 102(c)(1) and the rest of H.R. 3792. Under the circumstances, we believe that if the President chooses to sign H.R. 3792, he would be constitutionally authorized to decline to enforce Section 102(c)(2).

Analysis

1. Section 102(c)(2) Unconstitutionally Infringes on the President's Exclusive Authority to Conduct Negotiations on Behalf of the United States

Section 102(c) provides:

(c) INTERNATIONAL CONFERENCES AND CONTINGENCIES. -- (1) There are authorized to be appropriated for "International Conferences and Contingencies", \$6,340,000 for the fiscal year 1990 and \$7,300,000 for the fiscal year 1991 for the Department of State to carry out the authorities, functions, duties, and responsibilities in the conduct of the foreign affairs of the United States with respect to international conferences and contingencies and for other purposes authorized by law.

(2) None of the funds authorized to be appropriated under paragraph (1), may be obligated or expended for any United States delegation to any

meeting of the Conference on Security and Cooperation in Europe (CSCE) or meetings within the framework of the CSCE unless the United States delegation to any such meeting includes individuals representing the Commission on Security and Cooperation in Europe.

The Commission on Security and Cooperation in Europe (the Commission) is an entity controlled by the legislative branch. The Commission consists of twenty-one members, eighteen of whom are drawn from the houses of Congress, three of whom are appointed by the President. 22 U.S.C. § 3003(a). The Commission is deemed to be a standing committee of Congress for the purpose of receiving disbursements of foreign currencies, see 22 U.S.C. § 3007(b), and Commission employees are considered congressional employees. Id., § 3008(d).

It is abundantly clear that Section 102(c)(2), by purporting to require the President to include "individuals representing the Commission" as part of a delegation charged with conducting international negotiations, is unconstitutional.

The President possesses broad authority over the Nation's diplomatic affairs. That authority flows from his position as head of the unitary executive and as Commander-in-Chief. E.g., U.S. Const., Art. II, §§ 1, 2 & 3; Haig v. Agee, 453 U.S. 280, 291-92 (1981); Baker v. Carr, 369 U.S. 186, 212, 213 (1962); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936). Section 2 of Article II also gives the President the specific authority to "appoint Ambassadors, other public Ministers and Consuls." These constitutional provisions authorize the President to determine the form and manner in which the United States will maintain relations with foreign nations, and further to determine the individuals who will conduct those relations. Section 102(c)(2) of the bill is thus clearly unconstitutional, on two specific and distinct grounds.

First, the courts, the executive and Congress have all concurred that the President's constitutional authority specifically includes the exclusive authority to represent the United States abroad. As the Supreme Court held in Curtiss-Wright, speaking of the "federal power over external affairs":

In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.

299 U.S. at 319 (emphasis omitted). The Court's opinion is directly applicable here: "the President alone has the power to speak or listen as a representative of the nation. . . . he alone negotiates." Id. (emphases added). The Court went on to describe the President's authority in the realm of foreign affairs as

the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations -- a power which does not require as a basis for its exercise an act of Congress

Id. at 320.

Such authority "in the field of international relations" must self-evidently include the President's power to select his subordinates, who will speak as the President's assistants or agents in the realm of foreign affairs. James Madison observed in the First Congress that "No person can be forced upon [the President] as an assistant by any other branch of the Government." The First Congress 190 (R. Williams ed. 1970).

Justice Nelson relied upon the President's primacy in foreign affairs in dismissing a civil action for damages brought against the commander of an American gun ship that had bombarded a town in Nicaragua where a revolutionary government had engaged in violence against American citizens and their property:

As the Executive head of the nation, the president is made the only legitimate organ of the general government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens.

Durand v. Hollins, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186). In Goldwater v. Carter, 617 F.2d 697 (D.C. Cir.), rev'd on other grounds, 444 U.S. 996 (1979), the Court of Appeals for the District of Columbia Circuit stated that "The subtleties involved in maintaining amorphous relationships are often the very stuff of diplomacy -- a field in which the President, not Congress, has responsibility under our Constitution." Id. at 708. Section 102(c)(2) plainly conflicts with that fundamental constitutional command.

From the earliest days of the Republic the executive branch has made clear that it controls the representation of the foreign policy of the United States. In 1790, Secretary of State Thomas Jefferson made the point emphatically:

The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly.

Opinion on the Powers of the Senate Respecting Diplomatic Appointments, April 24, 1790, reprinted in 16 Papers of Thomas Jefferson 378, 379 (J. Boyd ed. 1961) (emphasis in original).

Jefferson made this point with even greater specificity in rebuking Citizen Genet for attempting to present a consul whose commission was addressed to the Congress of the United States. Jefferson emphatically declared that the President is

the only channel of communication between this country and foreign nations, it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation, and whatever he communicates as such, they have a right and are bound to consider as the expression of the nation

Jefferson to Edmond C. Genet, November 22, 1793, reprinted in 9 The Writings of Thomas Jefferson 256 (Bergh ed. 1903).

In modern times Presidents have also asserted their authority to control negotiations. President Bush based his 1989 veto of the FS-X legislation in part upon his constitutional authority to control foreign negotiations:

In the conduct of negotiations with foreign governments, it is imperative that the United States speak with one voice. The Constitution provides that that one voice is the President's.

25 Weekly Comp. Pres. Doc. 1191, 1192 (July 31, 1989). Other recent Presidents have taken the same view. E.g., President Reagan's Statement on Signing H.R. 1777 into law, 23 Weekly Comp. Pres. Doc. 1547, 1548 (Dec. 22, 1987) (invoking the President's "exclusive authority to determine the time, scope, and objectives" of any international negotiations); President Carter's Statement on Signing H.R. 3363 into law, 15 Weekly Comp. Pres. Doc. 1434 (Aug. 15, 1979) ("decisions associated with the appointment of Ambassadors are acknowledged to be a constitutional prerogative of the President").

Congress has also repeatedly endorsed this understanding of the Constitution. John Marshall, when serving in Congress, described the President's primacy in the conduct of foreign negotiations by referring to the President as "the sole organ of the nation in its external relations, and its sole representative

with foreign nations." 10 Annals of Cong. 613 (1800).¹ The Senate Committee on Foreign Relations reported to the Senate in 1816 in similar words:

The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiations may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety.

Reports of the Committee on Foreign Relations, vol. 8, p. 24 (1816).²

These examples and authorities by no means exhaust the list of what could be cited in support of our conclusion. Nonetheless, they are clearly sufficient to demonstrate that the President has the constitutional responsibility to represent the United States abroad and thus to choose the individuals through whom the Nation's foreign affairs are conducted. That responsibility cannot be circumscribed by statute.³ By requiring the

¹ Other congressmen contemporaneously recognized that communications with foreign governments was an exclusive presidential prerogative. For example, Representative James Bayard of Delaware noted that "the Constitution has placed the power of negotiation in the hands of the Executive only." 9 Annals of Cong. 2588 (1799); see also id. at 2677 (remarks of Rep. Parker); id. at 2494 (remarks of Rep. Griswold).

² Both Marshall's and the Committee's statements were cited by the Supreme Court with approval in Curtiss-Wright, 299 U.S. at 319-20.

³ Nor can Section 102(c)(2) be viewed as a legitimate exercise of congressional power over the appropriation of public funds. Congress may not use that power

to attach conditions to Executive Branch appropriations requiring the President to relinquish his constitutional discretion in foreign affairs. . . . the President cannot be compelled to give up the authority of his Office as a condition of receiving the funds necessary to carrying out the duties of his Office.

President to conduct negotiations by means of certain individuals, Section 102(c)(2) would impermissibly interfere with that specific authority over foreign negotiations and diplomatic appointments. Accordingly, the section is unconstitutional.

Second, Section 102(c)(2) is also constitutionally offensive on the ground that the individuals illegitimately "appointed" by the section are to "represent" a legislative entity. Section 102(c)(2) thus seeks to inject legislative agents directly into the executive's foreign relations negotiations, giving Congress regular and unsupervised access to privileged information. The role Section 102(c)(2) thus envisions for the legislative branch -- which would be "represented" on a negotiating delegation and presumably would receive reports on the conduct of negotiations from their "representative" -- would deprive the President of his constitutionally-mandated control over the disclosure of the content of negotiations.⁴ That control -- a necessary and recognized element of executive authority -- would be impaired by Section 102(c)(2).

That the Constitution mandates Presidential control over the disclosure of negotiations was an essential element of the Founders' vision. As John Jay wrote in The Federalist:

It seldom happens in the negotiation of treaties, of whatever nature, but that perfect secrecy and immediate dispatch are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from

Memorandum from William P. Barr, Assistant Attorney General, Office of Legal Counsel, to Dick Thornburgh, Attorney General, Re: The Constitutionality of the Proposed Limitation on the Use of the CIA Reserve for Contingencies, July 31, 1989, at 5 (footnote omitted).

⁴ That participatory role in ongoing negotiations is also completely divorced from the Framers' intentions with respect to the activities and authority of the legislative branch. As Alexander Hamilton explained,

The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate.

The Federalist No. 75, at 450 (A. Hamilton) (C. Rossiter ed. 1961).

apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly. The convention have done well, therefore, in so disposing of the power of making treaties that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest. . . . So often and so essentially have we heretofore suffered from the want of secrecy and dispatch that the Constitution would have been inexcusably defective if no attention had been paid to those objects.

The Federalist No. 64, at 392-93 (J. Jay) (C. Rossiter ed. 1961) (emphasis in original). Similarly, James Madison, while serving in Congress, observed that "the Executive had a right, under a due responsibility, also, to withhold information, when of a nature that did not permit a disclosure of it at the time." 5 Annals of Cong. 773 (1796).

Moreover, the executive branch has repeatedly objected to requirements for mandatory disclosure of information to Congress about international negotiations. At the same time, where possible, all Presidents have provided broad information to Congress about international negotiations.⁵ The conduct of

⁵ This balanced view of the President's responsibilities with respect to the disclosure of negotiations has been the consistent position of the executive branch since 1792, when President Washington received a request from the Congress for all "persons, papers, and records" relating to the failure of General St. Clair's military expedition against the Indians. 2 Annals of Cong. 493 (1792). Secretary of State Jefferson's notes reflect that President Washington thereafter convened the Cabinet to determine the proper response. 1 The Writings of Thomas Jefferson 303 (A. Lipscomb ed. 1903). The President and the Cabinet concluded that "the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public." Id. at 304. The President ultimately decided to produce the requested documents. He directed Secretary Jefferson to negotiate an agreement with Congress that acknowledged the President's right to protect state secrets, the public disclosure of which he determined could adversely affect national security. Jefferson's efforts were successful, and on April 4, 1792, the House resolved

that the President of the United States be requested to

international negotiations is a function committed to the President by the Constitution, see supra, and he must have the authority to determine what information about such international negotiations may, in the public interest, be made available to Congress and when such disclosure should occur. As the Supreme Court observed in Curtiss-Wright:

[C]ongressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty -- a refusal the wisdom of which was recognized by the House itself and has never since been doubted.

299 U.S. at 320.⁶ Curtiss-Wright thus clearly establishes that

cause the proper officers to lay before this House such papers of a public nature, in the Executive Department, as may be necessary to the investigation of the causes of the failure of the late expedition under Major General St. Clair.

3 Annals of Cong. 536 (1792) (emphasis added).

Similarly, in 1794, the Senate requested correspondence between the United States Minister to France and the Republic of France, and between the Minister and the State Department. Senate Journal, 3d Cong., 1st Sess. 42 (1794). President Washington submitted certain of the correspondence requested, but withheld "those particulars which, in my judgment, for public considerations, ought not to be communicated." 1 J. Richardson, Messages and Papers of the Presidents 152 (1896).

⁶ The Court in Curtiss-Wright specifically endorsed President Washington's refusal to provide the House with information it requested about treaty negotiations, even after the negotiations had been concluded. 299 U.S. at 320-321. A

the President has the authority to determine what information about international negotiations may, in the public interest, be made available to Congress and when, if at all, such disclosure should occur. Section 102(c)(2), however, would subvert the President's control over the disclosure of negotiations by inserting a "representative" of the legislative branch into diplomatic negotiations.⁷

Again, the examples and authorities offered do not exhaust those that could be invoked in support of our conclusion. Nonetheless, we believe that the historical record is clear that the President has the constitutional authority to control disclosure of the content of negotiations to Congress. It follows, equally clearly, that a provision that purports to place a "representative" of a legislative entity upon an executive negotiating team is inconsistent with that authority, and is unconstitutional.

2. Section 102(c)(2) Is Severable

The unconstitutional requirement that representatives of the Commission be included at the CSCE negotiations may be severed from the authorization for appropriations. Because the condition is severable, the President may enforce the remainder of the provision, disregarding the condition contained in Section 102(c)(2).

A presumption in favor of the severability of unconstitutional provisions exists so long as what remains of the statute is capable of functioning independently. See, e.g., Regan v. Time, Inc., 468 U.S. 641, 653 (1984) (plurality opinion); Alaska Airlines v. Donovan, 766 F.2d 1550, 1560 (D.C. Cir. 1985), aff'd sub nom. Alaska Airlines v. Brock, 480 U.S. 678 (1987). As the Supreme Court has explained on many occasions, "[u]nless 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 as a law." Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210, 235 (1932), quoted in Alaska Airlines, 480 U.S. at 684. This presumption may be overcome by evidence that, absent the unconstitutional provision, the statute

fortiori, the President has constitutional authority to withhold such information during the negotiations.

⁷ The effect of this provision would also be to vitiate the President's authority to determine not to disclose particular information because such disclosure would jeopardize national security. See United States v. Nixon, 418 U.S. 683, 710-11 (1974); Assertion of State Secrets Privilege in Civil Litigation, 3 Op. O.L.C. 91 (1979).

will not function "in a manner consistent with the intent of Congress." Alaska Airlines, Inc. v. Brock, 480 U.S. at 685 (emphasis in original).

The authorization contained in Section 102(c)(1) functions independently of the provision in Section 102(c)(2). Accordingly, the unconstitutional condition in Section 102(c)(2) may be severed from the remainder of the provision unless there is evidence that Congress would not have enacted the authorization absent the condition.⁸

There is no such evidence. Nothing in the debates concerning the condition suggests that Congress would not have enacted the authorization if the requirement of Commission representation was invalidated. The condition was added in the House as an amendment to the existing authorization provision. See 135 Cong. Rec. H1063 (1989). Its purpose was to enable members of the Commission to continue their previous participation in the CSCE negotiations. See 135 Cong. Rec. S8026 (1989) (statement of Sen. Fowler); id. (statement of Sen. D'Amato); id. (statement of Sen. DeConcini). No one, however, indicated that they would disapprove funding for the negotiations if the Commission access requirement were deleted. The chairman of the House subcommittee said only that "[i]t is an okay amendment." 135 Cong. Rec. H1063 (1989) (statement of Rep. Dymally).

That Congress clearly desired to impose the condition on the authorization does not mean that Congress would not have authorized the funds without the condition. The Supreme Court declined to make this assumption in FCC v. League of Women

⁸ We reject any argument that the conditional clause "unless the United States delegation to any such meeting includes individuals representing the Commission on Security and Cooperation in Europe" is the relevant language to be severed from the provision. It is merely an accident of grammar that this clause can be deleted without making nonsense of Section 102(c)(2) as a whole. Moreover, with this clause deleted Section 102(c)(2) would deny the President funding for a particular type of negotiations. For the reasons discussed above, this would in itself raise serious constitutional questions as an interference with the President's authority to conduct diplomacy as he sees fit. There is obviously no reason to prefer a severability analysis that presents the same constitutional questions that gave rise to the analysis in the first place. Cf. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (statutes should be construed to avoid constitutional questions). Section 102(c)(2) in its entirety is naturally understood as the condition regarding the CSCE negotiations, and the proper question is whether that whole section is severable.

Voters, 468 U.S. 364 (1984), where the Court held that an appropriations law's prohibition on editorializing by public broadcasting stations violated the First Amendment, but did not even consider whether the invalidity of the condition should result in the invalidity of the entire appropriation.⁹ Indeed, we are aware of no instance in which the Supreme Court has ever invalidated an appropriation because a condition on the use of the appropriation was held unconstitutional.

We are also reluctant to attribute to Congress an intent to preclude the United States from engaging in the CSCE negotiations. Congress was keenly aware of the significance of the negotiations concerning conventional military forces in Europe. The care with which Congress considered the negotiations illustrates their importance to Congress. We cannot believe that Congress would have preferred no participation by the United States in the CSCE negotiations to participation by a delegation that does not include representatives of the Commission.

3. The President May Refuse to Enforce Section 102(c)(2)

The final issue we address is whether the President may refuse to enforce an unconstitutional provision such as Section 102(c)(2).¹⁰ The Department of Justice has consistently advised that the Constitution provides the President with such authority. Both the President's obligation to "take Care that the Laws be faithfully executed" and the President's oath to "preserve, protect and defend the Constitution of the United States" vest the President with the responsibility to decline to enforce laws that conflict with the highest law, the Constitution. We emphasize, however, that there is little judicial authority concerning this question, and the position remains controversial.

The President's authority to refuse to enforce a law that he believes is unconstitutional derives from his duty to "take Care that the Laws be faithfully executed," Art. II, sec. 3, and the

⁹ Justice Stevens, dissenting alone, said that there was a "serious question . . . whether the entire public funding scheme is severable from the prohibition on editorializing and political endorsements." FCC v. League of Women Voters, 468 U.S. at 411 n.3 (Stevens, J., dissenting).

¹⁰ The analysis of this question does not depend on whether the President signed the bill or not. As the Supreme Court has observed, "it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds." INS v. Chadha, 462 U.S. 919, 942 n.13 (1983). That the President has signed the bill in no way estops his ability to assert the bill's unconstitutionality, in court or otherwise. See id.

obligation to "preserve, protect and defend the Constitution of the United States" contained in the President's oath of office. Art. II, sec. 1. The Constitution is the supreme law that the President has a duty to take care to faithfully execute.¹¹ Where a statute enacted by Congress conflicts with the Constitution, the President is placed in the position of having the duty to execute two conflicting "laws": a constitutional provision and a contrary statutory requirement. The resolution of this conflict is clear: the President must heed the Constitution -- the supreme law of our Nation.

Moreover, the take care clause does not compel the President to execute unconstitutional statutes. An unconstitutional statute is not a law. Alexander Hamilton explained:

There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principle; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

The Federalist No. 78, at 467 (A. Hamilton) (C. Rossiter ed. 1961). John Marshall stated the same position in Marbury v. Madison:

Certainly all those who have formed framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be,

¹¹ It is generally agreed that the Constitution is a law within the meaning of the take care clause. See, e.g., Constitutionality of GAO's Bid Protest Function: Hearings Before the Legislation and National Security Subcomm. of the House Comm. on Government Operations, 99th Cong., 1st Sess. 23 (1985) (Bid Protest Hearings) (statement of Professor Mark Tushnet) ("the President is required faithfully to execute the laws of the United States, which surely include the Constitution as supreme law"); Letter to Secretary of Education Shirley M. Hufstедler from Attorney General Benjamin R. Civiletti, June 5, 1980 ("the Executive's duty faithfully to execute the law embraces a duty to enforce the fundamental law set forth in the Constitution as well as a duty to enforce the law founded in the Acts of Congress, and cases arise in which the duty to the one precludes the duty to the other").

that an act of the legislature, repugnant to the constitution, is void.

5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).¹²

The President's oath of office is the other constitutional provision authorizing the President to refuse to enforce a law. The Constitution requires the President to take an oath in which he promises to "preserve, protect and defend the Constitution of the United States." U.S. Const. Art. II, sec. 1. As Chief Justice Chase asked, "How can the President fulfill his oath to preserve, protect, and defend the Constitution, if he has no right to defend it against an act of Congress sincerely believed by him to have been passed in violation of it?" Letter from Chief Justice Chase to Gerrit Smith, Apr. 19, 1868, quoted in J. Schuckers, The Life and Public Services of Salmon Portland Chase 578 (1874) (Letter from Chief Justice Chase) (emphasis in original). Chase concluded that the President's obligation to defend the Constitution of the United States authorizes him to decline to enforce statutes which he believes are unconstitutional.¹³ The President's obligation to defend the Constitution

¹² Even though the Constitution provides that a measure enacted pursuant to the procedure described in Article I, section 7 "shall become a Law," the fact that a law was adopted consistently with the constitutional process will not save it. Only laws "made in Pursuance" of the Constitution "shall be the supreme Law of the Land." U.S. Const. Art. VI; see also Marbury v. Madison, 5 U.S. (1 Cranch) at 180. A law that is not in pursuance of the Constitution is not the supreme law of the land -- indeed, it is not law. And if an unconstitutional law is void, then the President has no obligation to enforce it. See, e.g., Letter from Chief Justice Chase to Gerrit Smith, Apr. 19, 1868, quoted in J. Schuckers, The Life and Public Services of Salmon Portland Chase 577 (1874) ("Nothing is clearer to my mind than that acts of Congress not warranted by the Constitution are not laws."); 11 Op. Att'y Gen. 209, 214 (1865) ("If any law be repugnant to the Constitution, it is void; in other words, it is no law.").

¹³ Chase answered his question by endorsing President Johnson's decision to refuse to enforce the law:

To me, therefore, it seems perfectly clear that the President had a perfect right, and indeed was under the highest obligation, to remove Mr. Stanton, if he made the removal not in wanton disregard of a constitutional law, but with a sincere believe that the Tenure-of-Office Act was unconstitutional and for the purpose of bringing the question before the Supreme Court. Plainly it was a proper and peaceful, if not

permits him to decline to enforce a statute which is unconstitutional. Just as the take care clause requires the President to faithfully execute the laws, including the Constitution as the supreme law, the oath to defend the Constitution allows the President to refuse to execute a law he believes is contrary to the supreme law, the Constitution.

Indeed, the framers of the Constitution anticipated the question of the President's authority to refuse to enforce unconstitutional laws and indicated that the Constitution affords the President the authority to refuse to enforce unconstitutional legislation. James Wilson, one of the key drafters and advocates of the Constitution, addressed this question before the Pennsylvania convention that was debating whether to ratify the proposed Constitution. He stated:

[I]t is . . . proper to have efficient restraints upon the legislative body. These restraints arise from different sources. I will mention some of them. . . . I had occasion, on a former day . . . to state that the power of the Constitution was paramount to the power of the legislature, acting under that Constitution. For it is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual mode, notwithstanding that transgression; but when it comes to be discussed before the judges -- when they consider its principles and find it to be incompatible with the superior power of the Constitution, it is their duty to pronounce it void. . . . In the same manner, the President of the United States could shield himself and refuse to carry into effect an act that violates the Constitution.

2 The Documentary History of the Ratification of the Constitution (M. Jensen ed. 1976) (statement of James Wilson on Dec. 1, 1787) (second emphasis added).

This understanding comports with the Framers' profound structural concern about the threat of legislative encroachments on the executive and the judiciary. As Madison observed, "The

the only proper and peaceful mode of protecting and defending the Constitution.

Letter from Chief Justice Chase at 578. Similarly, this Office has opined that "the President's duty to uphold the Constitution carries with it a prerogative to disregard unconstitutional statutes." Memorandum from John M. Harmon, Assistant Attorney General Office of Legal Counsel, to Robert J. Lipshutz, Counsel to the President, Sept. 17, 1977, at 16.

legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." The Federalist No. 48, at 309 (J. Madison) (C. Rossiter ed. 1961). As Chief Justice Burger more recently admonished, "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." INS v. Chadha, 462 U.S. 919, 951 (1983). In particular, presidential decisions not to enforce a statute which violates the separation of powers have been justified by the need to resist legislative encroachment. For example, in 1860 Attorney General Black advised President Buchanan that the President could refuse to enforce an unconstitutional condition in a law:

Congress is vested with legislative power; the authority of the President is executive. Neither has a right to interfere with the functions of the other. Every law is to be carried out so far forth as is consistent with the Constitution. . . . You are therefore entirely justified in treating this condition (if it be a condition) as if the paper on which it is written were blank.

9 Op. Att'y Gen. 462, 469-70 (1860).¹⁴

For the reasons discussed above, the Department of Justice in modern times has also consistently advised that the Constitution authorizes the President to refuse to enforce a law that he believes is unconstitutional. See, e.g., Letter from Attorney General William French Smith to Congressman Peter W. Rodino, Feb. 22, 1985 (Attorney General Smith Letter), at 3 (the decision not to enforce the Competition in Contracting Act was based upon "the duty of the President to uphold the Constitution in the context of the enforcement of Acts of Congress" and the President's "oath to 'preserve, protect and defend' the Constitution"); Letter from Attorney General Benjamin R. Civiletti to Congressman Thomas P. O'Neill, Jr., Jan. 13, 1981; Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, to Robert J. Lipshutz, Counsel to the

¹⁴ See also R. Berger, Executive Privilege: A Constitutional Myth 309 (1974) ("Agreed that a veto exhausts presidential power when the issue is the wisdom of the legislation. But the object of the Framers was to prevent 'encroachment'; and they were too practical to limit the President's power to "defend" the Constitution against a breach of its very essence: the separation of powers. . . . I would therefore hold that the presidential oath to 'protect and defend the Constitution' posits both a right and a duty to protect his own constitutional functions from congressional impairment.") (emphasis in original).

President, Sept. 17, 1977 (Harmon Memorandum), at 16 ("the President's duty to uphold the Constitution carries with it a prerogative to disregard unconstitutional statutes"). The Department has given the same advice whether or not the President signed the law which he intends not to enforce. See, e.g., Attorney General Smith Letter; Harmon Memorandum.

We, too, conclude that at least in the context of legislation that infringes the separation of powers, the President has the constitutional authority to refuse to enforce unconstitutional laws. The opinions of the Department of Justice have long recognized the President's authority to refuse to enforce a statutory provision that interferes with the President's exercise of his constitutional powers. See, e.g., Attorney General Smith Letter at 3 (the decision not to enforce the Competition in Contracting Act was justified by the President's "constitutional duty to protect the Presidency from encroachment by other branches"); Memorandum for the Attorney General from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, Aug. 27, 1984, at 17 (describing the historical practice of the President "under which the President need not blindly execute or defend laws enacted by Congress if such laws trench on his constitutional power and responsibility"). James Wilson's statement, quoted above, provides further evidence of the constitutional authority of the President to shield himself from unconstitutional legislation by refusing to enforce such laws. We therefore advise that the President has the constitutional power to refuse to enforce laws that violate the separation of powers.

We recognize that opponents of presidential authority to refuse to enforce an unconstitutional statute attempt to draw support for their views in the same constitutional texts cited by proponents of such authority. The take care clause is often quoted as providing self-evident proof that the President may not refuse to enforce a law which he believes is unconstitutional.¹⁵ This reading of the provision denies the President any discretion to refuse to enforce a law that is unconstitutional. See, e.g., Bid Protest Hearings at 88 (letter from Professor Eugene Gressman).

¹⁵ See, e.g., Lear Siegler, Inc., Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1124 (9th Cir. 1988) ("To construe this duty to faithfully execute the laws as implying the power to forbid their execution perverts the clear language of the 'take care' clause"), withdrawn in relevant part, Nos. 86-6496, 87-5698 & 87-5670 (9th Cir. Jan. 10, 1990); Miller, The President and Faithful Execution of the Laws, 40 Vand. L. Rev. 389, 396 (1987) ("To say that the President's duty to faithfully execute the laws implies a power to forbid their execution is to flout the plain language of the Constitution.").

We reject this reading of the take care clause because it rests on two faulty premises concerning the nature of the "laws" which the President must enforce: first, that the President will never be faced with a conflict between a statute and the Constitution, and second, that an unconstitutional law is truly "law" for the purposes of the take care clause. As explained above, both of these premises are invalid. Statutes do conflict with the Constitution, and unconstitutional statutes are not laws the President must faithfully execute.

We are also aware that others have argued that the President may not refuse to enforce a law because the executive branch is not the institution within the federal government that is authorized to determine whether a law is unconstitutional. We have ourselves testified that "until a law is adjudicated to be unconstitutional, the issue of enforcing a statute of questionable constitutionality raises sensitive problems under the separation of powers." Bid Protest Hearings at 318-19 (statement of Acting Deputy Attorney General D. Lowell Jensen). We reject, however, the argument that the President may not treat a law as invalid prior to a judicial determination but rather must presume it to be constitutional. It affects a subtle, but fundamental transformation from the position, established in Marbury, that in deciding a case or controversy the judiciary ultimately decides whether a statute is constitutional to the position that a law is unconstitutional only when the courts say it conflicts with the Constitution. Professor Levinson has explained why this cannot be so:

If one believes that the judiciary "finds" the [law] instead of "creating" it, then the law is indeed "unconstitutional from the start." Indeed, the judicial authority under this view is derived from its ability to recognize the constitutionality or unconstitutionality of laws, but, at least theoretically, the constitutional status is independent of judicial recognition. To argue otherwise is ultimately to adopt a theory that says that the basis of law -- including a declaration of unconstitutionality -- is the court's decision itself. Among other problems with this theory is the incoherence it leads to in trying to determine what it can mean for judges to be faithful to their constitutional oaths.

Bid Protest Hearings at 67.

Still others have argued that the veto power is the only tool available to the President to oppose an unconstitutional law. We agree that the veto power is the primary tool available to the President. We disagree, however, with the contention that the Framers intended it to be the only tool at the President's

disposal. James Wilson's statement, quoted above, demonstrates that the idea that the President has the authority to refuse to enforce a law which he believes is unconstitutional was familiar to the Framers. The Constitution qualifies the President's veto power in the legislative process, but it does not impose a similar qualification on his authority to take care that the laws are faithfully executed.

Finally, we emphasize that this conclusion does not permit the President to determine as a matter of policy discretion which statutes to enforce. The only conclusion here is that he may refuse to enforce a law which he believes is unconstitutional. Obviously, the argument that the President's obligation to defend the Constitution authorizes him to refuse to enforce an unconstitutional statute does not authorize the President to refuse to enforce a statute he opposes for policy reasons. Thus, instances in which courts have rejected the claims of general presidential discretion to refuse to enforce a statutory command are irrelevant to the question of whether the President may refuse to enforce a law because he considers it unconstitutional.¹⁶

¹⁶ In Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838), the Postmaster General refused to comply with a statute that ordered him to pay two contractors for mail carrying services. The Court, although denying that the President was making such an argument, said, "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." Id. at 613. Kendall, however, did not involve a claim by the President that he was being ordered to enforce an unconstitutional law, and thus the Court had no occasion to examine the unique considerations presented by such a claim.

President Nixon's decision to impound funds appropriated by Congress is another example of an executive refusal to enforce a federal law, but there, too, President Nixon did not contend that the law was unconstitutional. Assistant Attorney General Rehnquist acknowledged that "it seems an anomalous proposition that because the Executive branch is bound to execute the laws, it is free to decline to execute them." He added, however, that "[o]f course, if a Congressional directive to spend were to interfere with the President's authority in an area confided by the Constitution to his substantive direction and control, such as his authority as Commander-in Chief of the Armed Forces and his authority over foreign affairs, a situation would be presented very different from the one before us." Memorandum Re Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools, Dec. 1, 1969 (citation omitted).

Conclusion

For the reasons given above, we conclude that Section 102(c)(2) is unconstitutional. We also conclude that it is severable, and that the President may constitutionally decline to enforce it.

A handwritten signature in dark ink, appearing to read 'W.P. Barr', with a stylized, sweeping flourish at the end.

William P. Barr
Assistant Attorney General
Office of Legal Counsel