THE WHITE HOUSE

WASHINGTON

August 27, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: DOJ Draft Report on H.R. 2348, the DOJ FY 1986 Appropriations Authorization

OMB has asked for our views by September 4 on a draft Justice Department report on the FY 1986 Justice authorization bill. The report objects to a number of constitutionally dubious provisions, including a provision prohibiting the Attorney General from appearing in the name of the United States when contesting the constitutionality of an Act of Congress, and provisions barring use of appropriated funds to overturn the per se illegality of resale price maintenance (a largely moot issue after Monsanto v. Spray-Rite) and, more significantly, to reopen civil rights consent decrees. The draft report objects at some length to a dirty pool provision barring any use of funds for the Office of the Attorney General until Justice orders all Federal agencies to comply with the Competition in Contracting Act of 1984. You will recall Justice opined that certain aspects of that law were unconstitutional and should be ignored; a district court disagreed, and the Government is now complying with the Act while pursuing an appeal.

The report also urges additional funds be authorized, as previously requested, for the U.S. Attorneys offices, and that $4 million earmarked for the Office of Special Investigations be reduced to the requested $3 million. Finally, noting that the FY 1981, 1982, 1983, 1984, and 1985 Justice authorization bills were never passed, Justice renews its annual pitch for a general authorization bill to take non-controversial authorities out of the annual authorization cycle. I have reviewed the draft report and have no objections.

Attachment

THE WHITE HOUSE

WASHINGTON

August 27, 1985

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Draft Report on H.R. 2348, the DOJ FY 1986 Appropriations Authorization

Counsel's Office has reviewed the above-referenced draft report, and finds no objection to it from a legal perspective.

FFF:JGR:aea 8/27/85
cc: FFFielding
JGRoberts
Subj
Chron

ID # 337814 CU

FI004

JR

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: James C. Murr

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: DOJ draft report on H.R. 2348, the DOJ FY 1986 appropriations authorization

ROUTE TO: | **ACTION** | **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CU Hall	ORIGINATOR	85/08/21			/ /
	Referral Note:				
Cust 18	D	85/08/23		S	85/09/03
	Referral Note:				
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	Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
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X - Interim Reply

DISPOSITION CODES:
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C - Completed
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FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

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Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

THE WHITE HOUSE

WASHINGTON

August 27, 1985

MEMORANDUM FOR WILLIAM BRADFORD REYNOLDS
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
U.S. DEPARTMENT OF JUSTICE

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Inquiry from Asian Indian Americans

In recent correspondence the leaders of three Asian Indian American organizations requested that the President ask the Department of Justice whether medical doctors of foreign origin have been deprived, through licensing restrictions, of the basic civil right to pursue their chosen profession. A copy of the correspondence is enclosed; the pertinent paragraph is III(a).

This matter is referred to you for whatever action, if any, you consider appropriate. Please understand that the White House is not requesting an investigation or inquiry, but simply referring the concerns of the Asian Indian leaders to you for any appropriate consideration. That has been made clear in my reply to the Asian Indian American leaders, a copy of which is attached for your information.

Attachment

THE WHITE HOUSE

WASHINGTON

August 27, 1985

MEMORANDUM FOR JAMES MANN
GENERAL COUNSEL
U.S. COMMISSION ON CIVIL RIGHTS

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Inquiry from Asian Indian Americans

In recent correspondence the leaders of three Asian Indian American organizations requested that the President ask the U.S. Commission on Civil Rights whether medical doctors of foreign origin have been deprived, through licensing restrictions, of the basic civil right to pursue their chosen profession. A copy of the correspondence is enclosed; the pertinent paragraph is III(a).

This matter is referred to you for whatever action, if any, you consider appropriate. Please understand that the White House is not requesting an investigation or inquiry, but simply referring the concerns of the Asian Indian leaders to you for any appropriate consideration. That has been made clear in my reply to the Asian Indian American leaders, a copy of which is attached for your information.

Attachment

THE WHITE HOUSE

WASHINGTON

August 27, 1985

Dear Dr. Cherian:

Linas Kojelis of the Office of Public Liaison recently referred your letter to the President raising Asian Indian American community interests to this office, for appropriate action with respect to paragraph III(a) of that letter. In that paragraph you questioned whether medical doctors of foreign origin were being denied basic civil rights through licensing restrictions.

As you know, the President is strongly opposed to any discrimination on the basis of race or ethnic origin. I do not know, however, if the restrictions to which you refer were imposed because of such discrimination or for legitimate reasons.

As requested in your letter, we have referred your concerns to the U.S. Civil Rights Commission and the Department of Justice. It will be the decision of the Commission and the Department whether any investigation or inquiry is warranted in response to your concerns. I you have additional information substantiating your concerns in this area, you should contact the Commission and the Department directly.

Sincerely,

John G. Roberts
Associate Counsel to the President

Dr. Joy Cherian
13316 Foxhall Drive
Wheaton, MD 20906

cc: Linas Kojelis

THE WHITE HOUSE

WASHINGTON

August 27, 1985

Dear Dr. Saxena:

Linas Kojelis of the Office of Public Liaison recently referred your letter to the President raising Asian Indian American community interests to this office, for appropriate action with respect to paragraph III(a) of that letter. In that paragraph you questioned whether medical doctors of foreign origin were being denied basic civil rights through licensing restrictions.

As you know, the President is strongly opposed to any discrimination on the basis of race or ethnic origin. I do not know, however, if the restrictions to which you refer were imposed because of such discrimination or for legitimate reasons.

As requested in your letter, we have referred your concerns to the U.S. Civil Rights Commission and the Department of Justice. It will be the decision of the Commission and the Department whether any investigation or inquiry is warranted in response to your concerns. If you have additional information substantiating your concerns in this area, you should contact the Commission and the Department directly.

Sincerely,

John G. Roberts
Associate Counsel to the President

Dr. Surendra K. Saxena
1 South 130 Pine Lane
Lombard, IL 60148

cc: Linas Kojelis

THE WHITE HOUSE

WASHINGTON

August 27, 1985

Dear Dr. Abraham:

Linas Kojelis of the Office of Public Liaison recently referred your letter to the President raising Asian Indian American community interests to this office, for appropriate action with respect to paragraph III(a) of that letter. In that paragraph you questioned whether medical doctors of foreign origin were being denied basic civil rights through licensing restrictions.

As you know, the President is strongly opposed to any discrimination on the basis of race or ethnic origin. I do not know, however, if the restrictions to which you refer were imposed because of such discrimination or for legitimate reasons.

As requested in your letter, we have referred your concerns to the U.S. Civil Rights Commission and the Department of Justice. It will be the decision of the Commission and the Department whether any investigation or inquiry is warranted in response to your concerns. If you have additional information substantiating your concerns in this area, you should contact the Commission and the Department directly.

Sincerely,

John G. Roberts
Associate Counsel to the President

Dr. Thomas Abraham
667 E. 233rd Street, #6E
Bronx, NY 10466

cc: Linas Kojelis

326094

ID # HM013-20

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Dr. Thomas Abraham et al.

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: Indian-American Community Concerns

ROUTE TO: / **ACTION** / **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
PLKOSE	ORIGINATOR	850626	LK	A	850626
VCUROBE	R	851107			/ /
	Referral Note: ATTN: John Roberts.				
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	Referral Note:				
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	Referral Note:				

ACTION CODES:
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C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
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DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: Please respond to "Section III(a)" of letter

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Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

THE WHITE HOUSE

WASHINGTON

June 26, 1985

Dear Friends:

On behalf of the President, I would like to thank you for your recent letter which was submitted at the White House briefing for the Indian-American community on May 10. As your letter raises many issues over a broad range of topics, I have taken the liberty of forwarding it to the appropriate offices and agencies and have asked that they reply to your various concerns directly.

I was most happy to chat with you at the luncheon in Rockville and look forward to seeing you again soon.

Sincerely,

Linas Kojelis
Associate Director
Office of Public Liaison

Dr. Thomas Abraham, President,
National Federation of Asian
Indian Organizations
667 E. 233rd St., #6E
Bronx, NY 10466

Dr. Surendra K. Saxena, President,
Association of Indians in America
1 So. 130 Pine Ln.
Lombard, IL 60148

Dr. Joy Cherian, President,
Indian-American Forum for Political
Education
13316 Foxhall Dr.
Wheaton, MD 20906

bcc: John Roberts, OGC

A MEMORANDUM OF ASIAN INDIAN AMERICAN COMMUNITY INTERESTS
Submitted to the President of the United States
At the White House Briefing
Held on May 10, 1985

Dear Mr. President:

On behalf of the associations listed below of citizens and permanent residents of the United States, we respectfully submit the following for your consideration:

I. The half-million Asian Indian Americans in the United States constitute a tremendous reservoir of talent in professional fields which the U.S. government has not made the most of. A number of qualified scientists, engineers, doctors, educators, businessmen, and lawyers of Indian descent are available for policy-making and executive positions in your administration. Would you look into the possibility of utilizing these resources for the benefit of the United States by appointing qualified Asian Indian Americans to commissions, task forces, advisory boards, and government agencies?

II. We support your policy goal of strengthening democracies around the world. Many of us were born in the largest democracy in the world, India; most of us have chosen to make the greatest democracy in the world, the United States, our home for the rest of our natural lives. We thus have a vested interest in promoting strong Indo-U.S. relations. Mr. President, would you take the initiative to promote a close friendship and cooperation with India during the upcoming visit of Honorable Rajiv Gandhi, Prime Minister of India?

III. Equal employment opportunity and affirmative action are successful programs that have corrected major imbalances in employment and job advancement in our society. Unfortunately, many young medical doctors of foreign origin are not given opportunities to earn their licenses in this country by the leaders of the American medical profession.

(a) Would you ask the U.S. Civil Rights Commission and the Department of Justice whether these professionals have been deprived of their basic civil rights to pursue the profession for which they are trained?

(b) Considering that the need for physicians is not being met in rural and economically disadvantaged areas of the United States, would you ask the Department of Health and Human Services to look into the possibility of establishing a special program to utilize the talents of these medical professionals to alleviate the lack of physicians in parts of the United States?

IV. Mahatma Gandhi, who inspired many of our American social and political leaders, deserves suitable recognition in the United States. Would you honor his memory and enrich the lives of millions of Americans by declaring October 2, 1985 Mahatma Gandhi Day in the United States?

Respectfully,

Thomas Abraham

Dr. Thomas Abraham
President
National Federation of Asian Indian Organizations
667 East 233rd Street, #6E
Bronx, New York 10466

Surendra K. Saxena

Dr. Surendra K. Saxena
President
Association of Indians in America
1 South 130 Pine Lane
Lombard, Illinois 60148

Dr. Joy Cherian
President
Indian-American Forum for Political Education
13316 Foxhall Drive
Wheaton, Maryland 20906

THE WHITE HOUSE

WASHINGTON

September 3, 1985

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Draft Report on H.R. 2348, the DOJ FY 1986 Appropriations Authorization

Counsel's Office has reviewed the above-referenced draft report, and finds no objection to it from a legal perspective. I strongly urge that our objections be discussed with the appropriate Senate committees and leadership, to avoid possible veto confrontation.

FFF:JGR:dgh 9/3/85

cc: FFFielding
JGRoberts
Subj
Chron

THE WHITE HOUSE

WASHINGTON

September 13, 1985

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Proposed DOJ Report on H.R. 2633, the "Rules Enabling Act of 1985"

Counsel's Office has reviewed the above-referenced report, and finds no objection to it from a legal perspective.

ID # _____ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: James Muir

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: Proposed DOJ report on H.R. 2633, the "Rules Enabling Act of 1985"

ROUTE TO: / **ACTION** / **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CU Hall	ORIGINATOR	85,09,13			1 1
	Referral Note:				
Cmt 18	R	85,09,13		S	85,09,13 3pm
	Referral Note:				
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		1 1			1 1
	Referral Note:				
		1 1			1 1
	Referral Note:				

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Completion Date = Date of Outgoing

Comments: _____

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SPECIAL

September 12, 1985

SPECIAL

LEGISLATIVE REFERRAL MEMORANDUM

TO:

Administrative Office of the U.S. Courts
General Services Administration - Ted Ebert (566-1250)

SUBJECT: Proposed DOJ report on H.R. 2633, the "Rules Enabling Act of 1985"

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than 3:00 p.m.
Friday September 13, 1985

Direct your questions to Branden Blum (395-3454), the legislative attorney in this office.

Branden Blum

for **James C. Murr for**
Assistant Director for
Legislative Reference

Enclosure

cc: F. Fielding
J. Cooney
K. Wilson

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

DRAFT

Honorable Peter W. Rodino, Jr.
Chairman
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter is in response to your request for the views of the Department of Justice on H.R. 2633, the "Rules Enabling Act of 1985." The Department would have no objection to enactment of this legislation if it were amended as suggested below.

H.R. 2633 would revise the procedures for promulgation by the Supreme Court of the rules of practice and procedure in the federal courts. It is a revision of H.R. 4144, 98th Congress, about which the Department commented in a March 5, 1984 letter to you. H.R. 2633 is a considerable improvement over H.R. 4144 and meets all of the substantial concerns we raised in our March 5 letter, except that it retains the open meeting provision (proposed § 2073(c)) to which we objected. The requirements imposed by that provision would make the rulemaking process more complex and lengthy and would inhibit the candor and free exchange of ideas necessary to the consideration of controversial rule proposals and effective rule drafting. In addition, rules might be subject to procedural challenges if the open meeting provisions were not strictly followed. In our view, the current system is working well and public participation in the rulemaking process is adequately assured through public comment on proposed rules.

The one new feature of H.R. 2633 that we wish to comment upon is the last clause of proposed § 2072(b), which would provide that rules promulgated by the Supreme Court "shall not ... supersede any provision of a law of the United States." The effect of this provision would be to significantly cut back on the scope of judicial rulemaking by precluding such rulemaking in areas of court practice and procedure where Congress has legislated. For example, if this provision were in effect the Supreme Court evidently would not be able to promulgate amendments to the Federal Rules of Evidence because those rules were enacted into

law. Pub. L. 93-595, § 1, January 2, 1975, 88 Stat. 1926. Thus, H.R. 2633 would operate to revoke the authorization in the enabling act for evidence rules (28 U.S.C. 2076) that "[t]he Supreme Court shall have the power to prescribe amendments to the Federal Rules of Evidence."

We believe that such a limitation is undesirable as a matter of policy because the judicial branch should retain its current flexibility (subject to congressional review) to promulgate rules on all procedural matters affecting litigation in the federal courts. Moreover, for reasons set forth below, the limitation is unnecessary.

We understand that the limitation has been included in this bill in part because of concerns that the existing supersession provisions unconstitutionally delegate to the judicial branch the authority to repeal or amend existing laws -- authority that the Supreme Court has recently stated in unequivocal terms must conform with the bicameralism and presentment requirements of Art. I of the Constitution. See INS v. Chadha, 462 U.S. 919, 954 (1983). We do not believe, however, that the existing supersession provisions are unconstitutional. The language of the existing provisions does not on its face authorize the judicial branch to repeal or amend existing laws of the United States. Rather, the language provides that once rules promulgated by the courts have taken effect, existing laws that are in conflict "shall be of no further force or effect. . . ." See 28 U.S.C. 2072. 1/ We believe this language should be interpreted as a recognition by Congress of the inherent authority of the courts to regulate their own practice and procedure and a declaration that Congress will, in general, defer to the courts' exercise of that authority, subject to Congress's continuing oversight of that process. 2/ Congress accomplishes this intent in the

---

1/ The supersession provision in the enabling act for the rules of evidence is couched in similar, although not identical, terms. See 28 U.S.C. 2076 ("Any provision of law in force at the expiration of [the congressional review period] and in conflict with any such amendment . . . shall be of no futher force or effect after such amendment has taken effect.").

2/ The dispute over whether promulgation of rules of practice and procedure for the federal courts is a legislative or a judicial function is long-standing. See, e.g., Pound, "The Rule-Making Power of the Courts," 12 A.B.A.J. 599 (1926); Wigmore, "All Legislative Rules for Judiciary Procedure are Void Constitutionally," 23 Ill. L. Rev. 276 (1928); Kaplan & Greene, "The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury," 65 Harv. L. Rev. 234

(Footnote Continued)

current enabling acts by providing that existing statutory law will, in effect, expire upon promulgation by the courts of rules that are "in conflict with" those statutory provisions.

We believe that the existing supersession provisions should not properly be characterized as delegating Congress's authority to repeal or amend legislative action, but rather as an attempt by Congress to strike a constitutionally sound balance between the overlapping powers of the judicial and legislative branches to promulgate rules of practice and procedure to govern litigation in the federal courts, by withdrawing from the field once the courts have exercised that power in a particular instance. Thus, the supersession provisions do not involve an unconstitutional delegation of legislative authority to the judicial branch, but rather congressional forbearance or deference, in an area of shared constitutional authority, to the judiciary's inherent authority to promulgate rules of practice and procedure. This general forbearance obviously does not preclude Congress, in any particular instance, from once again through the legislative process exercising its constitutional role concerning the courts. We believe that this approach is preferable to prohibiting supersession.

(Footnote Continued)
(1959); Pound, Procedure Under Rules of Court in New Jersey," 66 Harv. L. Rev. 28 (1952); Weinstein, "Reform of Federal Court Rule-making Procedures," 76 Colum. L. Rev. 905 (1978); Note, "Federal Rules of Evidence," 26 Hastings L. J. 1059 (1975); Note, "The Proposed Federal Rules Evidence: Of Privileges and the Division of Rule-Making Power," 76 Michigan L. Rev. 1177 (1978). Although the Supreme Court has most often spoken of the rule-making power in the context of Congress's authority to prescribe or to authorize court rules (see, e.g., Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825); Sibbach v. Wilson & Co., Inc., 312 U.S. 1, 10 (1941); Hanna v. Plumer, 380 U.S. 460 (1965)), the Court has also acknowledged that the courts themselves have an inherent responsibility, incident to the exercise of their judicial power, to regulate practice before them (see, e.g., Hayburn's Case, 2 U.S. (2 Dall.) 409, 413-14 (1792); Wayman v. Southard, 23 U.S. (10 Wheat.) at 43; Bank of United States v. Halstead, 23 U.S. (10 Wheat.) 51 (1825); Palermo v. United States, 360 U.S. 343, 345 (1959)). We believe that the Constitution contemplates in this area shared, overlapping power between the judicial branch (arising out of the prescription in Article III that the "judicial power" be vested in the judicial branch) and the legislative branch (arising out of the express grant of authority to Congress in Article II to make regulations governing the jurisdiction of the federal courts).

Therefore, we oppose H.R. 2633's "no supersession" provision (last clause of proposed § 2072(b)) and urge that the supersession provisions in the existing rules enabling acts be retained.

In conclusion, the Department of Justice would have no objection to enactment of H.R. 2633 if it were amended as suggested above. The Office of Management and Budget has advised the Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Phillip D. Brady
Acting Assistant Attorney General

cc: Hon. Edward T. Gignoux

THE WHITE HOUSE

WASHINGTON

September 17, 1985

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS JGR
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Draft DOJ Report on H.R. 1524, "Polygraph Protection Act of 1985"

Counsel's Office has reviewed the above-referenced draft report, and finds no objection to it from a legal perspective.

ID # _____ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
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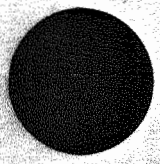
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 1 1



Name of Correspondent: James Murr

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: Draft DOJ report on H.R. 1524, "Polygraph Protection Act of 1985"

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUHOLL	ORIGINATOR	85109117			1 1
	Referral Note:				
CUAT18	R	85109117		S	85109117 4PM
	Referral Note:				
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ACTION

DISPOSITION

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

September 17, 1985

LEGISLATIVE REFERRAL MEMORANDUM

TO: Department of Defense - Werner Windus (697-1305)
Department of Energy - Bob Rabben (252-6718)
National Aeronautics and Space Administration - Toby Costanzo (453-1080)
Department of Transportation - John Collins (426-4687)
Central Intelligence Agency
National Security Council
Department of Labor - Seth Zinman (523-8201)
Department of Commerce - Michael Levitt (377-3151)
Department of the Treasury - Art Schissel (566-8523)
Office of Personnel Management - Bob Moffit (632-6516)

SUBJECT: Draft DOJ report on H.R. 1524, the "Polygraph Protection Act of 1985"

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than 4:00 P.M. TODAY SEPTEMBER 17, 1985.

(Note: The Employment Opportunities Subcommittee of the House Education and Labor Committee has scheduled a mark-up of H.R. 1524 for tomorrow.)

Direct your questions to Branden Blum (395-3454), the legislative attorney in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure
cc: F. Fielding
J. Cooney
P. Szervo
K. Wilson
A. Donahue
T. Stanners
K. Schwartz
H. Schreiber

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

DRAFT

Honorable Augustus F. Hawkins
Chairman
Committee on Education and Labor
U.S. House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This is to proffer the views of the Department of Justice regarding H.R. 1524, the proposed Polygraph Protection Act of 1985.

We take no position on the policy merits of H.R. 1524. However, we do object to the bill's failure to provide an exemption for using the polygraph in situations involving employees of government contractors performing work for the government related to the national defense and national security. Despite the close working relationship between the federal government and federal contractors, employees of contractors are not considered to be government employees and, therefore, the exemption for government employees provided in Section 8 of the bill would not apply to contractor employees.

For this reason, we oppose enactment of H.R. 1524 without an amendment which would exempt government contractor employees from coverage by the bill.

The Office of Management and Budget has advised this Department that it has no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,

Phillip D. Brady
Acting Assistant Attorney General

99TH CONGRESS
1ST SESSION

H. R. 1524

To prevent the denial of employment opportunities by prohibiting the use of lie detectors by employers involved in or affecting interstate commerce.

IN THE HOUSE OF REPRESENTATIVES

MARCH 7, 1985

Mr. WILLIAMS (for himself, Mr. MARTINEZ, Mr. FORD of Michigan, Mr. KEMP, Mr. MCKINNEY, Mr. HAYES, Mr. OWENS, Mr. DYMALLY, Mr. BOUCHER, Mr. MURPHY, Mr. TAUKE, Mr. LOWRY of Washington, Mr. COURTER, and Mr. EDWARDS of California) introduced the following bill; which was referred to the Committee on Education and Labor

---

A BILL

To prevent the denial of employment opportunities by prohibiting the use of lie detectors by employers involved in or affecting interstate commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Polygraph Protection Act of 1985".

SEC. 2. PURPOSE.

It is the purpose of this Act to prevent the denial of employment opportunities based on the use of instrumentation designed to detect deception or verify truth of statement. This Act shall be construed to prohibit the use of all such instrumentation on employees, agents, prospective employees and prospective agents.

SEC. 3. PROHIBITIONS ON LIE DETECTOR USE.

No employer or other person engaged in any business in or affecting interstate commerce, nor any agent or representative thereof, shall—

(1) directly or indirectly require, request, suggest, permit or cause any employee, agent, prospective employee or prospective agent to take or submit to any lie detector test or examination for any purpose whatsoever;

(2) use, accept, or refer to the results of any lie detector test or examination of any employee, agent, prospective employee or prospective agent for any purpose whatsoever; or

(3) discharge, dismiss, discipline in any manner, or deny employment or promotion, or threaten to do so, to any employee, agent, prospective employee or prospective agent who refuses, declines, or fails to take or submit to any lie detector test or examination.

SEC. 4. NOTICE OF PROTECTION.

The Secretary of Labor shall prepare and have printed a notice setting forth information necessary to effectuate the purposes of this Act. This notice shall be posted at all times in conspicuous places upon the premises of every employer engaged in any business in or affecting interstate commerce.

SEC. 5. RULES AND REGULATIONS.

In accordance with the provisions of subchapter II of chapter 5 of title 5, United States Code, the Secretary of Labor shall issue such rules and regulations as may be necessary or appropriate for carrying out this Act.

SEC. 6. AUTHORITY OF THE SECRETARY OF LABOR.

The Secretary of Labor shall—

(1) make such delegations, appoint such agents and employees, and pay for such technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this Act;

(2) cooperate with regional, State, local, and other agencies, and cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this Act; and

(3) make investigations and require the keeping of records necessary or appropriate for the administration of this Act in accordance with the powers and proce-

dures provided in sections 9 and 11 of the Fair Labor Standards Act of 1938 (29 U.S.C. 209 and 211).

SEC. 7. ENFORCEMENT PROVISIONS.

The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16, and 17 of the Fair Labor Standards Act of 1938 (29 U.S.C. 211(b), 216, 217). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938 (29 U.S.C. 216, 217).

SEC. 8. NO APPLICATION TO GOVERNMENTAL EMPLOYEES.

The provisions of this Act shall not apply with respect to any individual who is employed by the United States Government, a State government, city, or any political subdivision of a State or city.

SEC. 9. DEFINITIONS.

As used in this Act—

(1) The term "person" means any natural person, firm, association, partnership, corporation, or any employee or agent thereof.

(2) The term "lie detector" includes but is not limited to any polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other device (whether mechanical, electrical, or chemical)

which is used, or the results of which are used, for the purpose of detecting deception or verifying the truth of statements.

(3) The term "employer" includes an employment agency.

SEC. 10. EFFECTIVE DATE.

The provisions of this Act shall take effect on the date of enactment, except for section 4, which shall take effect six months from the date of enactment.

O

THE WHITE HOUSE

WASHINGTON

September 19, 1985

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

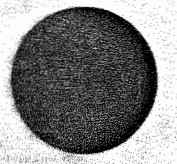
FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Draft Report on H.R. 2050, a Bill Concerning the Authority of the D.C. Parole Board

Counsel's Office has reviewed the above-referenced draft report, and finds no objection to it from a legal perspective.

ID # _____ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET



☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 85/09/11

Name of Correspondent: Branden Blum

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: DOJ draft report on H.R. 2030, a bill concerning the authority of the D.C. Parole Board

ROUTE TO:	ACTION		DISPOSITION		
Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CU Hall	ORIGINATOR	85/09/18			/ /
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	Referral Note:				
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ACTION CODES:
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Always return completed correspondence record to Central Files.
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OFFICE OF MANAGEMENT AND BUDGET
ROUTE SLIP

TO	✓ Fred Fielding	Take necessary action ☐
	John Cooney	Approval or signature ☐
	Karen Wilson	Comment ☐
		Prepare reply ☐
		Discuss with me ☐
		For your information ☐
		See remarks below ☐
FROM	Branden Blum	DATE 9/18/85

REMARKS

Department of Justice draft report on H.R. 2050, a bill concerning the authority of the D.C. Parole Board

In the attached draft report Justice opposes giving the D.C. Parole Board the exclusive power and authority to make parole determinations concerning prisoners convicted of violating D.C. laws, or Federal law applicable solely to the District.*

The Department concludes by suggesting that the parole system be replaced by a sentencing guideline system.

A House D.C. subcommittee is likely to be rescheduling hearings on H.R. 2050 shortly. (The hearing originally set for tomorrow has been postponed).

Please review the report and provide me with any comments by COB -- Monday, September 23, 1985.

OMB FORM 4

*Similar legislation (H.R. 3369) was opposed by the Department in the 98th Congress.

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Ronald Dellums
Chairman, Committee on the
District of Columbia
House of Representatives
Washington, D.C. 20515

DRAFT

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on H.R. 2050, a bill "to give to the Board of Parole of the District of Columbia exclusive power and authority to make parole determinations concerning prisoners convicted of violating any law of the District of Columbia, or any law of the United States applicable exclusively to the District." As set forth in more detail below, the Department of Justice believes that the change sought by this bill would not improve the law enforcement and corrections programs in the District of Columbia and we therefore oppose this bill.

At present under the D.C. Code, the determination of parole jurisdiction is controlled by the place of incarceration rather than the jurisdiction of conviction. The result is that the D.C. Board of Parole makes parole decisions for D.C. Code offenders when they are housed in D.C. institutions and the United States Parole Commission makes parole decisions for D.C. Code offenders when they are housed in federal institutions. At the present time over 1,400 D.C. Code offenders are held in Federal Bureau of Prisons facilities. This represents the designed capacity of three modern correctional institutions. Although some of these are in federal custody because of their extremely violent criminal histories or to separate them from other District of Columbia inmates, the bulk of them are in federal custody primarily because of shortages of space to house inmates in the District of Columbia system. Thus, two factors not addressed in H.R. 2050 are the real burden to the Federal Bureau of Prisons of confining this large group of local offenders and the serious problems involved in adding these geographically dispersed inmates to the D.C. Parole Board's caseload.

In the 1930's when the D.C. Board of Parole was established, this divided jurisdictional scheme may have met correctional needs. The Comprehensive Crime Control Act of 1983 abolishes the United States Parole Commission in 1991, however, and legislative attention must clearly be given to the question of future parole responsibility for D.C. Code offenders designated to Federal

institutions. At the same time every effort must be made to ensure that the District of Columbia will provide adequate prison space to house its sentenced criminals.

A larger question is what role should parole serve as a correctional tool in the District of Columbia? The legislative history of the Comprehensive Crime Control Act of 1983, P.L. 98-473, clearly reflects the Congressional determination that the "rehabilitation model" upon which the Federal sentencing and parole system was based was no longer valid. S. Rep. No. 225, 98th Cong., 1st Sess. 38 (1983). Based upon a study spanning a decade conducted by the National Commission on Reform of Federal Criminal Law, it was concluded that the Federal sentencing and parole system resulted in shameful disparities in criminal sentences. As stated in the Senate Report:

> The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform. Correcting our arbitrary and capricious method of sentencing will not be a panacea for all of the problems which confront the administration of criminal justice, but it will constitute a significant step forward.
>
> The [Comprehensive Crime Control Act of 1984 (CCCA)] meets the critical challenges of sentencing reform. The [CCCA's] sweeping provisions are designed to structure judicial sentencing discretion, eliminate indeterminate sentencing, phase out parole release, and make criminal sentencing fairer and more certain. The current effort constitutes an important attempt to reform the manner in which we sentence convicted offenders. The Committee believes that the [CCCA] represents a major breakthrough in this area. Id. at 65.

In addition to not reflecting this new understanding of the limitations of the "rehabilitation model," the District of Columbia parole system has other demonstrated problems. When we reviewed similar legislation two years ago, this matter was discussed in detail. The Department noted at that time that the D.C. Board of Parole, according to its 1982 annual report, granted parole at initial hearings to 61% of the adult offenders and that 73% of the remainder were granted parole upon a rehearing. The Board also reported however, that based upon a study of a selected sample of 322 parolees released on parole between 1977 and 1979, 52% were re-arrested during the first two years of parole supervision. Of the parolees who were re-arrested, 77% were convicted for crimes committed while on parole. Given the very high percentage of parolees released at the time of initial parole consideration and the very high rate of recidivist criminal activity

among those released, the policies and procedures of the D.C. Board of Parole were called into serious question.

We also pointed out that despite the large number of D.C. parolees who commit crimes following parole release, parole apparently was revoked in a relatively small percentage of the cases. In that regard, the D.C. Board of Parole reported that of those parolees in its 1977-1979 sample who were convicted of crimes while on parole, parole was revoked because of the new offense in less than one half of the cases. Although the reason for this statistic was not explained, it appears that it may be attributed to the D.C. Parole Board policy of not issuing parole violator warrants for certain offenses. In this regard, the Board listed in its 1982 Annual Report the types of offenses it terms "Eligible Offenses" for purposes of issuance of parole violator warrants. It appears that as a matter of policy, the Board will not issue parole violator warrants for burglary of commercial establishments, possession of firearms (unless the defendant is arrested with the weapon in his hand or on his person), grand larceny, embezzlement, fraud, forgery and uttering and for a host of other violations of the District of Columbia Code or the United States Code.

This apparent policy which allows substantial numbers of parolees to continue on parole even after arrest and conviction of serious crimes was of significant concern to us in the past. If these matters have not yet been completely remedied, and it may be too early to conclude that they have, then similar concern is presently warranted. Under H.R. 2050, the jurisdiction of the D.C. Board of Parole would be substantially expanded to include those D.C. Code offenders presently under the jurisdiction of the U.S. Parole Commission. These offenders, however, include some of the most dangerous and violent criminals convicted in the District of Columbia. Premature release of such individuals pursuant to existing parole policies would pose a real and direct threat to law enforcement interests in the District of Columbia.

We believe it is time for a thorough legislative review of District of Columbia sentencing and correctional practices. A major expansion of the capacity of D.C. correctional facilities is essential. The Federal Bureau of Prisons is seriously overcrowded and can no longer accept the overload of the District of Columbia system. This is especially true in light of the increased D.C. prison population that would result, at least temporarily, from a more responsibly run parole system. Replacement of the parole system in the District of Columbia by a

sentencing guideline system similar to that adopted by Congress in the Comprehensive Crime Control Act of 1984 should be considered. While expansion of the D.C. inmate capacity must begin at once, other changes can be more thoroughly considered than is done in H.R. 2050.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Phillip D. Brady
Acting Assistant Attorney General
Office of Legislative and
and Intergovernmental Affairs

THE WHITE HOUSE

WASHINGTON

November 5, 1985

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Draft Report on H.R. 2846, a Bill to Establish a New Cause of Action for Defamation of Public Figures

Counsel's Office has reviewed the above-referenced draft report, and finds no objection to it from a legal perspective.

ID # _____ CU

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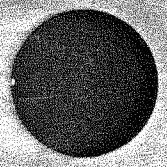

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Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Braden Blum

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: DOJ draft report on H.R. 2846, a bill to establish a new cause of action for defamation of public figures

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
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OFFICE OF MANAGEMENT AND BUDGET
ROUTE SLIP

TO	Fred Fielding	Take necessary action ☐
	John Cooney	Approval or signature ☐
	Karen Wilson	Comment ☐
		Prepare reply ☐
		Discuss with me ☐
		For your information ☐
		See remarks below ☐
FROM	Branden Blum	DATE 10/28/85

REMARKS

Department of Justice draft report on H.R. 2846, a bill to establish a new cause of action for defamation of public figures

In the attached draft report, Justice supports the idea of congressional hearings on public figure libel law but opposes H.R. 2846, in part because it would promote Federal involvement in defamation issues traditionally left to the States to resolve.

Please review the attached draft report and provide me with comments, if any, by Tuesday, November 5, 1985.

(Also, please advise if you want this report circulated to any agencies.)

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Charles E. Schumer
United States House of Representatives
Washington, D.C. 20515

Dear Congressman Schumer:

Fred Fielding has asked the Department of Justice to respond to your request for the Administration's views on proposed congressional hearings on public figure libel law and on H.R. 2846, a study bill designed "to protect the constitutional rights to freedom of speech by establishing a new cause of action for defamation."

When libelous reports about a public figure or official are published, two important interests are placed in conflict: society's need to protect the public's access to information; and the need for wrongfully defamed individuals -- particularly our public servants -- to protect their reputations. The appropriate accommodation of these significant, but conflicting, interests is an important public policy concern. Recent cases like Sharon v. Time, Inc., 83 Civ. 4460 (S.D.N.Y.), and Westmoreland v. CBS, Inc., 82 Civ. 7913 (S.D.N.Y.), have intensified the debate over the proper resolution of these issues. We believe that Congress can add significantly to that public debate. Therefore, the Department supports the idea of congressional hearings on public figure libel law.

Despite our support for this admirable endeavor, however, we feel constrained to oppose H.R. 2846. This study bill would create a new federal cause of action for public officials and public figures who are defamed in print or by an electronic media broadcast. The bill would allow the public figure or public official who is the subject of such a publication or broadcast to bring a declaratory judgment action in federal court (§ 1(a)(1)). The plaintiff would have the burden of proving by clear and convincing evidence each element of the cause of action (§ 1(b)), but proof of the defendant's state of mind would not be required (§ 1(a)(2)). No damages, actual or punitive, would be awardable under the bill (§ 1(a)(3)and § 3). Any plaintiff who brings a declaratory judgment action under the proposed statute would be barred from asserting any other claim or cause of action arising out of the alleged defamation (§ 1(c)). The bill would give a defendant the right to designate any defamation action by a

public figure or official as an action for declaratory judgment (§ 1(d)). The bill would also award reasonable attorney's fees to the prevailing party (§ 4).

We believe that H.R. 2846 would be constitutional. However, in creating a federal cause of action for public figure libel, the bill would promote federal resolution of defamation issues that have traditionally been left to state courts or legislatures to resolve. This would contravene principles of federalism. The bill also would impose new burdens on our already overburdened federal court system. Although many of these cases now might be brought in federal court under diversity jurisdiction, the Department nevertheless cannot support legislation that would unnecessarily add to the caseloads of our federal courts.

Moreover, we are concerned about the ramifications of making the proposed declaratory judgment action the exclusive remedy for public figures and officials who are defamed in the press or in a broadcast. This concern is exacerbated by the bill's provisions (§ 1(d)) giving defendants a unilateral right to avoid damages in every case merely by electing to designate a damage action as an action for declaratory judgment. This may be inappropriate where the defendant has acted maliciously or recklessly. Furthermore, it is not clear from § 2 of the bill whether the proposed one year statute of limitations for print or broadcast defamation would apply to all such actions, or only to actions by public figures or officials. We believe in any event that it should apply only to defamation actions by such plaintiffs.

For these reasons, the Justice Department would not favor enactment of H.R. 2846. We appreciate the opportunity to comment on your proposal. The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Phillip D. Brady
Acting Assistant Attorney General