Congressional Research Service

Memorandum

March 30, 2004

TO: Hon. Tom Harkin
Attention: Phil Buchan

FROM: T.J. Halstead
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American Law Division

SUBJECT: Validity of Provisions Mandating Notice and Comment Proceedings in Response to the Decisions of Parties Operating Pursuant to International Conventions and Protocols

Pursuant to your request, this memorandum analyzes certain provisions of a draft bill forwarded by the Administration that would amend the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) to allow for the implementation of the Stockholm Convention on Persistent Organic Pollutants (POPs Convention), the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC Convention) and the Protocol on Persistent Organic Pollutants to the Convention on Long-Range Transboundary Air Pollution (LRTAP POPs Protocol). In pertinent part, the draft bill would imbue the Administrator of the Environmental Protection Agency (hereinafter referred to as "Administrator") with discretionary authority to publish notices in the Federal Register and to provide an opportunity for comment in response to certain actions taken by parties to the POPs Convention and the LRTAP POPs Protocol.

The Administration has asserted that the notice and comment provisions in its proposal are necessarily "precatory" in nature, "because a mandatory consultation requirement would raise constitutional concerns."[1] You have asked whether it would be constitutionally problematic to make the notice and comment provisions in the draft proposal mandatory, despite the concerns raised by the Administration. A review of relevant constitutional principles appears to indicate that such a requirement would pass constitutional muster.

POPs Convention

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[1] Letter to Senator Harkin from Assistant Attorney General William Moschella, U.S. Department of Justice, Office of Legislative Affairs, March 25, 2004 (hereinafter referred to as "DOJ letter").

The POPs Convention was signed by the United States on May 31, 2001, and requires nations to reduce or eliminate the production and use of listed chemicals. The POPs

Convention allows new chemicals to be added to the list by amendment to the relevant treaty annexes, and an amendment may be proposed by any party to the Convention. Amendments may be adopted at a meeting of the Conference of the Parties after the circulation of such a proposal to all parties at least six months in advance of the meeting. The POPs convention also creates a Persistent Organic Pollutants Review Committee (POPs Review Committee) that is to consist of government-designated experts in chemical assessment or management.[2] The POPs Review Committee is charged generally with determining whether a listing proposal submitted by a party meets screening criteria established in the Convention, determining whether global action is warranted regarding the proposal, and recommending whether a proposed chemical should be considered for listing by the Conference of the Parties.

LRTAP POPs Protocol

The 1998 Aarhus Protocol on Persistent Organic Pollutants (hereinafter referred to as "LRTAP POPs Protocol") amended the Convention on Long-Range Transboundary Air Pollution with the objective of eliminating discharges, emissions and losses of listed persistent organic pollutants during their production, use and disposal.[3] Any party may offer an amendment to add a new chemical to the LRTAP POPs Protocol, which may be adopted by consensus of the parties represented at a session of the Executive Body of the Convention. Prior to the addition of a chemical, the LRTAP POPs Protocol requires the completion of a risk profile on the chemical establishing that it meets selection criteria specified under the protocol.

The Draft Proposal

The Administration's draft proposal, as supplied by your office, provides for the implementation of the PIC and POPs Conventions and the LRTAP POPs Protocol. To effectuate this implementation, the proposal imbues the Administrator with the discretionary authority to publish

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[2] POPs Convention, Article 19, §6.

[3] The Convention on Long-Range Transboundary Air Pollution is treated as an executive agreement under U.S. law and has not been submitted to the Senate for advice and consent to ratification. *See* Linda-Jo Schierow, "Persistent Organic Pollutants (POPs): Background and Issues for Congress," Congressional Research Service, Report No. RL31652, at 4 (November 27, 2002).

notices in the Federal Register in response to actions taken to add chemicals to the list of those covered under the POPs Convention and the LRTAP POPs Protocol specifically.

As noted above, the POPs Convention establishes a POPs Review Committee that is responsible for considering proposals to add chemicals to those listed in the POPs Convention and recommending to the Conference of the Parties whether a proposed chemical should be considered for listing by the Conference. In the event that the POPs Review Committee does not forward a proposal, the Conference may choose to consider the proposal on its own accord.[4] Section 3(4) of the draft bill contains several provisions authorizing the Administrator of the EPA to publish notices in the Federal Register at certain stages of the listing process and to provide an opportunity for comment on a proposed listing. In particular, Section 3(4), establishing a new 7 U.S.C. §136o(e)(3), authorizes the publication of a notice and opportunity for comment after a decision by the POPs Review Committee that a listing proposal meets the screening criteria specified in the POPs Convention or, alternatively, if the Conference of the Parties decides that such a proposal should proceed.

Likewise, a new 7 U.S.C. §136o(e)(4) would authorize the publication of notice and opportunity for comment upon a determination by the POPs Review Committee that a proposed listing warrants global action, or, alternatively, if the Conference of the Parties decides that the proposal should proceed. Finally, a new 7 U.S.C. §136o(e)(5) would authorize the publication of notice and opportunity for comment after the POPs Review Committee recommends that the Conference of the Parties consider making a listing decision regarding the chemical at issue.

Publication of notice and opportunity for comment would also be authorized after a party to the LRTAP POPs Protocol submits a risk profile in support of a proposal to add a chemical to those already listed.[5] Additional notice and comment proceedings would be authorized in instances where the Executive Body determines that further consideration of a pesticide is warranted,[6] as well as after the completion of a technical review of a proposal to add a chemical to the LRTAP POPs Protocol.[7] It is interesting to note that while the draft proposal makes the decision as to whether to engage at all in notice and comment procedures discretionary, the Administrator is required to provide detailed elements of notice in the event that such procedures are offered.

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[4] POPs Convention, Article 8.

[5] Draft proposal, Section 3(4), establishing a new 7 U.S.C. §136o(e)(3)(A)(ii).

[6] Draft proposal, Section 3(4), establishing a new 7 U.S.C. §136o(e)(4)(A)(ii).

[7] Draft proposal, Section 3(4), establishing a new 7 U.S.C. §136o(e)(5)(A).

Analysis

You have specifically inquired as to whether it would violate the doctrine of separation of powers to make the aforementioned discretionary notice and comment procedures mandatory, irrespective of the general concern voiced by the Administration that "a mandatory consultation requirement would raise constitutional concerns."[8] An examination of applicable principles and precedent appears to indicate that a mandatory notice and comment requirement would be constitutionally permissible.

Stated succinctly, the separation of powers doctrine "implicit in the Constitution and well established in case law, forbids Congress from infringing upon the Executive Branch's ability to perform its traditional functions."[9] The Supreme Court has established that in determining whether an act of Congress has violated the doctrine, "the proper inquiry focuses

on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions."[10] Furthermore, as was noted by the Court of Appeals for the Ninth Circuit in *Confederated Tribes of Siletz Indians v. United States*:

> Although the Supreme Court has not announced a formal list of elements to be considered when determining whether a violation of the doctrine has taken place, it has consistently looked to at least two factors: (1) the governmental branch to which the function in question is traditionally assigned, *see Mistretta*, 488 U.S. at 364, 109 S.Ct. at 65-51; *Morrison v. Olson*, 487 U.S. 654, 694-96, 108 S.Ct. 2597, 2620-22, 101 L.Ed. 2d 659 (1988); and (2) the control of the function retained by the branch, *see Mistretta*, 488 U.S. at 408-12, 109 S.Ct. at 673-75; *Morrison*, 487 U.S. at 692-96, 108 S.Ct. at 2619-22.[11]

Applying these factors to the case at hand, it appears unlikely that a reviewing court would hold that mandatory notice and comment provisions would violate the doctrine. As is indicated by the DOJ letter, it seems that any argument that a mandatory requirement would offend the separation of powers doctrine would hinge on the assertion that such a requirement necessarily constitutes an intrusion into the core power of the Executive

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[8] DOJ Letter at 1.

[9] *Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688, 694 (9th Cir. 1997) (citations omitted).

[10] *Nixon v. Administrator of General Services*, 433 U.S. 424, 443 (1977).

[11] *Confederated Tribes of Siletz Indians v. United States*, 110 F.3d at 694.

Branch over external affairs. Specifically, in *United States v. Curtiss-Wright Corp.*, the Supreme Court declared:

[n]ot only...is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. 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. As 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.'[12]

However, it is difficult to see how a mandatory notice and comment requirement would implicate this traditional executive function. Specifically, while it is generally conceded that there are some powers enjoyed by the President alone regarding foreign affairs,[13] it is likewise evident that Congress possesses wide authority to promulgate policies respecting foreign affairs.[14] Congress has often exercised this authority to determine policy objectives for the United States in international negotiations and to require subsequent legislative approval of international agreements before they may enter into force for the United States.[15]

A mandatory notice and comment requirement would not appear to be an attempt to control the substance of negotiations between the United States and other parties to POPs Convention or the LRTAP POPs Protocol. Instead, such a requirement would simply establish that the Administrator must publish notices in the Federal Register providing information regarding chemicals that are being considered for listing to either the Convention or the Protocol. A somewhat analogous requirement in the international arena may be found at 19 U.S.C. §3537, which requires the United States Trade Representative to consult with the appropriate congressional committees and to publish detailed notices

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[12] 299 U.S. 304, 319 (1936) (emphasis in original).

[13] The President's fundamental authority to decide whether or not to recognize foreign states or governments and to maintain diplomatic relations with them, "is implied in the President's express constitutional power to appoint Ambassadors...and to receive Ambassadors...and his implied power to conduct the foreign relations of the United States." American Law Institute, Restatement (Third) of the Foreign Relations of the United States," §204, Comment A (1987).

[14] Congress, in which is vested "[a]ll legislative powers," Article I, §1, is authorized to tax and spend "to...provide for the common Defence," *id.* §8 cl. 1, "[t]o regulate Commerce with foreign Nations," *id*., §8 cl. 3, and to make all laws that are necessary and proper to execute the foregoing powers as well as all other powers vested by the Constitution in the U.S. Government or in any government department or officer. *Id*., §8 cl. 18.

[15] See "Foreign Relations Restatement," n. 13, *supra*, at §303(2) ("the President, with the authorization or approval of Congress, may make an international agreement dealing with any matter that falls within the powers of Congress and of the President under the Constitution."). *See also*, Congressional Research Service, "Treaties and Other International Agreements: The Role of the United States Senate; A Study Prepared for the Senate Committee on Foreign Relations," 78-86 (January 2001) (S.Rep. 106-710).

in the Federal Register whenever it is a party to any dispute settlement proceedings under the WTO.[16] Furthermore, it should be noted that this notification provision could be likened to reporting requirements that are often imposed by Congress.[17] As a general proposition, Congress is entitled to full access to information that is in the possession of the Executive Branch, subject to claims of executive privilege.[18]

In addition to the general assertion that a mandatory notice and comment requirement would intrude on the President's power over the "field of negotiation" in foreign affairs, the DOJ letter states that any potential requirement that the Administrator consult with private parties or give consideration to comments received therefrom would also be constitutionally problematic. However, it is likewise difficult to ascertain how such a provision would necessarily impair the ability of the executive branch to carry out its core functions in this context. There is no indication that such a provision would be drafted so as to require the disclosure of sensitive information, or to require the inclusion of such individuals in the actual negotiation process. Rather, the notice and comment procedures at issue would appear to be tailored to ensure that the public is kept informed regarding ongoing proceedings in this context, and is further afforded the opportunity to comment on proposals under consideration. Accordingly, it appears that such a dynamic would not raise concerns any more significant than existing consultation requirements.[19]

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[16] *See also* 19 U.S.C. §3533 (likewise requiring the U.S. Trade Representative to consult with congressional committees under certain circumstances).

[17] *See* Memorandum for the General Counsels of the Federal Government from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, "The Separation of Powers Between the President and Congress," at 54-56 (May 7, 1996).

[18] *See Buckley v. Valeo*, 424 U.S. 1, 137-38 (1976).

[19] *See* n.16 and accompanying text, *supra*. In further support of this argument, the DOJ letter notes that the executive branch has raised similar concerns with regard to prior congressional enactments. DOJ letter at 2-3. It is important to note, however, that the examples cited by the DOJ pertain to prior DOJ opinions and presidential signing statements, as opposed to settled judicial precedent. There is a long history of presidential issuance of signing statements, and these statements provide "one way in which a President may indicate his intent to refuse to enforce a provision of a congressionally enacted law that he believes to be unconstitutional." Christine E. Burgess, Note, "When May a President Refuse to Enforce the Law?", 72 Tex. L. Rev. 631, 641 (1994). However, there is no support for the notion that objections or concerns raised in a signing statement are of substantive legal effect. As one commentator has suggested: "[w]here the President has played a major role in drafting or supporting a particular statutory provision, presidential statements should be granted interpretive significance.... When the President opposed the provision being interpreted, however, his signing statements ... lack persuasive authority." Frank B. Cross, "The Constitutional Legitimacy and Significance of Presidential 'Signing Statements'", 40 Admin.L.Rev. 209 (1988). This observation is buttressed by the analysis in *Dacosta v. Nixon*, 55 F.R.D. 145, 146 (E.D.N.Y. 1972), where the district court stated that a bill, when passed by Congress and approved by the President, "establishe[s] 'the policy of the United States' to the exclusion of any different executive or administrative policy, and ha[s] binding force and effect on every officer of the Government, no matter what their private judgments of that policy, and illegalize[s] the pursuit of an inconsistent executive or administration policy. No executive statement denying efficacy to legislation could have either validity or effect."

Based on these factors, it does not appear that a mandatory notice and comment requirement would present any substantive separation of powers concerns.