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WITHDRAWAL SHEET
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File Folder: Counsel's Office 7/84 - 1/85 [2 of 4] ~~OA 10514~~ Box 7 **Date:** 3/1/99

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1. memo	Fred Fielding to Baker re judicial nomination 1 p.	8/31/84	~~P6, F6~~
2. letter	Orrin Hatch, et al to Howard Baker re judicial nomination 1 p.	8/9/84	~~P6, F6~~
3. talking points	re judicial nomination 2 p.	nd	P6, F6 CO 10/15/00

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]
- P-1 National security classified information [(a)(1) of the PRA].
- P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
- P-3 Release would violate a Federal statute [(a)(3) of the PRA].
- P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA].
- P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA].
- P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA].

C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]
- F-1 National security classified information [(b)(1) of the FOIA].
- F-2 Release could disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA].
- F-3 Release would violate a Federal statue [(b)(3) of the FOIA].
- F-4 Release would disclose trade secrets or confidential commercial or financial information [(b)(4) of the FOIA].
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- F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
- F-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
- F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

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THE WHITE HOUSE

WASHINGTON

September 13, 1984

MEMORANDUM FOR EDWIN MEESE, III
JAMES A. BAKER, III
MICHAEL K. DEAVER
JOHN HERRINGTON

FROM: FRED F. FIELDING

RE: NLRB

I enclose a letter received from John Irving, former General Counsel to the NLRB, setting forth his analysis of the "Dotson Board".

Enclosure

JOHN S. IRVING, JR.
5108 RANDALL LANE
BETHESDA, MD 20816

PERSONAL AND CONFIDENTIAL

September 7, 1984

The Honorable Fred F. Fielding
Counsel to the President
The White House
Washington, D.C. 20500

Dear Fred:

This business with the Teamsters and alleged plans to replace or demote NLRB Chairman Dotson, is absurd. Dotson may not be as lovable as Pillsbury's Poppin' Fresh Dough Boy, but the decisions of his Board have restored balance to the law which, as you know, the Fanning Board upset. The real fear of Presser and other anti-Dotson union leaders is that recent Board positions will be adopted by the courts and, thus, become embedded in the law.

In his dump-Dotson campaign, Presser seems to have had the ear of at least some senior White House officials. I know there are many management representatives who would welcome the same courtesy and the opportunity to set the record straight - myself included. The fact is, if Dotson is sacrificed, before or after the election, in order to appease Presser or any other union-type, the business community will go up in smoke.

For the first time in decades, the opportunity exists to balance a law which, almost since its inception, has been misconstrued to the liking and advantage of unions. For the President to be misled into actions which could eliminate that opportunity, would be a serious mistake. Presidential advisors who are interested in currying favor with Presser need to be reminded that business leaders are the President's friends too. The business community has every bit as much at stake as unions in the outcome of this anti-Dotson furry - a furry which unions have contrived and orchestrated to excuse their own inability to organize workers.

For your further reading pleasure, I have enclosed recent testimony I presented before Congressman Clay's anti-Dotson (union generated) dog-and-pony show.

If you can think of anything else I can do to help keep the record straight, please call me.

Best regards,

John S. Irving

Enclosure

Statement

of

John S. Irving

Kirkland & Ellis

Subject: "Has Labor Law Failed?"

Joint Hearings

before

The Subcommittee on Labor-Management Relations

and

The Subcommittee on Manpower and Housing

of the

U.S. House of Representatives

June 26, 1984

STATEMENT OF JOHN S. IRVING
HOUSE SUBCOMMITTEES ON LABOR-MANAGEMENT
RELATIONS AND MANPOWER AND HOUSING
June 26, 1984

My name is John S. Irving. I represent management clients and am a partner in the law firm of Kirkland & Ellis in Washington, D.C. I am pleased to have this opportunity to express my views on whether the Country's labor laws are working as they should and, in particular, on the subject of NLRB decisions. Over the years I have taken a keen interest in the Board, both from outside and inside the Agency. In 1965, I began my career in labor law at the NLRB and was employed at the Board for thirteen of the fifteen years I spent in the Federal service, until 1979 when I entered private law practice.

During my years at the Board, which I began as a law clerk, I was a legal assistant, an appellate attorney, and supervised the Agency's regional offices and the General Counsel's Advice Section. From 1972 until 1975 I served as Deputy General Counsel and from 1975 to 1979, as General Counsel. While I was at the Agency and since, I have read virtually every new Board decision.

In short, I have been an interested observer of the Board and its decisions, and particularly interested in the changes in Board law over the years, changes which have resulted from a variety of causes. Some were in response to

court decisions. Most, however, resulted from changes in the composition of the Board and the differing philosophies and approaches of the majorities which determined the course of Board decisions.

Anyone who knows anything about the National Labor Relations Act knows that it is sheer nonsense to say that there is any one "correct" way that the Act must be read. The NLRA is the most complex Federal labor law, is truly the product of legislative compromise, and contains many vague and even conflicting provisions.

Because of these inherent inconsistencies and ambiguities, a better test of whether the Act is being "properly" interpreted by the Board is whether Board decisions are balanced and make practical labor relations sense. This is a quite different test from measuring Board decisions by whether they happen to "please" labor or management. Thus, in my view, Board interpretations of the Act are most susceptible to criticism when they lead to results which, as a practical matter, Congress never could have intended.

For at least five years, prior to 1983, Board decisions, or I should say majority decisions, were most susceptible to valid criticism. From approximately 1977 until recently, and particularly under the chairmanship of former Chairman John H. Fanning, a Board majority forged new rules and reversed, refined, and extended then-existing precedents to extremes which simply could not have been intended by

Congress. In a great number of instances, which I will discuss, the decisions of Board majorities during this 1977 to 1983 period, made little practical sense and even less sense as national labor policy.

In answer to the question, "Have the labor laws failed?", I would have to respond, emphatically, no. The changes in Board law which we have witnessed in recent months have restored needed balance and evenhandedness to the law. These corrections are long overdue and are proof that the NLRA has not failed. Instead, they are proof that the labor laws are working. The viability of this self-correction process should be a source of enthusiasm for the Act, not dire and misleading claims that the Act has "failed."

The critics of recent Board decisions - organized labor and its willing allies in the media and in Congress - base their claims on two faulty premises. First, they assume that recent changes in Board law are departures from sound, "correct" legal principles. They are not. Second, those critics would have us believe that the precedents being modified are "long established." They are not. Indeed, most of those "precedents" are of recent vintage. Moreover, the changes, in reality, are little more than a return to balance and a renunciation of short lived policies which may have worked to the advantage of organized labor, but which made little sense for national labor policy.

Others here today will focus in depth on the details of recent Board decisions about which labor complains. In order to minimize duplication, I have chosen to focus on the law as it stood prior to 1982 -- on many of the so-called "sound" and "established" precedents which new Board members since 1981 faced when they took office.

Between 1977 and 1983, management was distressed by many decisions from Board majorities comprised almost consistently of former Chairman Fanning and Member Jenkins and, variously, of former Chairman Murphy, Member Truesdale, and/or Member Zimmerman. While a number of critical articles were written by some, myself included,[1/] management refrained from demanding congressional hearings to challenge Board holdings and stopped short of demanding the resignations of Board members with whom they strongly disagreed. In short, management critics in those years were much more civilized than labor critics who currently are demanding the hides of certain Board members. Management thought it could encourage changes in course at the Board through constructive criticism

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1/ Irving, The NLRB as Change Approaches, Labor Law Developments 1984, Southwestern Legal Foundation; Irving, Recent NLRB Developments: The Survival of the Misguided Majority, Labor Law Developments 1983 at 77, Southwestern Legal Foundation; Irving, NLRB: Master of its Own Destiny (Fate?), Labor Law Developments 1982 at 67, Southwestern Legal Foundation; Irving, Plant Relocations and Transfers of Work: The NLRB's "Inherently Destructive" Approach, 34 Lab. L. J. 549 (1983); Irving, Closings and Sales of Businesses: A Settled Area?, 33 Lab. L. J. 218 (1982).

instead of misleading claims and feigned alarm which union critics have substituted lately for reasoned analysis.

Let us examine some examples of the "sound" and "established" precedents inherited by new Board members since 1981. The majority, almost consistently led by former chairman Fanning and member Jenkins, believed, for instance, that labor contracts do not really mean what they say. Although a contract contained an expiration date, the Fanning Board reversed established precedent in 1979 and held that contractual grievance procedures survive contractual expiration dates, even for grievances which arose after expiration.[2/] Such a rule, I suppose, would require contracting parties to negotiate expiration clauses which say, "When this contract expires, we really mean it."

Neither were contractual no-strike clauses construed to mean what they say. No matter how broad a no-strike clause, the Board required parties to specifically list certain kinds of strikes, e.g., sympathy strikes[3/] or strikes over the actions of third parties.[4/] If they failed to do so, the Board held that such strikes were not forbidden, even in the face of a broadly worded no-strike clause.

2/ American Sink Top & Cabinet Co., 242 N.L.R.B. 408 (1979).

3/ United States Steel Corp., 264 N.L.R.B. 76 (1982), enforcement denied, 711 F.2d 772 (7th Cir. 1983).

4/ Pacemaker Yacht Co., 253 N.L.R.B. 828 (1980); enforcement denied, 663 F.2d 455 (3rd Cir. 1981).

If management obtains one thing in return for the concessions it makes in a labor contract, it is labor peace for the term of the agreement. Yet, despite this obvious fact of industrial life, the Board ignored the realities of bargain struck by the parties and watered down broad contractual strike prohibitions which were both clear and unambiguous.

Similarly, in 1977 members Fanning and Jenkins and in this instance member Murphy reversed established precedent and undermined contractually agreed-upon arbitration procedures.[5/] Grievants in discharge cases were given the choice of arbitrating or resorting to the Board, or both. No matter that the dispute was essentially a "just cause" discharge dispute. No matter that the contracting parties had agreed to utilize the contractual grievance procedures as the sole means of resolving disputes during the term of the agreement. No matter that the dispute was, indeed, susceptible to resolution by an arbitrator. No matter that the Act specifically states in Section 203(b) that private dispute resolution is the "desirable method" of resolving contractual disputes. And, no matter that the Board was simultaneously complaining to Congress and the President about its "ever increasing caseload."

5/ General American Transportation Corp., 228 N.L.R.B. 808 (1977).

No, to this Board majority, NLRB dispute resolution was the desired course. Majorities led by members Fanning and Jenkins did everything they could to undermine established law favoring deferral to arbitration awards. Arbitrators were second-guessed, at least when the Board majority did not like the arbitral result.[6/] Various devices for second-guessing arbitrators were employed. Sometimes the Board simply would conclude that arbitral results were "repugnant to the Act," in some instances because the arbitrator's remedy was not congruent with a remedy the Board might grant.[7/] Often it was not enough that an arbitrator concluded on parallel facts that a discharge was, in fact, "for cause."[8/] It was not enough that the arbitrator actually considered the unfair labor practice issue, if the issue had not been raised by the grievant himself.[9/] And, of course, negotiated grievance settlements short of arbitration were entitled to no deference at all.[10/]

Such decisions, presumably supported by current Board critics, did little to encourage collective bargaining or to

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6/ Babcock & Wilcox Co., 249 N.L.R.B. 739 (1980).

7/ Hammermill Paper Co., 262 N.L.R.B. 1236 (1980).

8/ Albertson's, Inc., 252 N.L.R.B. 529 (1980), enforcement denied 108 L.R.R.M. 2714 (9th Cir. 1981).

9/ Professional Porter & Window Cleaning Co. 263 N.L.R.B. 136 (1982).

10/ Thatcher Glass Mfg. Co., 265 N.L.R.B. 321 (1982).

promote the sanctity of labor agreements. Instead, they seemed to concentrate on giving grievants and unions as many bites at dispute resolution mechanisms as possible, private and public. The consequence was to contribute unnecessarily to the Board's already inflated caseload -- at taxpayer expense.

But this is by no means a complete list of cases in which earlier Board majorities contributed to labor management instability by undermining collective bargaining agreements. With respect to plant relocations during the term of a labor agreement, the Board was willing to read provisions into contracts which were not there. Where contracts contained no prohibitions against mid-term relocations for economic, labor-cost savings reasons, the Board invented them. It provided unions with a veto against such moves, a veto for which unions need not bargain at the bargaining table. In one case, Brown Company, the Board actually held that the contract was irrelevant in such cases, a view rejected by the Ninth Circuit.[11/]

It is this ill-conceived theory, a theory which makes nonsense out of the bargain struck by the parties, that the current Board rejected in Milwaukee Spring.[12/] The outrage

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11/ Brown Co., 243 N.L.R.B. 769 (1979), enforcement denied in relevant part, ___ F.2d ___, 109 L.R.R.M. 2663 (9th Cir. 1981).

12/ Milwaukee Spring Division of Illinois Coil Spring Co., 268 N.L.R.B. No. 87 (1984).

feigned by representatives of organized labor in the wake of that decision had less to do with the reversal of sound established precedent, and more to do with labor's loss of its Board-devised "veto," an advantage to which it was never rightly entitled and which was contructed by the Board out of whole cloth.

In other important respects too, inherited precedents made little sense. So eager were majorities led by members Fanning and Jenkins to insulate union strikers from employer discipline that threats against non-strikers were ignored unless those threats were accompanied by "overt acts." Thus, it was unlawful for employers to discipline strikers who merely threatened to burn the homes of non-strikers.[13/] Neither could strikers be terminated for threatening to "take care of" a non-striker--at his home, at night, and in front of his pregnant wife and small child.[14/] This threat was unaccompanied by overt acts the Board said, noting that a screen door separated the non-strikers from the striker and his family. Other strikers were ordered reinstated when they jumped on the hoods of moving vehicles,[15/] and still

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13/ A. Duie Pyle, Inc., 263 N.L.R.B. 744 (1982), enforcement denied __ F.2d __, 115 L.R.R.M. 3428 (3rd Cir. 1984).

14/ Georgia Kraft Co., 258 N.L.R.B. 908 (1981), enforced 696 F.2d 931 (11th Cir. 1983), cert. granted 52 U.S.L.W. 3386 (Nov. 14 1983).

15/ Chevron, U.S.A., Inc., 255 N.L.R.B. 1380 (1981), enforcement denied 672 F.2d 359 (3rd Cir. 1982).

others were reinstated when they announced to patrons that their employer's cafeteria food contained rat hairs.[16] Violence and strike misconduct were encouraged by the Board's holding that "minor" distruction of property was excused as long as it was a "predictable reaction" to an employer's denial of employee rights.[17]

Similarly, a Fanning led majority encouraged the breakdown of shop floor discipline when it held that an employee is protected when, "face to face, inches apart," he "pushes away" (i.e., shoves) his supervisor, announces that he will talk any time he pleases, and threatens that if the supervisor were not an old man, he would "stomp [his] goddamn ass in the floor."[18] The majority justified this conclusion on the basis that the employee was provoked by a supervisor's campaign of harassment. Mercifully, the majority did acknowledge that fighting with, hitting, or slapping a supervisor would be unprotected. Employees who spread unsubstantiated allegations about employer sexual misconduct also were insulated from discipline as long as they were engaged in some semblance of protected activity at the same time.[19]

16/ Furr's Cafeteria, Inc. 251 N.L.R.B. 879 (1980).

17/ Import Body Shop, 262 N.L.R.B. 1188 (1982) Member Hunter dissenting.

18/ E. J. Du Pont de Nemours, 263 N.L.R.B. 159 (1982).

19/ Tyler Business Systems, 256 N.L.R.B. 567 (1981), enforcement denied 680 F.2d 338 (4th Cir. 1982).

The Fanning-Jenkins led majority demonstrated its further ignorance of the realties of the workplace in its 1982 holding in L.A. Water Treatment, 263 N.L.R.B. 244. In that case the Board majority announced that union represented employees have a right to bring a non-union witnesses to investigative interviews conducted by management. However, this right only exists, the majority said, where there would be "no-conflict" between the non-union witness and the union's representational role. And mind you, all the right conclusions must be reached by supervisors before conducting the interview in order to avoid violating the Act. The net result of this mindless decision is to discourage management from conducting any interview at all.

Of course, the zeal for protecting employee interests of members Fanning, Jenkins, and Zimmerman waned when they collided with the institutional interests of unions. Thus, said this majority, a union can have a rule prohibiting strikers from resigning from the union and returning to work without giving 30 days notice to the union.[20/] No matter that the striker might be permanently replaced by his employer while waiting for the notice period to expire. No matter that Section 7 of the Act specifically guarantees the right of employees to refrain from union activity. This was

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20/ Machinists Local 1327, District Lodge 115 (Dalmo Victor), 263 N.L.R.B. 984 (1982), enforcement denied ___ F.2d ___ (9th Cir. 1984).

a clear case of the express statutory rights of employees colliding with implied union institutional interests in "solidarity." As between the two, it is interesting to note which one was required to yield by the Board majority.

Similarly, contract clauses giving union officers, like "trustees," superseniority rights in cases of layoff were sanctioned by the Fanning majority as long as such officials had functions which relate in general to furthering the bargaining relationship.[21/] And, in 1982 the Board reversed precedent to require employers to continue bargaining for a new contract with an incumbent union, even while employees were seeking to oust the union through a Board decertification election.[22/]

A close examination of the Board cases I have mentioned should convince any objective observer that decisions by Board majorities between 1977 and 1983 left much to be desired. Many of these holdings made little sense from the standpoint of national labor policy and, clearly, many were out of touch with the realities of the workplace.

Let us be clear, then, about the recent complaints by representatives of organized labor. These representatives only profess to be complaining about Board reversals of "sound" precedents. In truth, they are complaining that the

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21/ American Can Co., 244 N.L.R.B. 736 (1979).

22/ Dresser Industries, Inc., 264 N.L.R.B. 1088 (1982).

present Board is reversing precedents that they like and which give tactical advantages to the unions they represent. Similarly, claims by these critics that the current Board is reversing "long established" precedent, in my view, is purposely misleading. The precedents being changed are of recent origin, and the Board is merely returning the law to the more balanced state which existed before the predecessors of this Board bent it out of proportion.

Why, for instance, do union critics complain when the current Board requires contracting parties to live up to their commitment to arbitrate disputes susceptible to resolution under agreed-upon contractual procedures?[23/] It could be that union representatives prefer to have the Board resolve their disputes, without the costs of arbitration. And, why are union representatives critical when the Board revitalizes the policy of deferring to arbitration awards?[24/] It could be because they would like to have two bites at the apple -- one before an arbitrator and one before the Board.

Why do union representatives complain when the current Board honors the bargain struck by the parties to collective bargaining by refusing to read provisions into contracts which are not there?[25/] It may be because unions would

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23/ United Technologies Corp., 268 N.L.R.B. No. 83 (1984).

24/ Olin Corp. 268 N.L.R.B. No. 86 (1984).

25/ Milwaukee Spring Division of Illinois Coil Spring Co., 268 N.L.R.B. No. 87 (1984).

rather "win" plant relocation prohibitions through Board construction instead of through the collective bargaining process. Why do union representatives complain when the Board refuses to require employers to bargain about business decisions which do not turn upon labor-cost considerations?[26/] It could be that they see some tactical advantage to having mandatory bargaining subjects defined so broadly that unions may be able to thwart or delay implementation of decisions they do not like.

Why do union representatives complain when the Board returns the law to where it was in 1981 and says that avowed and announced union activists can be asked uncoercively by management about the advantages or disadvantages of unionism?[27/] It could be that the rule rejected by the Board provided a handy trap for unwary employers whose innocent statements may be used to set aside elections which unions have lost. And, why should union representatives complain when the Board again returns the law to where it was in 1981 and distinguishes between no-solicitation rules which forbid union solicitation during "working time" and "working hours?"[28/] It could be that union representatives

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26/ Otis Elevator, Co., 269 N.L.R.B. No. 162.

27/ Rossmore House, 269 N.L.R.B. No. 198 (1984), overruling PPG Industries, 251 N.L.R.B. 1146 (1980).

28/ Our Way, Inc., 268 N.L.R.B. No. 61 (1983), overruling T.R.W. Bearings, 257 N.L.R.B. 442 (1981).

prefer a rule which makes no such distinction because it encourages union solicitation.

Let us be frank with outselves about the motives of those who have been so critical of Board decisions in recent months. They simply prefer things the way they were; the way Board appointees, whom they supported, construed the law. They really are complaining about a loss of tactical advantages it took them years to obtain through Board construction, tactical advantages to which they were not entitled under more balanced interpretations of the law to which this Board has returned.

The Board's present critics may be concerned about other things too. They may be concerned that the lead decisions recently issued by the Board are likely to be sustained by the courts, making their principles harder to dislodge in the future. Because these lead decisions respond to the concerns of courts about the directions of earlier Board decisions, they are, indeed, likely to be sustained by the courts. Thus, the critics have something to worry about.

These critics are also concerned that there are more changes to come, i.e., that other "established precedents" will be modified by the Board. They are correct, I predict. There are a variety of areas of Board law that are in dire need of correction after the distortions they suffered under earlier Boards. It is not unpredictable that organized

labor would adopt a damage control strategy, i.e., of generating distorted claims about Board decisions and the Board in an attempt to influence its members and, wishfully, the Board's composition.

Exaggerated and feigned outrage about the Board decisions and personnel also could provide a predicate for new labor law "reform" initiatives. In fact, one union witness recently told this committee that the NLRA is "no longer alive" and is "an albatross on the labor movement." What he means is that because the Act is being more neutrally administered, it is not working to the advantage of unions. Legislative "reforms," union spokesmen have argued, are needed to revitalize the Act and promote collective bargaining. What they really mean is legislative changes are needed to facilitate union organization and promote unionism. It is convenient then, the blame the Act and the Board for their lack of success in recent years in attracting workers to their cause.

When current union complaints about the Board are put in perspective, it is clear that they are comprised more of rhetoric than reasoned analysis. Impure motives are attributed to current Board members. Those appointed by President Reagan are said by critics to be antiworker, antiunion, anti-Act, anti-collective bargaining, and so on. Could it be that these shallow criticisms have anything to do with election year politics? Could it be that union advocates in

search of election year issues are seeking to discredit the President by discrediting the Board members he has appointed?

To me, these are better explanations for the current wave of union generated criticism of lead Board decisions, for the truth is that these decisions do little more than return the law to the more balanced posture it was in prior to 1977. The truth is that the precedents being reversed are the ones that are imbalanced, not the ones that are doing the reversing.

In conclusion, then, it is evident to me that decisions recently issued by the Board evidence no "breakdown in the labor laws." On the contrary, the restoration of balance and a return to reasoned, balanced principles are clear evidence that the labor laws <u>are working</u>. The balance is swinging to the middle, not the right, as labor spokesmen would have it. This correction is long overdue and will result in the enhancement of the labor law, not its "failure."

I disagree with labor's claims that collective bargaining is dying, that there is a tide of anti-unionism sweeping the management community and government agencies, and that frustrated workers and unions are prepared to avoid the Board and take to the streets. If workers are upset with the Board, this has less to do with Board decisions and more to do with the misinformation, predictions of doom, and unsupported charges of bias about the Board emanating from labor spokesmen and echoed by sympathetic elements in the

media and elsewhere. The truth is that workers are being misled by the very union spokesmen who aspire to lead them. If the labor laws break down sometime in the future, it will not be because of Board decisions. Rather, those who have embarked on a negative strategy which encourages disrespect for law, the Board and the Act, will have themselves to thank.

I wish to thank this Committee for affording me the opportunity to express my views.

THE WHITE HOUSE

WASHINGTON

September 6, 1984

MEMORANDUM FOR ALL WHITE HOUSE STAFF

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Preparation of Briefing Materials for Use by the President in Candidate Debates

It is very likely that the President will debate the Democratic Presidential nominee, Walter Mondale, sometime during the 1984 general election period. The purpose of this memorandum is to advise you of the legal and policy limitations on your activities in preparation of the briefing materials for the President's use in such debate.

As everyone should be aware by now, only those Government employees paid from the appropriations for the White House Office, or appointed to their current positions by the President with the advice and consent of the Senate, may engage in partisan political activity. All others are subject to the Hatch Act, 5 U.S.C. §§ 7321 - 7327, and are precluded from engaging in partisan political activity. Thus, most employees of the Office of Policy Development, the National Security Council, the Council of Economic Advisers, the Office of Management and Budget, and all other Executive departments and agencies are subject to the Hatch Act.

The Special Counsel of the Merit Systems Protection Board has taken the position that "hatched" employees may not write or prepare any materials that will be used only for political purposes. Such employees may, however, prepare briefing materials on official Administration policies and proposals for use by Administration officials, even when such materials might be included in partisan political statements. Moreover, the Special Counsel has stated that although "hatched" employees may not prepare responses to candidate questionnaires sent to the President, they may review such responses (as prepared by campaign or non-hatched Administration officials) for consistency with Administration positions and policies.

Accordingly, this Administration will observe the following guidelines in the preparation of briefing materials for use by the President in a candidate debate:

1. Individuals or offices may be requested to prepare background or briefing materials for use in the Presidential debates only by the following people: James A. Baker, III, Richard G. Darman, Michael Baroody, and Robert Sims.

THE WHITE HOUSE

WASHINGTON

August 31, 1984

MDT TOLD FF 9/5/84 he said he would take care of

MEMORANDUM FOR JAMES A. BAKER, III
CHIEF OF STAFF AND
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Proposed Conversation with Senator Hatch Concerning the Nomination of Andrew L. Frey to be an Associate Judge of the D.C. Court of Appeals

You may recall that subsequent to the President's nomination of Andrew L. Frey to be an Associate Judge of the D.C. Court of Appeals, Senators Hatch, Denton, Grassley and East, at the urging of certain pro-life organizations, advised Senator Howard Baker by letter (attached at Tab A) of their intention to fight this nomination on the Senate floor. A hearing on Frey's nomination is now scheduled for September 11, 1984* before the Subcommittee on the District of Columbia, Senate Committee on Governmental Affairs, chaired by Senator Mathias.

RECOMMENDATION:

That you use the occasion of the President's trip to Salt Lake City (Senator Hatch is manifested on Air Force I on the California to Salt Lake City leg) to urge Senator Hatch not to oppose the Frey nomination. Talking points are attached at Tab B.

* I am inclined to ask that this be put off until after the election unless you feel to the contrary

2. No Reagan-Bush '84 officials shall request White House or other government employees to prepare briefing materials for use in the Presidential debates; Reagan-Bush '84 officials may forward materials prepared by them to the White House through the office of Richard Darman.

3. Briefing materials specially prepared for use by the President in a candidate debate shall not be composed or typed by government employees subject to the Hatch Act; however, such employees may review briefing materials in their areas of expertise for consistency with Administration policies or positions.

4. Hatched employees may continue to prepare (i.e., compose and/or type) statements of Administration position and policy for use by "non-hatched" Administration officials.

cc: Margaret D. Tutwiler (for transmittal to Reagan-Bush '84)
Members of the Cabinet

United States Senate

c. 8-9

COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

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JOEL S. LISKER, CHIEF COUNSEL AND STAFF DIRECTOR

9 August 1984

Honorable Howard H. Baker, Jr.
Majority Leader
United States Senate
S-233, The Capitol
Washington, D.C. 20510

Dear Howard:

With respect to the nomination of Andrew L. Frey to the District of Columbia Court of Appeals, which may soon be coming onto the Executive Calendar, we will object to any unanimous consent agreement or waiver of the rules.

There are numerous serious problems with this nomination that ought to be explored prior to a Senate vote on confirmation.

We appreciate your protecting us on this matter.

Sincerely,

Orrin G. Hatch, U.S.S.

Jeremiah A. Denton, U.S.S.

Charles E. Grassley, U.S.S.

John P. East, U.S.S.

B

TALKING POINTS ON THE NOMINATION OF ANDREW L. FREY

1. Mr. Frey is eminently well-qualified for this appointment.

   -- For the last decade Mr. Frey has been the federal government's chief advocate before the Supreme Court on criminal law matters and, perhaps more than any other person, has fashioned the arguments that have led the Supreme Court to restore needed balance in the area of criminal justice.

   -- He has consistently and effectively espoused these conservative legal positions during his 12-year tenure, spanning several administrations, in the Office of the Solicitor General.

   -- Mr. Frey's criminal law expertise was an important consideration in filling this vacancy on the D.C. Court of Appeals because of the Court's influence over criminal law issues arising in the District of Columbia.

2. Mr. Frey's admittedly pro-choice views should not be considered disqualifying.

   -- Mr. Frey has made small contributions in the past to pro-choice organizations, but he is not now nor has he ever been an active member in any such group.

   -- The D.C. Court of Appeals has no policy role on issues involving abortion -- an area, in this case, reserved for the D.C. Council and the Congress.

   -- Mr. Frey firmly believes in the principle of judicial restraint.

3. Under the nominating procedures for D.C. judges, Frey is the Administration's only real chance of filling this vacancy with a conservative.

-- D.C. law requires that the President select his nominee from a list of three names submitted by the D.C. Judicial Nomination Commission. (This Commission, as you know, has a liberal composition.)

-- The other two candidates were more liberal than Frey across the board.

-- The D.C. Judicial Nomination Commission previously kept Frey off the list because he was considered too conservative and had been too effective in arguing the government's positions before the Supreme Court.

-- Under D.C. law, if Frey is not confirmed, the President would be required to pick a new nominee from the remaining names on the list.

THE WHITE HOUSE

WASHINGTON

August 31, 1984

MEMORANDUM FOR THE ATTORNEY GENERAL
EDWIN MEESE III
JAMES A. BAKER, III
DEPUTY ATTORNEY GENERAL CAROL E. DINKINS
JOHN S. HERRINGTON
D. LOWELL JENSEN
TEX LEZAR
M. B. OGLESBY
MARGARET TUTWILER

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Summary of Decisions -- August 16, 1984 Meeting of the President's Federal Judicial Selections Committee

Summarized below are the decisions made in our meeting of August 16, 1984.

I. CIRCUIT COURT VACANCIES

A. 3rd Circuit: The Committee agreed to continue moving forward with the background checks on Faith Whittlesey; Justice will provide background information on Judge Mansmann to Ed Meese.

B. 7th Circuit: We will continue reviewing candidates to fill the vacancy on this court.

C. 9th Circuit: The background investigations have been initiated on Melvin T. Brunetti as a candidate to fill one of the two remaining vacancies on this court.

D. 10th Circuit: Discussions of candidates for this position will continue at the next meeting.

II. DISTRICT COURT VACANCIES

A. District of Massachusetts: Background investigations have been initiated on Mark L. Wolf and Judge William G. Young as candidates to fill the two vacancies on this court.

B. District of New Jersey: Background investigations have been initiated on Joseph H. Rodriguez as a candidate to fill the vacancy on this court.

C. Southern District of Florida: B. Oglesby is to discuss the candidates for these vacancies with Senator Hawkins.

D. Western District of Louisiana: Background investigations have been initiated on F.A. Little, Jr. and Donald E. Walter as candidates to fill the two vacancies on this court.

E. Western District of Texas: Background investigations have been initiated on U.S. Magistrate Walter S. Smith as a candidate to fill the vacancy on this court.

F. Northern District of Ohio: Background investigations have been initiated on Judge Alice Batchelder as a candidate to fill the vacancy on this court.

G. Southern District of Ohio: Background investigations have been initiated on Judge Herman J. Weber as a candidate to fill the vacancy on this court.

H. Northern District of Illinois: The discussion of Assistant U.S. Attorney Ann C. Williams as a candidate for this court will be continued at the next meeting.

I. District of Montana: The discussion of candidates for this court will continue at our next meeting. B. Oglesby is to discuss those candidates with the Montana Congressional delegation.

J. District of Nevada: Background investigations have been initiated on Howard D. McKibben as a candidate to fill the vacancy on this court.

K. Central District of California: Background investigations have been initiated on William D. Keller and Henry T. Moore, Jr. as candidates to fill two of the six vacancies on this court. Ed Meese is to discuss other candidates with Senator Wilson and report at the next meeting.

L. Eastern District of Tennessee: Background investigations have been initiated on R. Allan Edgar as a candidate to fill the vacancy on this court.

August 30, 1984

ADVISORY STATUS REPORT FOR THE ATTORNEY GENERAL AND DEPUTY ATTORNEY GENERAL

UNITED STATES DISTRICT JUDGESHIPS - LOG

DISTRICT	SPONSOR	VACANCIES	CANDIDATE	RESUME	FBI BACKGROUND COMMENCED	RATING	TO WH	REMARKS
Arizona		Cordova 5/3/84						
N.D. Calif	Wilson	Schnacke 12/31/83	Charles A. Legge	Yes	5/21	WQ	6/14	Sen 6/19 Hear 6/26
C.D. Calif		New pos	William D. Keller	Yes	8/17			
		New pos	Henry T. Moore	Yes	8/17	Withdrew 8/24		
DC		Green 1/15/84	Stanley Sporkin	Yes	3/29	WQ/Q	6/25	Sen 6/28
N.D. Ill	Percy	One, eff 6/1/83	Ilana Diamond Rovner	Yes	5/8	Q	6/14	Sen 6/19 Hear 6/26
		New pos	James F. Holderman	Yes	7/30	WQ-inf		
		New pos	Charles Norgle	Yes	7/30			
W.D. Ky		New pos Allen 10/85	Ronald Meredith	Yes	7/26			
E.D. La	Moore/ Livingston	Cassibry 3/15/84	Marcel Livaudais, Jr.		4/12	Q/NQ	6/15	Sen 6/19 Hear 6/26
W.D. La		Scott A&Q	F.A. Little, Jr.	Yes	8/17			
		New pos	Donald E. Walter	Yes	8/17			

DISTRICT	SPONSOR	VACANCIES	CANDIDATE	RESUME	FBI BACKGROUND COMMENCED	RATING	TO WH	REMARKS
D. Mass		New Pos	Mark L. Wolf	Yes	8/17			
		New Pos	William G. Young	Yes	8/17			
E.D. Mich		Harvey 3/31/84	Richard Suhrheinrich	Yes	7/20	Q-inf		
		New Pos Joiner 8/15/84	George LaPlata	Yes	7/30			
D. Nev		New Pos	Howard D. McKibben	Yes	8/23			
D. N.J.		New Pos	Joseph H. Rodriguez	Yes	8/17	WQ-inf		
S.D. NY	Moynihan	Lasker 10/3/83 Werker 5/10/84	William E. Hellerstein					
E.D. N.C.	Helms	New Pos	Samuel Currin	Yes	7/20			
N.D. Ohio		New Pos	Alice M. Batchelder	Yes	8/17			
S.D. Ohio		New Pos	Herman J. Weber	Yes	8/17			
E.D. Pa	Heinz/ Specter	Hannum 5/29/84 Broderick 7/1/84	Anthony J. Scirica	Yes	5/18	WQ	6/13	Sen 6/19 Hear 7/26
D. S.D.		Bogue 7/1/85						
E.D. Tn	Baker	New Pos	James Jarvis	Yes	7/20	Q-inf		
		Milburn	R. Allan Edgar	Yes	8/17			
M.D. Tn	Baker	Morton 7/31/84	Tom Higgins Robert Jones Rose Cantrell		7/30			

DISTRICT	SPONSOR	VACANCIES	CANDIDATE	FBI RESUME	BACKGROUND COMMENCED	RATING	TO WH	REMARKS
E.D. Tx	Tower	Fisher 1/30/84	Howell Cobb	Yes	5/21	WQ		
N.D. Tx		Hill 7/20/84						
W.D. Tx		New Pos	Walter S. Smith, Jr.	Yes	8/17			

ADVISORY STATUS REPORT FOR THE ATTORNEY GENERAL AND DEPUTY ATTORNEY GENERAL

UNITED STATES CIRCUIT & SPECIAL JUDGESHIPS - LOG

DISTRICT	SPONSOR	VACANCIES	CANDIDATE	RESUME	FBI BACKGROUND COMMENCED	RATING	TO WH	REMARKS
First		New pos	Juan R. Torruella	Yes	7/11	WQ	7/30	Sen 8/1 Hear 8/7
Third		New pos	Carol Los Mansmann	Yes	7/11	Q		
		New pos	Faith Ryan Whittlesey	Yes	7/30			
Fourth		New pos	Emory Sneeden	Yes	7/11	Q/NQ	7/27	Sen 8/1 Hear 8/7
Fifth		New pos	Edith Jones	Yes	7/11			
Sixth		New pos	H. Ted Milburn	Yes	7/20	WQ-inf		
Seventh		New pos	Frank H. Easterbrook	Yes	7/11	Q/NQ	7/27	Sen 8/1 Hear 9/5
		Pell 7/31/84						
Ninth		New pos	Cynthia Holcomb Hall	Yes	7/11	Q	7/27	Sen 8/1 Hear 8/7
		New pos	Charles E. Wiggins	Yes	7/11	EWQ/WQ	7/27	Sen 8/1 Hear 9/5
		New pos	Melvin Brunetti	Yes				
		Choy, 10/3/84						
Tenth		McWilliams, 8/31/84						
D.C.		New pos	Paul Bator	Yes	7/11	WQ/Q	7/27	Sen 8/1 Hear 9/5

DISTRICT SPONSOR	VACANCIES	CANDIDATES	RESUME	FBI BACKGROUND COMMENCED	RATING	TO WH	REMARKS
Ct of International Trade	Two, eff (2) 4/30/84 (2-Rep)	Thomas J. Aquilino, Jr.	Yes	5/21	Q	7/27	Sen 8/1
		Nicholas Tsoucalas	Yes	6/21			
Claims Court	One, 5/84	Roger B. Andewelt	Yes				
		Marian Blank Horn	Yes	6/19	N/A		