THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release November 2, 1983

REMARKS OF THE PRESIDENT
AND MRS. CORETTA KING
AT SIGNING CEREMONY
FOR MARTIN LUTHER KING, JR.
HOLIDAY LEGISLATION

The Rose Garden

11:06 A.M. EST

THE PRESIDENT: Please be seated. Mrs. King, members of the King family, distinguished members of the Congress, ladies and gentlemen, honored guests. I am very pleased to welcome you to the White House, the home that belongs to all of us, the American people.

When I was thinking of the contributions to our country, the man that we're honoring today, a passage attributed to the American poet, John Greenleaf Whittier, comes to mind. "Each crisis brings its word and deed." In America, in the fifties and sixties, one of the important crises we faced was racial discrimination. The man whose words and deeds in that crisis stirred our nation to the very depths of its soul was Dr. Martin Luther King, Jr.

Martin Luther King was born in 1929, in an America where, because of the color of their skin, nearly one in ten lived lives that were separate and unequal. Most black Americans were taught in segregated schools. Across the country, too many could find only poor jobs, toiling for low wages. They were refused entry into hotels and restaurants, and made to use separate facilities.

In a nation that proclaimed liberty and justice for all, too many black Americans were living with neither. In one city, a rule required all blacks to sit in the rear of public buses. But in 1955, when a brave woman named Rosa Parks was told to move to the back of the bus, she said, "No". A young minister in a local Baptist church, Martin Luther King, then organized a boycott of the bus company -- a boycott that stunned the country.

Within six months the courts had ruled the segregation of public transportation unconstitutional. Dr. King had awakened something strong and true, a sense that true justice must be color-blind, and that among white and black Americans, as he put it, "Their destiny is tied up with our destiny, and their freedom is inextricably bound to our freedom; we cannot walk alone."

In the years after the bus boycott, Dr. King made equality of rights his life's work. Across the country, he organized boycotts, rallies and marches. Often, he was beaten, imprisoned, but he never stopped teaching non-violence. "Work with the faith", he told his followers, that honor and suffering is redemptive. In 1964, Dr. King became the youngest man in history to win the Nobel Peace Prize.

Dr. King's work brought him to this city often.

And in one sweltering August day in 1963, he addressed a quarter of a million people at the Lincoln Memorial. If American history grows from two centuries to twenty, his words that day will never be forgotten. "I have a dream that one day on the red hills of Georgia, the sons of former slaves and the sons of former slave owners will be able to sit down together at the table of brotherhood."

In 1968, Martin Luther King was gunned down by a brutal assassin, his life cut short at the age of 39. But those 39 short years had changed America forever. The Civil Rights Act of 1964 had guaranteed all Americans equal use of public accommodations, equal access to programs financed by federal funds, and the right to compete for employment on the sole basis of individual merit.

The Voting Rights Act of 1965 had made certain that from then on, black Americans would get to vote. But most important, it was not just a change of law. It was a change of heart, the conscience of America had been touched. Across the land, people had begun to treat each other, not as blacks and whites, but as fellow Americans, and since Dr. King's death, his father, the Reverend Martin Luther King, Sr., and his wife, Coretta King, have eloquently and forcefully carried on his work. Also his family have joined in that cause.

Now our nation has decided to honor Dr. Martin Luther King, Jr. by setting aside a day each year to remember him and the just cause he stood for. We've made historic strides since Rosa Parks refused to go to the back of the bus. As a democratic people, we can take pride in the knowledge that we Americans recognized a grave injustice and took action to correct it and we should remember that in far too many countries, people like Dr. King never had the opportunity to speak out, at all.

But traces of bigotry still mar America. So each year on Martin Luther King Day, let us not only recall Dr. King, but rededicate ourselves to the commandments he believed in and sought to live every day. "Thou shalt love thy God with all thy heart and thy shall love thy neighbor as thyself." And I just have to believe that all of us, if all of us, young and old, Republicans and Democrats, do all we can to live up to those commandments, then we will see the day when Dr. King's dream comes true, and in his words, "All of God's children will be able to sing with new meaning, land where my fathers died, land of the pilgrim's pride, from every mountainside, let freedom ring."

Thank you, God bless you, and I will sign it. (Applause.)

MORE

MRS. KING: Thank you, Mr. President, Vice President Bush, Majority Leader Baker and the distinguished Congressional and Senatorial delegations and other representatives who have gathered here and friends.

All right-thinking people, all right-thinking Americans are joined in spirit with us this day as the highest recognition which this nation gives is bestowed upon Martin Luther King, Jr., one who also was the recipient of the highest recognition which the world bestows, the Nobel Peace Prize.

In his own life example, he symbolized what was right about America, what was noblest and best, what human beings have pursued since the beginning of history. He loved unconditionally. He was in constant pursuit of truth and when he discovered it, he embraced it. His non-violent campaigns brought about redemption, reconciliation and justice. He taught us that only peaceful means can bring about peaceful ends, that our goal was to create the love community.

America is a more democratic nation, a more just nation, a more peaceful nation because Martin Luther King, Jr., became her pre-imminent non-violent commander.

Martin Luther King, Jr., and his spirit live within all of us. Thank God for the blessing of his life and his leadership and his commitment. What manner of man was this? May we make ourselves worthy to carry on his dream and create the love community.

Thank you.

END 11:17 A.M. EST

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release November 2, 1983

The President today signed the following legislation:

H.R. 730 which permits reimbursement of full relocation costs incurred by Ronald Goldstock and Augustus M. Statham when they moved to Washington, D.C., to accept Senior Executive Service appointments with the Office of Inspector General, Department of Labor;

H.R. 732 which relieves five Department of Labor employees from liability for travel, moving, and relocation expenses incurred when they transferred from the U.S. Postal Service to the Department of Labor; and

H.R. 745 which directs the Secretary of Transportation to pay Stephen C. Ruks the sum of $9,700.

# # #

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release November 2, 1983

The President has signed H.R. 3706 which establishes the third Monday in January as a legal public holiday for the observance of the birthday of the Rev. Martin Luther King, Jr., beginning with January 1986.

# # #

THE WHITE HOUSE

WASHINGTON

November 2, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Department of Justice Proposed Report on H.R. 3084, a Bill to Provide for the Selection of the Court of Appeals to Decide Multiple Appeals Filed With Respect to the Same Agency Order

OMB has asked for our views by noon today on the above-referenced report. In the report the Department of Justice supports enactment of H.R. 3084, which would amend 28 U.S.C. § 2112(a) to replace the "first filing" rule for selecting the court of appeals to review agency action in the case of multiple filings with a random selection process.

The "first filing" rule of 28 U.S.C. § 2112(a) has as you doubtless know led to the unedifying spectacle of races to the courthouse as litigants seek to obtain review in the forum most amenable to their position. With technological sophistication these races have been decided by fractions of seconds; there are even cases of exact ties. The latest development, a boon to the photocopier industry, is continuous filing of copies of petitions around the time an order is to be issued, which ensures one of the copies will be filed precisely as the order is issued.

H.R. 3084 would provide that when appeals are filed in more than one court within ten days after issuance of an agency order, the reviewing court will be determined through a random selection process administered by the Administrative Office of U.S. Courts. This will not stop multiple filings. Indeed, it may encourage more. Under current law, if a litigant wishes to avoid review in the D.C. Circuit, he races to file in another court. Under H.R. 3084, he (or co-parties) will file in as many other circuits as possible, to increase the odds under random selection of avoiding the D.C. Circuit. Justice considers this consequence less troubling than races to the courthouse, which subject the judicial system to ridicule, and I agree. The Justice report notes that the Judicial Conference would prefer that the Panel on Multidistrict Litigation administer the random selection process, and suggests that deferring to the

Conference's expertise would be appropriate. The report concludes with a technical suggestion concerning treatment of stays issued by various courts pending determination of the reviewing forum.

I agree that races to the courthouse have gotten out of hand and represent a ridiculous waste of resources. They are so sophisticated now there is often extended litigation over who won. H.R. 3084 will end the races, and the new problems it will create - such as encouraging more multiple filings - are more tolerable. I have no objection.

Attachment

THE WHITE HOUSE

WASHINGTON

November 2, 1983

MEMORANDUM FOR JAMES C. MURR
CHIEF, ECONOMICS-SCIENCE-GENERAL GOVERNMENT
BRANCH, OFFICE OF MANAGEMENT AND BUDGET

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

SUBJECT: Department of Justice Proposed Report on H.R. 3084, a Bill to Provide for the Selection of the Court of Appeals to Decide Multiple Appeals Filed With Respect to the Same Agency Order

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

FFF:JGR:aea 11/2/83
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 2, 1983

MEMORANDUM FOR JAMES C. MURR
CHIEF, ECONOMICS-SCIENCE-GENERAL GOVERNMENT
BRANCH, OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Department of Justice Proposed Report on H.R. 3084, a Bill to Provide for the Selection of the Court of Appeals to Decide Multiple Appeals Filed With Respect to the Same Agency Order

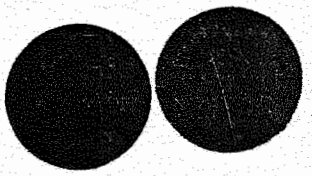
Counsel's Office has reviewed the above-referenced proposed report, and finds no objection to it from a legal perspective.

FFF:JGR:aea 11/2/83
cc: FFFielding/JGRoberts/Subj/Chron

ID # _____ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

JR



☐ 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: Department of Justice proposed report on HR 3084, a bill to provide for the selection of the court of appeals to decide multiple appeals filed with respect to the same agency order

ROUTE TO: Office/Agency (Staff Name)	ACTION Action Code	Tracking Date YY/MM/DD	DISPOSITION Type of Response	Code	Completion Date YY/MM/DD
CUHOLL	ORIGINATOR	83/11/01			/ /
	Referral Note:				
CVAT	B	83/11/01		S	83/11/02 NOON
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ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

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: _____

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
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5/81

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

SPECIAL

November 1, 1983

LEGISLATIVE REFERRAL MEMORANDUM

TO: LEGISLATIVE LIAISON OFFICER
Administrative Office of the United States Courts
Administrative Conference of the United States

SUBJECT: Department of Justice proposed report on H.R. 3084, a bill to provide for the selection of a specific court of appeals to determine multiple appeals from the same agency order.

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 Noon - Tuesday, November 2, 1983.

Direct your questions to Branden Blum (395-3802), the legislative attorney in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: Fred Fielding
Karen Wilson
Bob Bedell
John Cooney

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Sam B. Hall
Chairman
Subcommittee on Administrative Law
& Governmental Relations
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on H.R. 3084, a bill to amend the Judicial Code to provide for the selection of the court of appeals to decide multiple appeals filed with respect to the same agency order. The Department of Justice has no objection to enactment of this legislation.

The proposal of H.R. 3084 originated as a recommendation of the Administrative Conference in 1980. 1/ Very similar proposals have appeared as part of general regulatory reform bills, including S. 1080, which passed the Senate in the 97th Congress, 2/ and H.R. 746, which was voted out by the House Judiciary Committee in

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1/ See Recommendation 80-5: Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action in Recommendations and Reports of the Administrative Conference of the United States 25 (1980) [hereafter cited as "ACUS Recommendation"]; see generally McGarity, Multi-Party Forum Shopping for Appellate Review of Administrative Action in Recommendations and Reports of the Administrative Conference of the United States 437 (1980) [hereafter cited as "ACUS Report"].

2/ See 128 Cong. Rec. S2713, S2718 (daily ed. March 24, 1982); see generally S. Rep. No. 305, 97th Cong., 1st Sess. 92-94 (1981); S. Rep. No. 284, 97th Cong., 1st Sess. 173 (1981).

the 97th Congress. 3/ The Judicial Conference supports this reform, subject to an amendment to be discussed below. 4/

Section 2112(a) of the Judicial Code (Title 28) provides that when appeals of an agency order are filed in more than one court of appeals, venue is initially vested in the court of appeals in which the first filing occurred. The bill would establish a different process for determining initial venue in the multiple filing situation. If appeals had been filed in more than one court of appeals within ten days of the issuance of an agency order, the Administrative Office of the Courts would make a random selection among the courts in which the filings had occurred. The agency would file the administrative record in the court designated by the random selection process, and all other courts in which proceedings had been instituted with respect to the order would be required to transfer the proceedings to the designated court. The court in which proceedings were initially consolidated in this manner would thereafter be free to transfer the case to another court under the existing change of venue standard for such cases.

The reform proposed in H.R. 3084 is responsive to the problem of "races to the courthouse" that has arisen under the current rule (28 U.S.C. § 2112(a)), which assigns initial venue to the court in which the first filing occurs. 5/ Litigants frequently perceive some advantage in having a case heard in one circuit rather than another. While the court in which the first filing occurs is free to transfer the case to another circuit "[f]or the convenience of the parties in the interest of justice," as a practical matter the litigation in agency review cases is normally carried out in the court in which venue is initially vested. 6/ There may accordingly be a strong strategic incentive to be the first to file. The effects of this system were well-described in the statement of the reform proposal by the Administrative Conference:

> A statute...provides that, when petitions for appellate review of the same order are filed in two or more

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3/ See H.R. Rep. No. 435, 97th Cong., 2d Sess. 11-12, 34-35, 80-83 (1982).

4/ See notes 10-12 and accompanying text infra.

5/ Of course compliance with the current rule is literally impossible if filings occur in a number of courts simultaneously or if the temporal priority of filings in different courts cannot be ascertained. See generally ACUS Report, supra note 1, at 478-80.

6/ See id. at 445 & n. 89.

> courts of appeals, the...court in which the first petition was filed...has jurisdiction of the review proceeding to the exclusion of others. This provision has become less and less useful as the choice of forum has become more significant in lawyers' minds, and races to the courthouse have proliferated and methods of conducting the races have become more refined. Races are now decided by seconds or fractions of seconds, if they can fairly be said to have been decided at all. (There is no single finish line to cross or tape to break; time stamping machines in clerk's offices are not synchronized.) Moreover, races will be even harder to judge as agencies adopt regulations, designed to make the races fairer and more civilized, specifying the date and time at which agency orders are deemed to have been issued.
>
> The spectacle of the race to the courthouse is an unedifying one that tends to discredit the administrative and judicial processes and subject them to warranted ridicule. It will require Congressional action to bring the final curtain down on the spectacle. Our first and principal recommendation is...simple random selection of the reviewing court.... 7/

The reality of this problem was abundantly documented and illustrated in the report supporting the Administrative Conference's recommendation. The following incident, for example, is instructive:

> Forum shopping costs money. Under the current first-to-file statute, parties spend much time and money on the walkie-talkies and other arcane paraphernalia necessary to pursue their elaborate races to the courthouse. Once the race is complete the parties frequently consume additional resources litigating over who won the race....
>
> One of the most bizarre and expensive courthouse races occurred in an appeal from a recent Federal Energy Regulatory Commission (FERC) decision.... On June 21, 1978 FERC issued an opinion.... Petitions for review were filed in the Fifth and District of Columbia Circuits at approximately 3:02 p.m.... The Fifth Circuit...referred the matter to FERC for findings as to which party filed first....
>
> [An Administrative Law Judge (ALJ), following FERC instructions,] held three days of hearings at FERC headquarters, the District of Columbia Circuit

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7/ ACUS Recommendation, supra note 1, at 25.

courthouse and the Fifth Circuit courthouse, during which the parties reenacted the race. According to the ALJ's findings, Tenneco had a five-person line-of-sight human chain from the FERC offices on the first floor to an open telephone line on the second floor. Three reenactments of the sequences resulted in findings of 2.11, 1.16, and 0.95 seconds for this link in the chain. At the other end of the telephone line, Tenneco maintained a two-man chain to await the signal in the federal courthouse in New Orleans. Another petitioner, Air Products, took the Commission at its word that it would release its decision at precisely 3:00 p.m. EDT and filed a petition in the Fifth Circuit at 3:01 p.m. EDT, prior to the signal from Tenneco's human chain.

The Public Service Commission of the State of New York, which was racing to the District of Columbia Circuit, prepared two human chains, one being a subterfuge to confuse the timing of Tenneco's chain. After three trial runs the ALJ calculated that the Public Service Commission's chain, which ran across a courtyard to another building, consumed between 1.36 and 1.84 seconds. Another chain at the District of Columbia Circuit courthouse relayed the message to a Public Service Commission operative at the District of Columbia Circuit timeclock.

The ALJ set forth the above factual findings and the Commission adopted them. The Fifth Circuit, however, was dissatisfied with the Commission's action.... The...ALJ...responded with an elaborate chart that related the events to the hundredth of a second. Because Tenneco had begun the process slightly before the order had been stamped in the FERC office, the ALJ found that Tenneco won the race.... 8/

The enactment of H.R. 3084 will not eliminate multiple filings in administrative review cases. Parties will continue to file in the forum they favor to preserve the chance that it will be selected through the random process. Indeed, random selection will produce new forms of wasteful strategic maneuvering -- parties seeking to avoid a particular court, for example, may

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8/ ACUS Report, supra note 1, at 453, 455-57 (footnotes omitted).

The Report went on to estimate that the overall costs to the system resulting from a single race "could...easily exceed $100,000 in a typical case." See id at 458. Other forms of creative trickery noted in the Report included preparing multiple copies of a single petition and filing them at two second intervals on either side of the time that the agency's decision was expected. See id. at 462.

file in as many other courts as possible to increase the probability that some forum other than the disfavored one will be chosen. 9/ Since, however, the choice of forum would no longer depend on split-second timing, the bill's reform would avoid the bizarre spectacles that have resulted specifically from the current "first filing" rule.

The bill designates the Administrative Office of the Courts to carry out the random selection among the courts in which filings have occurred. The Administrative Office of the Courts is a non-judicial body which provides support services to the court system and has not been assigned responsibilities that affect the course of litigation in particular cases. 10/ We are advised that the Judicial Conference has recommended that the random selection function be assigned to the Panel on Multidistrict Litigation 11/ rather than the Administrative Office of the Courts. 12/ It would seem appropriate to defer to the judgement of the Judicial Conference concerning the judicial branch agency that would be most suitable for this function.

A final word is in order regarding stays of administrative orders. Under the current system, a stay may be issued by one of the courts in which filing has occurred before the identity of the court of first filing has been ascertained. This raises questions as to the authority of the court issuing the stay to maintain it in effect once the proceedings have been transferred elsewhere and the ability of the court to which the proceedings have been transferred to set aside another court's stay while the case is pending before it. In such cases courts have not, in fact, lifted stays issued by other courts, which tends to ensure

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9/ See ACUS Report, supra note 1, at 510.

10/ See generally 28 U.S.C. §§ 601-611.

11/ The Panel on Multidistrict Litigation consists of seven circuit and district judges designated by the Chief Justice. Its general function is managing consolidated pre-trial proceedings in factually related suits commenced in different districts. See generally 28 U.S.C. § 1407.

12/ The Administrative Office of the Courts has advised us orally that the Judicial Conference adopted this recommendation on September 22, 1983. In an earlier statement supporting the reform proposal the Judicial Conference mentioned assignment of the random selection function to the Multidistrict Litigation Panel as an alternative possibility. See Regulatory Procedures Act of 1981: Hearings on H.R. 746 before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary 801 (1981).

that a stay issued by any court will remain in effect until some court has reached a decision on the merits. This practice increases the incentive for multiple filing and forum shopping, since a filing in any court accompanied by an application for a stay can potentially result in a lengthy delay in the implementation of the administrative order, even if the case is heard on the merits in some other forum. 13/

This problem could be ameliorated by providing that the court in which the case proceeds is free to make the dispositive decision concerning the propriety of a stay, without regard to prior actions by other courts. The bill addresses this point in the following terms:

> Until the record concerning an order is filed in a court pursuant to this subsection, any court of appeals in which proceedings with respect to that order have been instituted within ten days after the issuance of such order may, to the extent authorized by law, postpone the effective date of the order as necessary to permit the designation of a court pursuant to paragraph (1) of this subsection. Such action by the court may thereafter be modified, revoked, or extended by the court in which the record is filed or by any other court of appeals to which the proceedings are transferred.

While the general purpose of this provision is clear from its legislative history, 14/ its formulation is somewhat confusing. The latter part of the first sentence seems to indicate that a stay issued by a court only remains in effect until some other court has been designated under the random selection process. 15/ However, the initial part of the sentence indicates that a stay may be issued by any court in which timely filing has

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13/ See ACUS Report, supra note 1, at 477-78.

14/ See ACUS Recommendation, supra note 1, at 26; H.R. Rep. No. 435, 97th Cong., 2d Sess. 82 (1982); S. Rep. No. 305, 97th Cong., 1st Sess. 93-94 (1981)

15/ The bill states that a court in which filing has occurred within 10 days of issuance of the order may "postpone the effective date of the order as necessary to permit the designation of a court pursuant to paragraph (1) of this subsection." The corresponding provision of the version of the proposal appearing in H.R. 746 of the 97th Congress stated that a court in which filing has occurred within 10 days of issuance of the order may "postpone the effective date of the order for not more than 15 days." See H.R. Rep.

(Footnote Continued)

occurred until the administrative record is filed in the designated court, which would occur some time after that court's designation. The apparent suggestion in the first sentence that a prior stay issued by another court automatically lapses once a court has been randomly designated is at odds with the second sentence's grant of authority to the designated court -- a stay that is no longer in effect cannot be revoked or modified or continued. It might be preferable to replace these two sentences with a simple statement that a stay of the order issued by any court lapses when it transfers proceedings to another court. This would have the desired effect of placing the transferee court in the position of writing on a clean slate in relation to an application for a stay of the order.

In sum, while wasteful litigative tactics will persist following the enactment of H.R. 3084, problems of this sort seem inherent to some extent in a system that commonly provides a broad choice of forums in agency review cases. The game-playing that will go on under the random choice approach of the bill should be less expensive and time-consuming than that occurring under the first filing rule of current law.

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,

Robert A. McConnell
Assistant Attorney General

(Footnote Continued)

No. 435, 97th Cong., 2d Sess. 12 (1982). The Committee Report explained: "During the period before the random selection, any court of appeals in which an appeal has been filed may postpone the effective date of the agency order for not more than 15 days. This time limitation is included to minimize forum shopping for temporary stays and to ensure that judicial comity does not prevent the court chosen by lottery from lifting a stay. It in no way changes the existing standards for granting stays of agency orders." Id. at 82; see id. at 35.

file

THE WHITE HOUSE

WASHINGTON

November 4, 1983

MEMORANDUM TO: JOHN G. ROBERTS, JR.

FROM: STEVEN L. ABRAMS

SUBJECT: Bypass Charges in S. 1660 and H.R. 4102 Are Constitutional

You have asked me to respond to a memorandum written by Peabody, Lambert & Meyers in which it is argued that the bypass charges proposed in the bills referred to above are unconstitutional.

Specifically, the Peabody memo argues that the proposed bypass charges would constitute "taxes" under federal law, and Congress would thus be prohibited from delegating authority to assess such charges under the Constitution, since the power of taxation is a purely legislative power.

It is in fact settled, as the memo claims, that fees are distinguishable from taxes if the charge imposed is in the nature of compensation or an equivalent given by the payor "by choice and in exchange for a particular benefit." City of Vanceburg, Ky. v. Federal Energy Regulatory Commission, 571 F.2d 630, 644 (D.C. Cir. 1977). See Peabody memo at 3-5.

Further, the particular test set out in National Cable Television Association v. United States, 415 U.S. 336 (1974) and its companion case, Federal Power Commission v. New England Power Co., 415 U.S. 345 (1974), requires a fee to be measured by the "value to the recipient." National Cable at 343.

However, the proposed "joint board" would be acting within the scope of its authority under the legislation in establishing charges for bypassers, since such charges would constitute fees under the above rulings.

A bypass charge would give recognition to the value of the option enjoyed by bypassers to undercut exchange services while simultaneously having the public exchange available as a back-up. When bypass occurs, the bypasser avoids paying the interstate subsidy built into message toll rates. However, if the alternate exchange is not

available, the user will go through the public network. "(I)t is clear that many by-passers are really not by-passers, they are cheaters, that is, they still leak into the local switched network after 'by-passing.'" Universal Telephone Service Preservation Act of 1983: Joint Hearings on S. 1660 and H.R. 3621 Before the Senate Committee on Commerce, Science, and Transportation and the House Committee on Energy and Commerce, 98th Cong., 1st sess. 381 (1983) (testimony of Gene Kimmelman, Staff Attorney, Public Citizen's Congress Watch).

Since bypassers are typically large corporate users and their reliance on the public switchboards as a last resort is unpredictable, the network cannot ordinarily cope with the unanticipated demand.

This is analogous to "demand" charges paid by large users of electricity in addition to their regular usage charges. The rationale is that the electric utility must have extra capacity to accommodate surges of demand. See Ass'n of the Bar of the City of New York, Electricity and the Env't 181 (1972).

Moreover, bypassers also reap a benefit from the preservation of a system which maintains widespread availability of telephones, which allow bypassers to engage in two-way communication.

Since the charge, therefore, is a fee and not a "tax," Congress can delegate its levying authority constitutionally. As to the exact measurement of the charge by the joint board, the presumption is that the board will demonstrate a sufficient relationship between its conclusions and the facts on which it relies to support its exercise of authority. Cf. United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 755-56 (1972). The burden is on the party challenging a fee schedule to show that the order challenged is unreasonable or arbitrary. See Aeronautical Radio, Inc. v. United States, 335 F.2d 304, 309 (7th Cir. 1964).

In conclusion, the grant of authority in the proposed legislation to assess bypass charges would apply to specific beneficiaries receiving specific benefits and thus would be a constitutional delegation of authority by Congress.

THE WHITE HOUSE

WASHINGTON

November 8, 1983

FOR: FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Enrolled Res. S.J. 188 - National Christmas Seal Month

Richard Darman has asked for comments by c.o.b. Thursday, November 10, on the above-referenced enrolled joint resolution, which designates this month as National Christmas Seal Month. It has been approved by OMB and HHS. I have reviewed the enrolled resolution, and the memorandum for the President prepared by OMB Assistant Director for Legislative Reference, James M. Frey, and have no objection.

Our office, incidentally, has already reviewed and approved the proclamation called for by this joint resolution.

THE WHITE HOUSE

WASHINGTON

November 8, 1983

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT AND
DEPUTY TO THE CHIEF OF STAFF

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

SUBJECT: Enrolled Resolution S.J. 188 - National Christmas Seal Month

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

FFF:JGR:ph 11/8/83
cc: FFFielding
JGRoberts
Subject
Chron.

THE WHITE HOUSE

WASHINGTON

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ID # 168138 CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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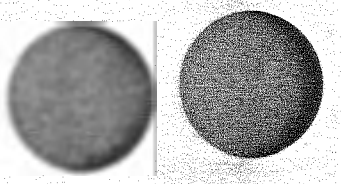

Name of Correspondent: Richard G. DARMAN

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

Subject: Enrolled Res. S. J. Res 188 - National Christmas Seal Month

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

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CWHOLL	ORIGINATOR	83/11/09			/ /
	Referral Note:				
CNATIB	D	83/11/08		S	83/11/10 COB
	Referral Note:				
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Document No. 168138SS

WHITE HOUSE STAFFING MEMORANDUM

DATE: 11/7/83 ACTION/CONCURRENCE/COMMENT DUE BY: Thursday c.o.b. November 10

SUBJECT: ENROLLED RES. S.J. RES. 188 - National Christmas Seal Month

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	HICKEY	☐	☐
MEESE	☐	☑	JENKINS	☐	☐
BAKER	☐	☑	McFARLANE	☐	☐
DEAVER	☐	☑	McMANUS	☐	☐
STOCKMAN	☐	☐	MURPHY	☐	☐
DARMAN	☐P	☑SS	ROGERS	☐	☐
DUBERSTEIN	☑	☐	SPEAKES	☐	☐
FELDSTEIN	☐	☐	SVAHN	☑	☐
FIELDING	☑	☐	VERSTANDIG	☐	☐
FULLER	☐	☐	WHITTLESEY	☑	☐
GERGEN	☑	☐	_____	☐	☐
HERRINGTON	☐	☐	_____	☐	☐

REMARKS:

Please provide comments/recommendations by c.o.b. Thursday, November 10, 1983.

Thank you.

RESPONSE:

NOV -8 8:4

Richard G. Darman
Assistant to the President
Ext. 2702

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

NOV 7 1983

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Resolution S.J. Res. 188 - National Christmas Seal Month
Sponsor - Sen. Byrd (D) West Virginia and 3 others

Last Day for Action

Purpose

Designates the month of November 1983 as "National Christmas Seal Month."

Agency Recommendations

Office of Management and Budget	Approval
Department of Health and Human Services	Approval (Informally)

Discussion

S.J. Res. 188 designates November 1983 as "National Christmas Seal Month," and requests the President to issue a proclamation calling upon all Government agencies and the people of the United States to observe this month with appropriate activities supporting the Christmas Seal program. The resolution passed both Houses by voice vote.

The resolution notes that chronic diseases of the lung afflict over seventeen million Americans and cause more than two hundred thousand deaths annually, at a cost to the Nation of more than $48.8 billion each year in lost wages, productivity, and in direct costs of medical care.

The resolution makes special mention of the American Lung Association (ALA) -- the Christmas Seal organization -- which leads the fight in the voluntary sector to prevent illness, disability, and death from lung disease. The ALA is a nonprofit public health organization supported by individual contributions to Christmas Seals and other donations.

Since 1907, Christmas Seals have been used to raise funds through private contributions to provide education to Americans

about lung disease. Christmas Seal dollars help educate the public, patients, and their families about lung diseases, sponsor community action programs, underwrite medical research, and support education for physicians and other health care workers. This year, Christmas Seals will be in sixty million homes.

A proposed proclamation has already been forwarded to the White House for your consideration and issuance.

(Signed) James M. Frey,

Assistant Director for
Legislative Reference

Enclosures

Ninety-eighth Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Monday, the third day of January, one thousand nine hundred and eighty-three

Joint Resolution

To designate the month of November 1983 as "National Christmas Seal Month".

Whereas chronic diseases of the lung afflict well over seventeen million Americans, cause more than two hundred thousand deaths annually, at a cost to the Nation of more than $48.8 billion each year in lost wages, productivity, and in direct costs of medical care;

Whereas leading the fight in the voluntary sector to prevent illness, disability, and death from lung disease is the American Lung Association—the Christmas Seal People—a. nonprofit public health organization supported by individual contributions to Christmas Seals and other donations;

Whereas chronic obstructive pulmonary diseases have been among the fastest rising causes of death—an 87 per centum increase in the past ten years. Almost seven million Americans, including two million two hundred and fifty thousand children, suffer from asthma;

Whereas, two and one-half million people have emphysema, while seven million eight hundred thousand suffer from chronic bronchitis. And it is expected that lung cancer will surpass breast cancer as the leading cause of cancer deaths among American women during this decade;

Whereas the American Lung Association, the Nation's first national voluntary public health organization, was founded in 1904 as the National Tuberculosis Association to combat TB when this lung disease was known to nearly every American family and one in seven deaths resulted from tuberculosis. Beginning in 1907, Christmas Seals were used to raise funds through private contributions to provide education to Americans about the disease;

Whereas, in its early years, the National Tuberculosis Association pioneered in school programs aimed at motivating our young people to establish healthful living patterns. That tradition remains strong as the American Lung Association, through its community Lung Associations, helps educate the public, patients, and their families about lung diseases; sponsors community action programs for good lung health; underwrites medical research; supports education for physicians and other health care workers; wages vigorous campaigns against cigarette smoking and air pollution. The primary source of funding for more than seventy years has been Christmas Seals. This year, Christmas Seals will be in sixty million homes. Tuberculosis has been subdued considerably, but not eradicated in the one hundred and two years since the discovery of the tubercle bacillus by Doctor Robert Koch. The disease is still responsible for one in one thousand deaths—many among children. The American Lung Association continues to work with Congress to better distribute resources to control tuberculosis and work toward its eradication;

Heart, Lung and Blood Institute, a major component of the National Institutes of Health, to support research, training, and demonstration programs relevant to the lung, as well as the National Institute of Allergy and Infectious Diseases and the National Institute of Environmental Health Sciences, in addition to the Tuberculosis Program of the Centers for Disease Control, the Office of Smoking and Health, and the Office of Health Promotion; and

Whereas the American Lung Association continues to cooperate with Federal agencies to bring about a decrease in the serious problem of lung disease, a mission to which its volunteers and staff are committed: Now, therefore, be it

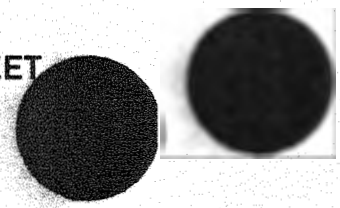
Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the month of November 1983 is designated as "National Christmas Seal Month" and the President of the United States is authorized and requested to issue a proclamation calling upon all Government agencies and the people of the United States to observe the month with appropriate activities supporting the Christmas Seal program.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

ID # CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET



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Name of Correspondent: Richard G. DARMAN

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

Subject: Suggested (Draft) Signing Statement for H.R. 3348 (Gold medal for Leo Ryan)

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CWHOLL	ORIGINATOR	83/11/18			/ /
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CWATIB	S	83/11/18		S	83/11/18 2:15
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WHITE HOUSE STAFFING MEMORANDUM

DATE: 11/18/83 ACTION/CONCURRENCE/COMMENT DUE BY: IMMEDIATELY

SUBJECT: SUGGESTED (DRAFT) SIGNING STATEMENT FOR H.R. 3348

(Prepared by Duberstein's Office)

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	HICKEY	☐	☐
MEESE	☐	☐	JENKINS	☐	☐
BAKER	☐	☐	McFARLANE	☐	☐
DEAVER	☐	☐	McMANUS	☐	☐
STOCKMAN	☐	☐	MURPHY	☐	☐
DARMAN	☐P	☑SS	ROGERS	☐	☐
DUBERSTEIN	☐	☐	SPEAKES	☐	☐
FELDSTEIN	☐	☐	SVAHN	☐	☐
FIELDING	☑	☐	VERSTANDIG	☐	☐
FULLER	☐	☐	WHITTLESEY	☐	☐
GERGEN	☐	☐	ELLIOTT	☑	☐
HERRINGTON	☐	☐	_____	☐	☐

REMARKS:

May we have any edits/comments on this draft statement immediately.

RESPONSE:

NOV 18

Richard G. Darman
Assistant to the President
Ext. 2702

Prepared by Tom Donnelly

DRAFT

I am pleased today to affix my signature to the bill H.R. 3348, honoring the late Congressman Leo J. Ryan by authorizing a special Congressional Gold Medal of appropriate design to be struck and presented to his family.

Today marks the fifth anniversary of the day Leo Ryan was tragically struck down by an assassin's bullet on a faraway airport runway in Guyana. As his colleagues have noted in their tribute to him, it was typical of Leo Ryan's concern for his constituents that he would take it upon himself to personally investigate the rumors of mistreatment in Jonestown that reportedly affected so many from his district.

Leo Ryan is the 88th recipient of a Congressional Gold Medal and only the 4th Member of Congress to receive the nation's highest civilian honor from his colleagues.

THE WHITE HOUSE

WASHINGTON

November 10, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Alleged Unconstitutionality of Proposed Bypass Charges in S. 1660 and H.R. 4102

Michael W. Faber of Peabody, Lambert & Meyers has written you on behalf of his partner, Ted Meyers, to contend that the proposed bypass charges in S. 1660 and H.R. 4102 are unconstitutional. Those bills, the "Universal Telephone Service Preservation Act of 1983," would impose a charge on telephone service users bypassing central exchanges. The amount of the charge would be set by a new regulatory agency. A memorandum prepared by Peabody, Lambert & Meyers contends that the charge is properly classified as a tax, not a fee. The legislative history compiled to date on the bypass charge question indicates that the purpose of the charge is to create a fund to help maintain universal telephone service -- a purpose evident in the very name of the Act. Charges to promote such general public purposes -- as opposed to paying for costs associated with a particular activity -- are taxes, not fees. Under established precedents, Congress cannot constitutionally delegate the taxing authority, and the bills are, accordingly, unconstitutional.

The argument as presented in the Peabody memorandum is compelling, but there is another side to the story. Although I am not intimately familiar with how these systems work, I am advised that users who bypass exchange services -- thereby avoiding certain tolls -- nonetheless enjoy the benefit of having the exchange services available as a back-up or alternate. Such intermittent use of exchange services by the large-volume bypassers imposes large and unpredictable demands on the exchange services. It is also true that those who bypass the exchanges nonetheless benefit directly from the existence of universal service facilitated by the exchanges. These arguments suggest that those who normally bypass exchanges nonetheless impose costs on the exchanges, and that charges for bypassing can be justified as fees if directly related to those costs. The problem is that this justification is not the most prominent in the legislative history developed to date.

The Peabody memorandum has been widely circulated and has caused something of a stir. There is, however, no reason for our office to become involved in this dispute at this point. I recommend no response.

ID # 181302 CU

UT001-03

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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Name of Correspondent: Michael W. Faber

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

Subject: Encloses copy of memo re: unconstitutionality of the mandatory bypass charges to fund universal telephone service (as proposed in S. 1660 and HR 4102)

We have not received these bills in this office yet.

ROUTE TO: **ACTION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD		Action DD
CWHOLL	ORIGINATOR	83/10/26		/
Referral Note:				
CWAT 18	D	83/10/26	S	83/11/06
Referral Note:				
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181092 CU

PEABODY, LAMBERT & MEYERS
A PROFESSIONAL CORPORATION
1150 CONNECTICUT AVENUE, N. W.
WASHINGTON, D. C. 20036

(202) 457-1000

TELEX: 897413
CABLE ADDRESS: "EXCELSIOR"

WRITER'S DIRECT DIAL NUMBER

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ROBERT C. HACKER
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KATHRYN E. PAULI
JAY D. PEDELTY
GLENN R. REICHARDT
RALPH A. SIMMONS
DIANE GILBERT WEINSTEIN

TELECOMMUNICATIONS POLICY ANALYST
JOANNA T. HORSFALL

October 24, 1983

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

Dear Mr. Fielding:

Enclosed please find a copy of a tax memorandum prepared by our office in connection with the communications legislation now pending in the Congress (S. 1660 and H.R. 4102). The memorandum was prepared at the request of my partner, Ted Meyers, who is currently in London.

Ted wanted you to have an early opportunity to review this memorandum as it was the subject of a heated debate at the House markup held last Friday and continuing today.

The memorandum demonstrates that the proposed charge on "bypass" technologies is in reality a "tax;" and that the legislation constitutes an impermissible delegation of the taxing power of the Congress.

If you have any questions regarding this material please do not hesitate to call.

Sincerely,

Michael W. Faber

Encl.
MWF:ua

COMMITTEE OF CORPORATE TELECOMMUNICATIONS USERS

1150 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20036
(202) 457-0900

October 24, 1983

HAND-DELIVERED

Dear Congressman:

The Committee of Corporate Telecommunications Users (CCTU), a not-for-profit organization representing the interests of some 40 of the nation's largest users of communications goods and services, wishes to share its views on pending telecommunications legislation. The CCTU is a unique users group. Its members include both large and small corporations, universities and municipalities, all of which are dependent upon a variety of high quality, diversified and cost effective communications services.

We have particular and serious concerns about the constitutionality of the bypass charge created by H.R. 4102. We have enclosed a copy of an internal firm memorandum which discusses this question. It is our opinion that the bypass "charge" created by H.R. 4102 is, by legal precedent, a tax. Delegation by Congress of authority to tax, as attempted in H.R. 4102, is constitutionally impermissible.

We appreciate your attention to this important matter and would be pleased to respond to any questions.

Sincerely,

Stephen Wilson

Stephen D. Wilson
Chairman

Kenneth Phillips

Kenneth L. Phillips
Legislative Affairs Chairman

Tedson Meyers

Tedson J. Meyers
Counsel

Attachment

PEABODY, LAMBERT & MEYERS
A PROFESSIONAL CORPORATION
1150 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20036

(202) 457-1000

TELEX: 89-7413
CABLE ADDRESS: "EXCELSIOR"

October 17, 1983

MEMORANDUM

TO: Tedson J. Meyers
Robert C. Godbey

FROM: Neil D. Kimmelfield

RE: Mandatory Bypass Charges To Fund Universal Telephone Service, As Proposed In S. 1660 And H.R. 4102, Are Not Constitutionally Permissible

---

SUMMARY OF LEGAL CONCLUSIONS

(1) Bypass charges imposed pursuant to either the Senate bill or the House bill */ would constitute "taxes" under Federal law.

(2) The U.S. Supreme Court, and numerous Federal circuit courts and Federal district courts, have held that the power of taxation is a purely legislative power, and any attempt by Congress to delegate the power of taxation is unconstitutional.

(3) Both the Senate bill and the House bill contain provisions explicitly delegating to Federal, quasi-Federal and State agencies the power to determine bypass charges, and are therefore unconstitutional.

---

*/ This memorandum will refer to S. 1660, the "Universal Telephone Service Preservation Act of 1983" (the "Senate bill"), and to H.R. 4102, also the "Universal Telephone Service Preservation Act of 1983," (the "House bill").

I. BYPASS CHARGES IMPOSED PURSUANT TO EITHER THE SENATE BILL OR THE HOUSE BILL WOULD CONSTITUTE "TAXES" UNDER FEDERAL LAW.

A. Synopsis of Senate and House Bills.

Under both the Senate bill and the House bill, local exchange bypass charges would be imposed on specified classes of persons for the purpose of subsidizing the availability of basic exchange telephone service to the general public (i.e., "universal service"). Bypass charges imposed on a person would bear no relation to any benefit provided to such person by the entity imposing the charge.

Under the Senate bill, amounts to be collected as bypass charges would be determined solely by a quasi-Federal "joint board," under a mandate to reimburse amounts determined to be eligible "universal service" costs by State commissions in accordance with criteria established by the joint board. The joint board, which would not be subject to review by the FCC or by Congress, would be empowered to determine the level of bypass charges based solely on the joint board's consideration of the need to (i) maintain universal telephone service, (ii) "insure fairness" to persons liable for bypass charges, and (iii) promote competition and the development of technologies.

Under the House bill, charges to subsidize universal service would be determined in the first instance by each exchange common carrier itself, which would submit to the FCC a tariff requiring

bypassers to pay charges reflecting the uncompensated actual or potential availability to them of the carrier's facilities for exchange access (even though not used by the bypassers), as determined by the carrier. Tariffs submitted by a carrier would be subject to review only by the appropriate State commissions, in accordance with rules and procedures promulgated by the FCC.

Under both bills, all amounts collected as bypass charges would be used to reduce local telephone service rates paid by the general public.

The bypass provisions of both bills are discussed in more detail in an Appendix to this memorandum.

B. Under Federal law, a charge imposed on a person pursuant to governmental authority for the benefit of the public, or for the benefit of any person other than the person upon whom the charge is imposed, constitutes a "tax."

It is a well established principle of Federal law that "a tax in legal contemplation is an exaction, taking money from the taxpayer for public purposes; it is an enforced proportional contribution of money or other property." Puglisi v. United States, 564 F.2d 403, 408 (Ct. Cl. 1977); United States v. State of Md., 471 F. Supp. 1030 (D. Md. 1979). On numerous occasions, Federal courts have been called upon to determine whether particular charges imposed upon private persons pursuant to governmental authority constitute "taxes." The courts have consistently

distinguished between taxes and other types of charges on the basis of the purpose for which the charges are imposed. Where charges have been assessed as consideration for goods or services provided to the person assessed, or to recoup the cost of services provided by the government for the benefit of such person, such charges have been characterized as "fees." However, where charges have been imposed for the benefit of the public, or for the benefit of any person other than the person assessed, such charges have been characterized as "taxes."

For example, in City of Vanceburg, Ky. v. Federal Energy Regulatory Commission, 571 F.2d 630, 644 (D.C. Cir. 1977), it is stated:

> As a sovereign the Government levies taxes, but as a property owner it may charge fees for the use of its property. Acting as the Government's agent, the Commission sets and collects fees for the use of Government property. These fees are paid by choice and in exchange for a particular benefit, the use of specific Government property, just as rents are freely paid for the use of private property. Taxes, in contrast, are imposed by the sovereign without regard to choice or particular benefit. (Emphasis in original.)

Similarly, in In re Lorber Industries of California, Inc., 675 F.2d 1062, 1066 (9th Cir. 1982), it is stated:

> [C]harges can be classified as a tax only if they constitute "a pecuniary burden laid upon individuals or property for the purpose of supporting the Government" or to support "some special purpose authorized by it." New Jersey v. Anderson, 203 U.S. [483, 492]. . . . Taxes are levied without the consent or voluntary action of the taxpayer. Id.

In Lorber, the court was called upon to determine whether user fees owed to a county sanitation district constituted "taxes" entitled to priority under the Federal Bankruptcy Act. In determining that the user fees did not constitute "taxes," the court stressed that the fees merely constituted consideration paid for benefits received by the payor. The court stated:

> The Ordinance allows the District to assess surcharges only when District services are used by industrial customers and only in an amount proportionate to their use. The imposition of these charges thus was triggered by Lorber's decision to discharge into the system large amounts of industrial waste water. Because the assessment resulted from Lorber's acts, it falls within the non-tax fee classification defined by the Supreme Court in National Cable Television Association v. United States, 415 U.S. 336, 340-41 (1974).

675 F.2d at 1067.

In National Cable Television Association v. United States, supra, ("National Cable"), and its companion case, Federal Power Commission v. New England Power Co., 415 U.S. 345 (1974) ("New England Power"), the Supreme Court clearly established the principle that, in order to avoid characterization as a "tax," a charge imposed pursuant to governmental authority must be determined by reference to the value or cost of goods or services provided to the person upon whom the charge is imposed. National Cable and New England Power invalidated fees imposed by Federal agencies pursuant to the Independent Offices Appropriation Act of 1952 (31 U.S.C. § 483a) ("IOAA"), which provides in part:

> It is the sense of the Congress that any work, service . . . benefit, . . . license, . . . or

> similar thing of value or utility performed, furnished, provided, granted . . . by any Federal agency . . . to or for any person . . . shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized . . . to prescribe therefor . . . such fee, charge, or price, if any, as he shall determine . . . to be fair and equitable taking into consideration direct and indirect costs to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . . .

In National Cable, the Supreme Court was presented with an FCC fee schedule for cable television ("CATV") licensees. Pursuant to the IOAA, the FCC had charged each CATV system a filing fee plus an annual fee of 30 cents per subscriber. The Court noted that the per-subscriber fee was unrelated to the cost of providing a licensing service to the CATV systems, and instead appeared to be levied for the purpose of recouping costs incurred by the FCC with respect to its overall program of CATV regulation. It was thus in the nature of a tax. 415 U.S. at 340-41. See also Yosemite Park & Curry Co. v. United States, 686 F.2d 925, 930 (Ct. Cl. 1982). This presented potential constitutional difficulties, since, according to the Court, the taxation power may not be broadly delegated by Congress to agencies such as the FCC. 415 U.S. at 340-41. The Court therefore read the IOAA to authorize only reimbursement of the cost of providing the license. The fee, the Court reasoned, must be based on the actual cost to the Government, not on the public policy or interest served. 415 U.S. at 341-43. See also Yosemite Park & Curry Co., supra, at 931.

In the words of the Court of Claims, Yosemite Park & Curry Co., supra, at 931:

> [The Supreme Court in National Cable] noted that the FCC had not clearly distinguished between the benefit to the individual recipient of the license as opposed to the benefit to the industry at large or the public at large. Benefits in the latter category (industry or public) are the subject of taxes, not fees.

Similarly, in New England Power, the Court stressed the difference between agency charges imposed for services benefiting the payor and charges imposed for the public benefit. That case involved annual assessments by the Federal Power Commission ("FPC") on electric utilities and natural gas companies, designed to defray general administrative expenses of the FPC. The FPC fees were set aside because, since they were justified only by general public or industry benefit, they were in the nature of taxes and thus, according to the Court's narrow reading of the IOAA, not authorized by that Act. 415 U.S. at 348-51. See also Yosemite Park & Curry Co., supra, at 931.

At least one Federal court has expressly characterized as a "tax" a surcharge imposed on regulated utilities for the purpose of financing projects which benefit the general public. In United States v. State of Maryland, 471 F. Supp. 1030 (D. Md. 1979), the court considered whether Maryland's surcharge on generated kilowatt hours of electric energy, imposed upon regulated electric utilities for the purpose of establishing an "environmental trust fund," constituted a tax. In the preamble to the act authorizing the

surcharge, the Maryland Legislature recited as its reasons for establishing the environmental trust fund the following:

> The General Assembly of Maryland recognizes that electric power generation and distribution makes use of our environmental trust, including air, land and water and that the citizens of Maryland and other states benefit from the production of electric energy in Maryland and further recognizes that the electric companies . . . as holders of public service franchises serving the public's interest, must bear, with other industries and governmental agencies at all levels, a shared responsibility with the citizens in the protection of the public environmental trust . . . .

471 F. Supp. at 1032. To establish the trust fund, the act required the Maryland Public Service Commission to impose an environmental surcharge per kilowatt hour of electric energy generated within Maryland, and to authorize the electric companies to add the full amount of the surcharge to customers' bills. Revenues from the surcharge were collected by the Comptroller and placed in the environmental trust fund. 471 F. Supp. at 1034.

The State of Maryland argued that the surcharge was not a tax, but merely compensated the State for services rendered by the State which benefited the electric utilities. The State also asserted that the proceeds of the surcharge were not used to finance general governmental activities but were devoted "solely to utility-related functions." 471 F. Supp. at 1035-36. However, the court rejected these arguments and held that the surcharge was clearly in the nature of a tax.

> From a review of the statutory provisions in question in the light of the record here, there can be little doubt that this

> environmental surcharge is an involuntary exaction by the State of money from the electric utilities. The electric companies have no choice as to the payment or non-payment of these charges. Nor can it be doubted that these funds are used to finance projects which benefit the general public. The ecological, biological and environmental studies financed by the Environmental Trust Fund are clearly intended to benefit the general public and not merely the electric utilities. The fact that obvious benefits accrue to the general public conclusively establishes that Maryland's environmental surcharge is a tax and not a utility rate. See National Cable Television Association v. United States, 415 U.S. 336, 340-41 (1974).

471 F. Supp. at 1036 (emphasis added).

The emphatic language in United States v. State of Maryland makes it clear beyond doubt that any charge imposed for the purpose of providing a benefit to the general public constitutes a "tax" for purposes of Federal law.

C. Bypass charges imposed pursuant to the Senate bill or the House bill would be determined without regard to the cost or value of any goods or services provided to the persons assessed, and would thus constitute "taxes" under Federal law.

The avowed purpose of both the Senate bill and the House bill is to make basic exchange telephone service available to "all the people of the United States." In furtherance of these public purposes, each bill would require the imposition on certain persons of bypass charges (i) computed by reference to the overall cost of maintaining exchange access availability (whether

or not used by such persons), and (ii) to be dedicated to subsidizing the cost of providing exchange access to residential telephone users.

Accordingly, bypass charges imposed pursuant to the Senate bill or the House bill would clearly be classified as "taxes" under both the general test established by the Federal courts (an "exaction for public purposes"), and (ii) the more specific test enunciated by the Supreme Court in National Cable and New England Power (a charge determined without reference to the cost of services provided to the person assessed).

II. THE POWER OF TAXATION IS A PURELY LEGISLATIVE POWER, AND ANY ATTEMPT TO DELEGATE THAT POWER IS UNCONSTITUTIONAL.

The Supreme Court has ruled unequivocally that the power of taxation may not be delegated by Congress. In National Cable, supra, the Court stated:

> Taxation is a legislative function and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income . . . . It would be . . . a sharp break with our traditions to conclude that Congress had bestowed on a Federal agency the taxing power . . . . The lawmaker may, in light of the "public policy or interest served," make the assessment heavy if the lawmaker wants to discourage the activity; or it may make the levy slight if a bounty is to be bestowed; or the lawmaker may make a substantial levy to keep entrepreneurs from exploiting a semi-public cause for their own personal aggrandizement. Such assessments are in the nature of "taxes" which under our

> constitutional regime are traditionally levied by Congress.

415 U.S. at 340-41 (citations omitted).

The Federal courts have consistently held that the Supreme Court's opinion in National Cable prohibits delegation by Congress of the taxing power. In New England Power Co. v. U.S. Nuclear Regulatory Commission, 683 F.2d 12, 14 (1st Cir. 1982), the court stated, "In National Cable Television, the Court distinguished 'taxes,' which may only be levied by Congress, from 'fees,' which may properly be charged by agencies." In National Association of Broadcasters v. FCC, 554 F.2d 1118, 1129 (D.C. Cir. 1976), the court stated, "[I]t should . . . be noted that National Cable, as part of the basis for its opinion, relied on Art. I, § 1 and § 8, par. 18 of the Constitution in holding that taxation is an essential legislative function that Congress cannot 'abdicate or transfer to others.' Once agency charges exceed their reasonable attributable costs they cease being fees and become taxes levied, not by Congress, but by an agency. This, the cases hold, is prohibited." Similarly, in Clark v. Valeo, 559 F.2d 642, 684 (D.C. Cir. 1977), the court stated, "In [National Cable Television], the Supreme Court held that if what the statute attempted was in effect a delegation of the legislative taxing power in the guise of setting fees for regulated companies, even though the statute contained 'standards,' serious constitutional problems would be raised."

Clearly, the Federal courts have consistently adhered to the rule that Congress may not delegate the taxing power, even if the delegation is in the guise of setting fees, and even if the delegating statute contains "standards."

III. BOTH THE SENATE BILL AND THE HOUSE BILL CONTAIN PROVISIONS EXPLICITLY DELEGATING TO FEDERAL AND STATE AGENCIES THE POWER TO DETERMINE BYPASS CHARGES, AND ARE THEREFORE UNCONSTITUTIONAL.

The taxes imposed pursuant to the Senate bill would take the form of "universal service surcharges" paid into a Universal Service Fund. The amount of surcharge (i.e., the rate of tax) would be determined solely by the joint board, without review by the Congress. The only standards guiding the joint board in its determination of surcharge rates would be the mandate established by the bill to (i) maintain universal telephone service, (ii) insure fairness, and (iii) promote competition and technological development.

The taxes imposed pursuant to the House bill would take the form of bypass charges paid directly to exchange common carriers to be used by such carriers to reduce residential telephone rates in the carriers' exchange areas. The amount of bypass charges paid to exchange carriers would be determined according to tariffs submitted to the FCC by the carriers, and would be subject to regulation only by State commissions, conditioned upon compliance

by the State commissions with rules and procedures promulgated by the FCC.

Clearly, under both the Senate bill and the House bill, the amount of taxes payable in the form of "bypass charges" would be determined by Federal, quasi-Federal and State agencies, not by Congress. This attempt to delegate the legislative taxing power violates the constitutional prohibition of such delegation established by National Cable, New England Power, and their progeny.

APPENDIX

SUMMARY OF IMPORTANT PROVISIONS OF
THE SENATE BILL AND THE HOUSE BILL.

A. Purposes of the Senate and House Bills

The express purpose of the Senate bill, as stated in Section 2 thereof, is:

> [to make] available, so far as possible, to all the people of the United States, rapid, efficient, nationwide, and worldwide telecommunications services with adequate facilities at reasonable charges; for the purpose of maintaining the availability of universal basic exchange telephone service at reasonable charges to basic exchange telephone customers; for the purpose of assuring that any interexchange carrier or other person . . . that offers, owns, operates, or controls any transmission facility or service used as a substitute for voice grade or equivalent transmission facilities or services offered by exchange carriers shall bear an equitable share of the costs of universal telephone service; for the purpose of encouraging continuing improvements in telecommunications technologies and service in all areas of the United States; for the purpose of assuring the continued growth and development of a competitive marketplace for the provision of telecommunications services and equipment which are critical to providing the public with high-quality telecommunications at reasonable cost; and for the purpose of promoting safety of life and property through the use of telecommunications.

Section 2 of the House bill states:

> (b) The purposes of this Act are --
>
> (1) to assure the availability to all the people the United States, affordable, reliable, efficient communication services which are essential to full participation in the Nation's economic, political, and social life;

(2) to assure that the costs of maintaining such availability of services are equitably allocated among all users and providers of communication services who benefit from the availability of such services;

(3) to assure that the States have sufficient regulatory authority to maintain universally available and affordable telephone service; and

(4) to assure that the economy, general welfare, and national security of the United States will benefit from continuing improvements in telecommunications technology and the continued development of a competitive telecommunications industry.

B. Bypass Charges Established by the Senate and House Bills for the Funding of Universal Service

The Senate bill and the House bill would each create a mechanism whereby certain persons that do not connect, directly or indirectly, with an exchange carrier would be required to bear a portion of the costs of universal telephone service (the "bypass charge").

Under the Senate bill, the Federal Communications Commission ("FCC") would establish a "joint board" to be composed of five FCC commissioners and four commissioners nominated by the national organization of the State commissions. The joint board would be charged with establishing a "Universal Service Fund" for the purpose of reimbursing universal service costs of exchange carriers. Under the bill, exchange carrier costs would be reimbursable if "reasonably incurred and . . . directly related to the efficient

and economic provision of basic exchange telephone service, as determined by State commissions in accordance with criteria established by the joint board." Additionally, under the Senate bill, the joint board would be required to establish rules, procedures and mechanisms to "insure that reimbursements made to an exchange carrier shall be used by such carrier to reduce rates on a nondiscriminatory basis for basic exchange telephone service." Any decision of the joint board in connection with matters relating to universal telephone service would "be adopted by the Commission as a final decision."

The Senate bill's Universal Service Fund would be financed by means of a "universal service surcharge" (imposed by decision of the joint board) payable both by (i) persons using the services of exchange companies and (ii) persons that offer, own, operate or control transmission facilities or services used as a substitute for voice grade or equivalent transmission facilities or services offered by exchange carriers. In determining the level of surcharges, the joint board would be required to take into account the need to (i) maintain universal telephone service, (ii) "insure fairness" to persons liable for surcharges, and (iii) promote competition and the development of technologies.

The House bill would not create any "fund" or other new entity as a means of providing universal telephone service subsidies, but would require the FCC, in establishing a system of charges for exchange access, to provide that

> [a]n exchange common carrier shall submit to the Commission a tariff under which any inter-exchange carrier or other person who, without direct or indirect connection to such carrier, and for commercial purposes, makes available (for others or for its own use) facilities, services, or related functions for exchange access, comparable to those available from an exchange carrier for exchange access, shall pay a charge -- (i) which reflects the otherwise uncompensated availability of the exchange carrier's facilities for exchange access as a reliable and commercially valuable alternative for the facilities of such person, and (ii) which allows for recovery of an equitable share of the costs of services, facilities, or other factors that are maintained in order to be able to provide, upon request, exchange services (including exchange access) to those who are covered by this subsection.

Bypass charges recovered by an exchange carrier under these provisions would be used "to defray the revenue requirements associated with providing residential service in such carrier's exchange area."

The House bill would require the FCC to "delegate to each State commission . . . the authority to administer the system of access charges, conditioned upon the compliance of the State commission with the requirements of [the bill], and with rules and procedures promulgated by the [FCC] thereunder."