

ID # 373366 CU

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J.R.

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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Name of Correspondent: Samuel A. Alito

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Subject: Enrolled Bill H.R. 583 "to amend the Low-Level Radioactive Waste Policy Act"

ROUTE TO:		ACTION		DISPOSITION	
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Completion Date YY/MM/DD
<u>NY-011</u>		ORIGINATOR	<u>8510113</u>		<u>C 8510122</u>
		Referral Note:			
<u>Cost 18</u>		<u>A</u>	<u>8610114</u>	<u>NAN</u>	<u>C 8610122</u>
		Referral Note:	<u>see JBR note to DH</u>		
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- ACTION CODES:**
- A - Appropriate Action
 - C - Comment/Recommendation
 - D - Draft Response
 - F - Furnish Fact Sheet to be used as Enclosure
 - I - Info Copy Only/No Action Necessary
 - R - Direct Reply w/Copy
 - S - For Signature
 - X - Interim Reply
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THE WHITE HOUSE
WASHINGTON

1/22

TO: DGH

FROM: John G. Roberts, Jr.
Associate Counsel
to the President 

- FYI
- COMMENT
- ACTION

DBW WAS ASSIGNED AND
HANDLED THE ACTUAL BILL, SO
THIS MAY BE CLOSED OUT.

Memorandum



373366

CU

Subject

Enrolled Bill H.R. 1083

Date

JAN 10 1986

To

Fred F. Fielding
Counsel to the President

From

Samuel A. Alito, Jr. *SAA*
Deputy Assistant Attorney
General
Office of Legal Counsel

Attached please find a copy of the Department's report on the above-referenced enrolled bill. It is being sent to you concurrently with the delivery of the original to the Office of Management and Budget.

We understand that John Roberts of your Office has been following this matter.

Attachment



U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

13 JAN 1986

Honorable James C. Miller
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Miller:

In compliance with your request, we have examined a copy of the enrolled bill H.R. 1083, a bill "[t]o amend the Low-Level Radioactive Waste Policy Act to improve procedures for the implementation of compacts providing for the establishment and operation of regional disposal facilities for low-level radioactive waste; to grant the consent of the Congress to certain interstate compacts on low-level radioactive waste; and for other purposes."

On balance, the Department of Justice does not object to executive approval of this enrolled bill. However, section 227 of the bill, which would grant congressional consent to the Northeast Interstate Low-Level Radioactive Waste Management Compact (Compact), contains a provision that raises substantial constitutional problems. This provision (Art. IV(o)(2) of the Compact) would set a 90-day time limit for judicial review of certain administrative decisions made by the Commission established under the Compact, and would mandate that the decision of the Commission be "deemed affirmed" if the court did not rule within that time. As set forth below, we believe that this provision usurps the judicial power, in contravention of the constitutionally-mandated separation of powers.

The Compact, which was negotiated by Connecticut, New Jersey, Delaware, and Maryland, implements a regional approach to the management and disposal of low-level radioactive

waste by providing a mechanism for establishment of regional waste disposal facilities and by granting to party states the right to deposit wastes at those facilities. The Compact establishes the Northeast Interstate Low-Level Radioactive Waste Commission (Commission), composed of members appointed by the party states. Among other responsibilities, the Commission may designate "host states" that must establish regional disposal facilities to accept wastes generated by other party states, if the states fail to pursue voluntarily the development of such facilities. Art. IV(i)(9).

The Compact establishes jurisdiction in the federal courts for suits arising from actions of the Commission. Jurisdiction is provided in the United States District Court for the District of Columbia for "all actions brought by or against the Commission." Any actions initiated in a state court "shall be removed" to the federal court. Art. IV(n). In addition, the United States Court of Appeals for the District of Columbia Circuit is given jurisdiction "to review the final administrative decisions of the Commission." Art. IV(o). Persons aggrieved by a final administrative decision of the Commission may obtain review of the decision by filing a petition for review within 60 days after the Commission's final decision. Art. IV(o)(1). On review, the court of appeals is precluded from substituting its judgment for that of the Commission "as to the decisions of policy or weight of the evidence on questions of fact," but may remand the case for further proceedings if it finds that the petitioner has been aggrieved because the finding, inferences, conclusions or decisions of the Commission are: (a) in violation of the Constitution of the United States; (b) in excess of the authority granted to the Commission under the Compact; (c) procedurally defective "to the detriment of any person;" or (d) arbitrary, capricious, or an abuse or clearly unwarranted exercise of discretion. Art. IV(o)(3).

Section (o)(2) of Article IV provides that whenever review is sought of any Commission decision "relative to the designation of a host state,"

the court of appeals shall accord the matter an expedited review, and if the court does not rule within 90 days after a petition for review has been filed, the Commission's decision shall be deemed to be affirmed.

We assume that the purpose of this provision is to insure that the court of appeals will expeditiously consider and rule on the designation of host states responsible for construction and operation of regional disposal facilities, so that the construction of such facilities can proceed as promptly as possible. Its effect would be to establish an outside limit of 150 days (60 days for filing the petition for review and 90 days for the court's ruling) from the time of the Commission's determination to the end of review by the court of appeals. The provision, however, would not just limit the time available to the court of

appeals to rule on a petition for review; it would also effectively "affirm" any designation decision of the Commission not ruled on by the court within that time, regardless whether the court had in fact reviewed the petition and determined that affirmance was warranted under the standards set out in the Compact.

To our knowledge, this provision is virtually unprecedented. We are not aware of any comparable provision in statutes authorizing judicial review of administrative actions. The closest analogy we have found is the Speedy Trial Act, 18 U.S.C. 3161 et seq., which requires that federal criminal defendants be charged and tried within certain time limits. 18 U.S.C. 3161(a)-(h). If the time limits are not met, the charges against the defendant must be dismissed by the court, either with or without prejudice. 18 U.S.C. 3162(a)(2). The constitutionality of the Speedy Trial Act was upheld by the United States Court of Appeals for the Fourth Circuit in United States v. Brainer, 691 F.2d 691 (1982); cf. United States v. Bounos, 730 F.2d 468, 471 & n.2 (7th Cir. 1984) (court need not reach issue). As discussed below, however, we believe that the purpose and effect of the Speedy Trial Act differ significantly from the purpose and effect of Art. IV(o)(2) of the Compact, and therefore that the Brainer decision does not answer satisfactorily the difficult constitutional questions presented here.

Our primary concern is that the provision would violate the constitutionally mandated separation of powers between the Legislative and Judicial Branches. "Basic to the constitutional structure established by the Framers was their recognition that '[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.'" Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57 (1982), quoting The Federalist No. 47, at 300 (H. Lodge ed. 1888) (J. Madison). Accordingly, "[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure as nearly as possible, that each branch of government would confine itself to its assigned responsibility." INS v. Chadha, 462 U.S. 919, 951 (1983); see also Buckley v. Valeo, 424 U.S. 1, 122 (1976). "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. at 951.

The Constitution vests all federal judicial power "in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, sec. 1. "[O]ur Constitution unambiguously enunciates a fundamental principle--that the 'judicial Power of the United States' must be reposed in an independent Judiciary." Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. at 60. As Hamilton stated in The Federalist No. 78 at 466 (Mentor ed. 1961) (citation omit-

ted), it is necessary for the Judiciary to remain "truly distinct from the Legislature and the Executive. For I agree that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'" Thus, it is a violation of the separation of powers for the Legislative and Executive Branches to exercise judicial power, just as it is unconstitutional for the Judiciary to engage in lawmaking or executive functions.

The core of the judicial power, which the Legislative and Executive Branches may not invade, is the rendering of decisions in court cases, i.e., the "application of principles of law or equity to [the] facts" of a particular case. Vermont v. New York, 417 U.S. 270, 277 (1974); see also Williams v. United States, 289 U.S. 553, 578 (1933); United States v. Klein, 80 U.S. (13 Wall) 128 (1872); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856). To be sure, Congress has the constitutional authority to enact laws establishing the framework within which judicial decisions must be made. Congress has broad authority to prescribe rules of practice and procedure, to define and limit jurisdiction, and to limit remedies available to litigants. In addition, Congress prescribes the substantive law that governs court decisions. But once that framework has been established, only the courts can render the actual decision.

Separation of powers questions regarding the exercise of the judicial power have frequently arisen in other contexts, such as cases concerning the powers of non-Article III courts. See Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. at 63-76. The provision discussed here, however, presents a different -- and as we have said, a virtually unique -- separation of powers question. Under this measure, if the court of appeals fails to rule on a petition for review within the prescribed time limit, the Commission's decision must "be deemed to be affirmed." Such an affirmance would be tantamount to a judgment of the court of appeals and would accordingly have a legal status different from a mere decision of the Commission. Such an affirmance would plainly represent an exercise of the core judicial function of deciding cases. However, it would derive, not from any action taken by the Judiciary, but from an automatic decision-making mechanism created by legislative enactment. Therefore, by enacting this provision, Congress would in effect be creating a mechanical substitute to do the work of the court of appeals. Because of the novelty of the measure and the consequent lack of judicial authority addressing the constitutionality of such measures, any judgment about the constitutionality of Art. IV(o)(2) must proceed from first principles relating to the separation of powers. Nevertheless, we believe that this measure is unconstitutional.

We do not believe our conclusion is inconsistent with the Fourth Circuit's decision in United States v. Brainer, supra, holding that the time constraints and dismissal sanction of the

Speedy Trial Act do not violate the separation of powers. The Brainer court assumed (691 F.2d at 695) that "the application of existing law to the facts of a case properly before the courts is a judicial function which the legislature may not constitutionally usurp." But the court analogized the challenged provisions of the Speedy Trial Act to "the host of other procedural requirements of unquestioned validity by which Congress regulates the courts of its creation -- such measures as the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, the Federal Rules of Evidence, and statutes prescribing who may sue and where and for what." 691 F.2d at 696. The court added that "[s]tatutes of limitation provide perhaps the closest analogy." Ibid.

Whatever the merits of these inexact analogies may be in the context of the Speedy Trial Act, they have no force here. For example, we see no meaningful comparison for separation of powers purposes between a statute of limitations, which bars a party from bringing suit after the passage of a specified period of time, and the provision at issue here, which may result in the rendering by extra-judicial means of a decision in a case that is properly before the court of appeals. A statute of limitations, unlike this measure, does not create an automatic decision-making mechanism to take the place of a court. A better rationale for the result in Brainer is that mandatory dismissal under the Speedy Trial Act is necessary to remedy a violation of the criminal defendant's statutory right to a speedy trial -- a right that has roots in the Sixth Amendment and that plays an important role in safeguarding the accuracy of the trial process. As the Supreme Court has recognized in cases involving the Sixth Amendment speedy trial guaranty, dismissal of the action is really "the only possible remedy" for deprivation of a right to a speedy trial. See Strunk v. United States, 412 U.S. 434, 438-40 (1973); Barker v. Wingo, 407 U.S. 514, 531 (1972). The judicial review provision in Art. IV(o)(2) of the Compact, by contrast, does not appear to be designed to protect any particular substantive right (let alone any constitutional right), for it mandates an automatic affirmance of the Commission no matter what the Commission has decided. Although the measure demonstrates Congress's desire to have an expeditious review of the Commission's designation decisions, affirmance of such decisions cannot be viewed in any sense as a "remedy" to redress injury to other parties from delay in completion of judicial review. It is not at all clear, for example, that parties who support the Commission's decision would necessarily be injured by any further delay in review, or that affirmance of the decision would alleviate any such injury.

Moreover, under the Speedy Trial Act the court has discretion to dismiss the case either with or without prejudice, based on the court's evaluation of the reasons for and effect of the delay in the particular case. The choice whether to give the dismissal preclusive effect is therefore left to the courts, and requires the courts to conduct the sort of factfinding that is at

the core of the judicial function. No such latitude is given the court of appeals under the Compact; regardless of the circumstances and the merits of the petition for review, the Commission's decision is automatically deemed to be affirmed once the 90-day period has run.

Therefore, we believe that Art. IV(o)(2) of the Northeast Compact, which would be enacted into law by H.R. 1083, unconstitutionally usurps the judicial power. Because the provision is a relatively minor feature of the bill, and would raise questions only about the finality of certain actions taken by the Northeast Compact Commission and the availability of judicial review of those decisions, we do not recommend a veto of this enrolled bill. We strongly urge, however, that the President issue a signing statement noting the constitutional defect. We have attached suggested language for inclusion in such a statement.

Sincerely,

(Signed)

John R. Bolton
Assistant Attorney General

Suggested Language

I am today signing H.R. 1083, a bill that will provide a framework for cooperation between the states and the federal government in solving the difficult problem of handling and disposing of low-level radioactive wastes. I am pleased that Congress has taken this action, and that those states which have already formed interstate compacts to manage their low-level radioactive wastes will be able to proceed expeditiously.

As presented to me, however, the bill contains one constitutional flaw. Art. IV(o)(2) of the Northeast Interstate Low-Level Radioactive Management Compact (which would be enacted into law by H.R. 1083) sets a 90-day time limit for judicial review by a federal court of appeals of certain administrative decisions made by the Commission established under the Compact, and mandates that the decision of the Commission be "deemed affirmed" if the court does not rule within that time. The Attorney General has advised me that by providing for an "automatic affirmance" of Commission decisions, Congress would usurp the core judicial function of applying principles of law to the facts of a particular case, in contravention of the constitutionally mandated separation of powers.

Because the effect of the provision is somewhat limited, and because I believe this legislation is a vital step in solving the serious problem of disposal of low-level radioactive waste, I am signing this bill today despite this constitutional concern.

**OPEN REAGAN PRESIDENTIAL RECORDS
RE
SAMUEL A. ALITO**

WHORM: Subject File

FG017-11 United States Attorneys – casefiles 475416 (9 pages) and 521074 (1 page)

HE007-03 Water Pollution – Water Purification – casefile 373366 (10 pages)