

B-215489

July 24, 1984

DIGEST

Subparagraph (C) of section 7422(c)(2) of Naval Petroleum Reserves Production Act, as amended, authorizing either House of Congress to veto President's decision to continue production at naval petroleum reserves, is unconstitutional in light of Immigration and Naturalization Service v. Chadha, ___ U.S. ___, 103 S.Ct. 2764 (1983). However, subparagraph (C) is severable from remainder of section 7422(c)(2), converting section 7422(c)(2) to a "report and wait" provision, expressly approved by Supreme Court in Chadha.



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

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The Honorable Bill Nichols
Chairman, Subcommittee on Armed
Services Investigations
Committee on Armed Services
House of Representatives

Dear Mr. Chairman:

Your letter of January 16, 1984, asked that we analyze several issues surrounding continued production of the naval petroleum reserves, particularly reserve number 1 at Elk Hills, California. This responds to your question concerning the implications of the Supreme Court's decision in Immigration and Naturalization Service v. Chadha, U.S. ___, 103 S. Ct. 2764 (1983), (Chadha), on the one-house veto provision in section 201 of the Naval Petroleum Reserves Production Act, (Act), as amended, 10 U.S.C. § 7422 (c)(2)(C), Pub. L. 94-258, tit. II, § 201(3), 90 Stat. 307 (1977).^{1/}

Although the precise ramifications of the Chadha decision remain to be developed through further judicial inquiry, we would maintain that the one-house veto provision of section 7422(c)(2)(C) of the Act is unconstitutional. And, in our opinion, section 7422(c)(2)(C) is severable from the remaining provision of section 7422(c)(2) transforming section 7422(c)(2) into a "report and wait" provision.

The controversy in Chadha arose when the House of Representatives, by resolution, ordered the deportation of Jagdish Rai Chadha, overruling the Attorney General's decision to allow Chadha to remain in the United States. Chadha subsequently challenged the constitutionality of the legislative veto provision of the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2) (1976), arguing that the one-house veto allowed Congress to circumvent the constitutional requirements for legislative action. The Supreme Court agreed, holding that the resolution of the House of Representatives was essentially legislative in purpose and effect and, as such, must adhere to Article I requirements of bicameralism, Art. I,

^{1/} For ease of reference, we will refer to this provision as section 7422(c)(2)(C) throughout this response.

Sec. 7, cl. 2, and presentment, Art. I, Sec. 7, cl. 3. Chadha further indicates that if an unconstitutional legislative veto cannot be severed from the underlying delegation of authority, the delegation itself would also be unconstitutional.

In your letter you question Chadha's effect on section 7422(c)(2) of Title 10 of the United States Code.^{2/} Section 7422(c)(2) delegates authority to the President to decide whether or not production at naval petroleum reserves numbered 1, 2, and 3, should continue beyond an initial six-year period. 10 U.S.C. § 7422(c)(1, 2). Specifically, section 7422(c)(2) allows the President to extend production for additional periods not to exceed three years. However, the President must first evaluate the need for continued production and submit to Congress, at least 180 days before the current term of production expires, a report on the investigation and a certification that continued production is in the national interest. Section 7422(c)(2)(C) contains the

^{2/} 10 U.S.C. § 7422(c)(2) reads in full:

"(2) After April 5, 1982, the President may extend the period of production in the case of any naval petroleum reserve for additional periods of not to exceed three years each--

"(A) after the President requires an investigation to be made, in the case of each extension, to determine the necessity for continued production from such naval petroleum reserve;

"(B) after the President submits to the Congress, at least one hundred eighty days prior to the expiration of the current production period prescribed by this section, or any extension thereof, a copy of the report made to him on such investigation together with a certification by him that continued production from such naval petroleum reserve is in the national interest; and

"(C) if neither House of Congress within ninety days after receipt of such report and certification adopts a resolution disapproving further production from such naval petroleum reserve."

troublesome language, authorizing production to continue only if "neither House of Congress within 90 days after receipt of such report and certification, adopts a resolution disapproving further production." 10 U.S.C. § 7422(c)(2)(C)~~X~~

Chadha indicates that not all actions taken by either House of Congress must adhere to the procedural requirements of Article I, Sec. 7, cls. 2, ~~3~~ of the Constitution. The test is whether the action "contains matter which is properly to be regarded as legislative in its character and effect." Chadha, 103 S. Ct. at 2784, quoting from S. Rep. No. 1335, 54th Cong., 2d Sess., 8 (1897). If the action taken by either House of Congress is legislative action, that is, "action that had the purpose and effect of altering the legal rights, duties, and relations of persons * * * all outside the legislative branch," id., then such action must adhere to the procedural requirements of Art. I, Sec. 7, ~~of~~ the Constitution.

In our opinion, the one-house veto provision of section 7422(c)(2)(C)~~X~~ contemplates action which is legislative in character and effect. A legislative veto pursuant to section 7422(c)(2)(C)~~X~~ would operate to overrule a Presidential determination to continue production from a naval petroleum reserve and could impact on the existing rights of a third party, Chevron U.S.A., Inc., by limiting its ability to pump oil from reserve number 1 at Elk Hills, California.^{3/} Accordingly, we would maintain that section 7422(c)(2)(C)~~X~~'s veto provision is unconstitutional. Our inquiry now turns to the more difficult issue of severability of section 7422(c)(2)(C)~~X~~.

Unlike the Immigration and Nationality Act at issue in Chadha, the Naval Petroleum Reserves Production Act of 1976 does not contain a severability clause, explicitly reflecting Congress' desire that the invalidity of one part of the Act not affect the validity of the Act as a whole or any other parts thereof. In the absence of a presumption in favor of severance resulting from a severability clause, the

^{3/} Since June 19, 1944, the petroleum reserve at Elk Hills has been operated under a unit plan contract between the United States and Standard Oil Co., now Chevron U.S.A., Inc.. Under the contract, (section 5), Chevron's right to receive a share of the oil produced is affected if production is curtailed. Since the effect of either House's veto of the President's decision would be to curtail production, a one-house veto of the President's decision also would appear to affect Chevron's legal rights and duties. See Chadha, 103 S. Ct. at 2784~~X~~

longstanding test for severability, as reiterated by the Supreme Court in Chadha, is two-pronged. First, the unconstitutional provision is severable if the remainder of the statute is "fully operative as a law" with the unconstitutional provision removed. Chadha, 103 S. Ct. at 2775 (quoting from Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 234 (1932)). Second, the provision is severable unless it is evident that the Congress would not have enacted "the provisions which are within its power, independently of [those] which [are] not." Chadha, 103 S. Ct. at 2774 (quoting from Buckley v. Valeo, 424 U.S. 1, 108 (1976)).

Turning to the first prong of the test, namely, the ability of the statute to stand on its own if the unconstitutional portion is severed, we think the Act would be fully operative without the legislative veto provision. If subpart (C) is severed from subparagraph 7422(c)(2), section 7422(c)(2) of the Act would allow the President to decide whether or not to continue production at the reserves, but still would require him to report and certify the need for continued pumping to Congress. Thus, Congress' oversight of the President's delegated authority is preserved in a way that does not offend the Constitution. Severing the legislative veto provision would convert section 7422(c)(2) of the Act to a "report and wait" provision, expressly approved by the Supreme Court in Chadha. Chadha, 103 S. Ct. at 2776 fn. 9 (citing other examples of "report and wait" requirements approved by the Supreme Court).

With respect to the second prong of the test, we cannot say that Congress would not have passed the remainder of the Act independently of the one-house veto provision of section 7422(c)(2)(C). The primary concerns of both Houses were reducing our dependence on foreign oil and bringing the reserves up to productive capacity. See 122 Cong. Rec. 7908 (1976) (statement of Sen. Cannon) and 122 Cong. Rec. 8888 (1976) (statement of Rep. Melcher, Chairman of the conference committee to resolve the differences between H.R. 49 and S. 2173). Specifically referring to section 7422 of the Act, the conference committee identified the purpose of the legislation as assuring "the development of petroleum in the reserves at the maximum efficient rate for the six-year period of

production authorized or any extension." H.R. Rep. No. 942, 94th Cong., 2d Sess. 26 (1976) (conference report).^{4/}

It is, of course, true that Congress wanted to maintain congressional oversight of the development and production of the naval petroleum reserves, but we cannot say that the one-house veto provision was the crucial mechanism for assuring oversight. Senator Cannon cites maintenance of congressional oversight of important national resources as an accomplishment of the conference bill, 122 Cong. Rec. 7908 (1976). However, the need for such oversight was phrased in general terms. Similarly, a principal House sponsor of the Act, Congressman Melcher, emphasized the consultation and reporting requirements added to 10 U.S.C. § 7431, not section 7422(c)(2)(C),^X when describing the Act's congressional oversight provisions.

^{4/} We think the conference report accompanying the Naval Petroleum Reserves Production Act and debate thereon are particularly significant in ascertaining Congress' intent in enacting the Act. Because of the vast disparities between the House and Senate versions of the Act, the conference agreement is a compromise of the numerous differences in approach to opening the naval petroleum reserves to production. As the conference committee noted, "the differences between H.R. 49 as passed by the House and as amended by the Senate [were] so great as to make a side-by-side comparison impractical." H.R. Rep. No. 942, 94th Cong., 2d Sess. 14 (1976). Although both versions sought to resolve the important issue of how petroleum in the naval reserves could best serve the public interest, they differed on who should have jurisdiction and control of the reserves, how much oil should be produced, and how to provide for a strategic reserve.

122 Cong. Rec. 8888 (1976) (remarks of Mr. Melcher).^{5/} Indeed, our review of both the House and Senate debates on the conference report discloses only one instance where section 7422(c)(2)(C)'s legislative veto provision was specifically tied to the need for congressional oversight authority. 122 Cong. Rec. 8891 (1976) (remarks of Mr. Jeffords). On balance, while congressional oversight was an important consideration during the debate on the Act, our review of the Act's legislative history does not persuade us that Congress would not have enacted the other provisions of the Act if the one-house veto provision of section 7422(c)(2)(C) was not included.

Without the one-house veto provision, Congress is free to enact legislation in the usual manner to discontinue production at the naval petroleum reserves. Alternatively, if Congress wishes to act prospectively, it could now amend section 7422(c)(2) of the Act, limiting the President's authority to order continued production. In this regard, Representative Levitas has introduced a bill, "to terminate certain authority of the executive branch * * * which is subject to congressional review unless that authority is approved by an enactment of the Congress." H.R. 5234, 98th Cong., 2d Sess., (1984).

In summary, we would maintain that section 7422(c)(2)(C)^X is severable from section 7422(c)(2). The process of determining the Congress' intent as to the importance of one part of an act is, in the Supreme Court's own words, "an elusive inquiry," at best. But because of the clear importance given to developing the naval reserves and reducing American

^{5/} Section 7431 of Title 10^X, United States Code, as amended by the Act, gives the Armed Services Committees of the Senate and the House a central role in oversight of production and development of naval petroleum reserves numbered 1, 2, and 3. Subsection 7431(b) requires the Secretary of Energy to report to the Armed Services Committees at the beginning of each fiscal year. The report is to include the current status of and future plans for exploration, production and development programs at the reserves, production and disposition of petroleum and proceeds realized, status of pipeline construction and any problems with transportation facilities, as well as any other information the Secretary considers relevant. This subsection also requires that any changes in the plans thus reported not be implemented until 60 days after they are submitted to the committees, accompanied by a report from the Attorney General on the anticipated effects of the new plans on competition.

dependence on foreign oil, the other available oversight mechanisms provided in the Act, the operative vitality of the Act without the veto provision, and the "cardinal principle of statutory construction * * * to save and not to destroy," Tilton v. Richardson 403 U.S. 672, 684 (1971) (quoting from NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937)), we would maintain that section 7422(c)(2)(C) is severable from the Act. As suggested above, the more likely construction is to leave the remainder of the Act intact, severing only subpart (C) of section 7422(c)(2). Thus the initial decision to continue production remains with the President and congressional oversight is maintained through the "report and wait" requirement of sections 7422(c)(2)(A) and (B).

We trust this analysis will assist in your consideration of the issues surrounding continued production of the naval petroleum reserves.

Sincerely yours,

for Milton J. Fowler
Comptroller General
of the United States

NAVAL PETROLEUM RESERVES PRODUCTION ACT
Validity

COURTS

Decisions

Immigration and Naturalization Service v. ~~Shah~~