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THE WHITE HOUSE

WASHINGTON

February 16, 1984

MEMORANDUM FOR DIANNA G. HOLLAND

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: H.R. 1492 (Christopher Columbus  
Quincentenary Jubilee Act)

No action is necessary by our office on this item at this time. In light of the pre-staffing confusion that resulted in our missing the February 10 deadline for comments, I telephoned Bill Maxwell to discuss possible problems with the bill. It turns out that those problems have been resolved. Our office's sole objection concerned the designation of the Secretary of the Smithsonian Institution as an ex officio member of the Commission. Since the Secretary is not appointed by the President, his service on the Commission would raise serious concerns with respect to the Appointments Clause. On February 1, 1984, the Senate, in a rare display of statesmanship, amended the bill to remove the Secretary from the Commission. The Christopher Columbus Quincentenary bill should have clear sailing from now on.

Attachment

## 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: H.R. 1492 (Christopher Columbus Quincentenary Jubilee Act)

**ROUTE TO:**

**ACTION**

**DISPOSITION**

Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
<u>W Holland</u>		<u>ORIGINATOR</u>	<u>84102115</u>			<u>  1  /  1  /  </u>
<u>WAT18</u>		<u>D</u>	<u>84102115</u>			<u>yesterday</u>
			<u>  1  /  1  /  </u>			<u>  1  /  1  /  </u>
			<u>  1  /  1  /  </u>			<u>  1  /  1  /  </u>
			<u>  1  /  1  /  </u>			<u>  1  /  1  /  </u>

**ACTION CODES:**

- A - Appropriate Action
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- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure

- I - Info Copy Only/No Action Necessary
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- A - Answered
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**FOR OUTGOING CORRESPONDENCE:**

- Type of Response = Initials of Signer
- Code = "A"
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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.  
 Refer questions about the correspondence tracking system to Central Reference, ext. 2590.



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF ADMINISTRATION  
Washington, D.C. 20503

February 13, 1984

MEMORANDUM FOR RICHARD A. HAUSER  
DEPUTY COUNSEL TO THE PRESIDENT

FROM: D. EDWARD WILSON, JR. *D. E. W. Jr.*  
GENERAL COUNSEL

SUBJECT: H.R. 1492 (Christopher Columbus Quincentenary  
Jubilee Act)

Attached for your information and appropriate staffing is a Legislative Referral Memorandum from OMB concerning the above-referenced bill. As you will recall, this proposed bill contains appointments clause problems. For your information, there is a file (entitled "Appointments Clause") on this matter in my old office.

*10618*  
*FN staffing. Don't*  
*JGR working on a similar*  
*problem.*  
*RMT.*



MEMORANDUM

THE WHITE HOUSE

WASHINGTON

February 17, 1984

FOR: FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: H.R. 4144 -- A Bill to Amend the  
Procedure Used to Promulgate Rules  
for Various Federal Judicial Proceedings

OMB is soliciting views on the above-referenced bill, which would alter the historic procedure for promulgating the Federal Rules of Civil and Criminal Procedure. The current statutory scheme vests the authority to promulgate such rules in the Supreme Court, and provides that rules proposed by the Supreme Court must lie before Congress for ninety days. 28 U.S.C. § 2072 (civil); 18 U.S.C. § 3771 (criminal). H.R. 4144 would vest authority to issue rules of procedure in the Judicial Conference, advised by a committee of bench and bar representatives appointed by the Judicial Conference. As you know, the Judicial Conference is a statutorily-created entity composed of the Chief Justice, the Chief Judges of the various circuits, and a district judge from each circuit. 28 U.S.C. § 331. The proposed bill also contains a "report and wait" provision specifying that proposed rules must be submitted to Congress by March 15 to go into effect on December 15.

I have no Constitutional objections to the proposed bill. In the historic case of Sibbach v. Wilson, 312 U.S. 1 (1941), the much-underrated Justice Roberts wrote for a closely-divided Court that Congress could delegate its authority to issue rules governing procedure in federal courts "to this or other federal courts." Id., at 9. Although the Judicial Conference is not a court, it is composed entirely of federal judges, and was created by Congress precisely to promote uniform and efficient administration of the federal judicial system. If Congress can delegate rule-making authority to federal courts, it seems clear that it can similarly delegate such authority to the Judicial Conference. The "report and wait" provision of the current Rules Enabling Act was explicitly upheld in INS v. Chadha, slip op., at 14 n.9, and the version in H.R. 4144 is not substantively different.

I have no strong feelings on whether it is better as a policy matter to have the rules issued by the Judicial Conference, as proposed by H.R. 4144, or by the Supreme Court, as is currently the case. I suspect it makes little difference. Most of the work on the rules is currently done by bench and bar advisory committees that submit drafts and recommendations to the

Supreme Court for formal adoption. The same would be true under H.R. 4144, except formal adoption would be by the Judicial Conference. By "formal" I do not mean rubber-stamp -- the Justices take seriously their responsibility under the Rules Enabling Act, and it is not unusual for "dissents" to accompany submitted rules. Indeed, it is the burden of reviewing proposed rules that has led several members of the Court to support proposals such as H.R. 4144. I think, however, that it is futile to try to assess whether we would like rules from the Judicial Conference more or less than rules from the Supreme Court.

Attachment

THE WHITE HOUSE  
WASHINGTON

February 17, 1984

MEMORANDUM FOR BRANDEN BLUM  
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING *FFF/RAH*  
COUNSEL TO THE PRESIDENT

SUBJECT: H.R. 4144 -- A Bill to Amend the  
Procedure Used to Promulgate Rules  
for Various Federal Judicial Proceedings

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

FFF:JGR:ph 2/17/84  
cc: FFFielding/  
JGRoberts ✓  
Subject  
Chron.



THE WHITE HOUSE

WASHINGTON

February 17, 1984

MEMORANDUM FOR BRANDEN BLUM  
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING  
COUNSEL TO THE PRESIDENT

SUBJECT: H.R. 4144 -- A Bill to Amend the  
Procedure Used to Promulgate Rules  
for Various Federal Judicial Proceedings

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

*F3050*

WHITE HOUSE  
CORRESPONDENCE TRACKING WORKSHEET

TV

O - OUTGOING

H - INTERNAL

I - INCOMING

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

*DL*

Name of Correspondent: James C. MURR

MI Mail Report

User Codes: (A) \_\_\_\_\_ (B) \_\_\_\_\_ (C) \_\_\_\_\_

Subject: H.R. 4144, a bill to amend the procedure used to promulgate rules for various Federal judicial proceedings

ROUTE TO:

ACTION

DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
<u>CUSTOLL</u>	<u>DDI</u>	<u>84.02.02</u>			<u>1 1</u>
<u>CUAT 18</u>	<u>D</u>	<u>84.02.02</u>		<u>S</u>	<u>84.02.12</u>
	<u>DDI</u>				<u>1 1</u>
					<u>1 1</u>
					<u>1 1</u>
					<u>1 1</u>

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FOR OUTGOING CORRESPONDENCE:

- Type of Response = Initials of Signer
- Code = "A"
- Completion Date = Date of Outgoing

Comments:

Jan 31 84 Brandon Blum memo to Dionna Hallard attached

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

January 24, 1984

201763 *cu*

LEGISLATIVE REFERRAL MEMORANDUM

TO: LEGISLATIVE LIAISON OFFICER

Department of Justice  
Administrative Office of the United States Courts  
General Services Administration

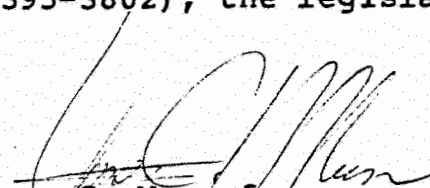
SUBJECT: H.R. 4144, a bill to amend the procedure used to promulgate rules for various Federal judicial proceedings

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

Monday, February 20, 1984.

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

  
James C. Murr for  
Assistant Director for  
Legislative Reference

cc: K. Wilson

J. Cooney

✓  
F. Fielding

EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO Dianna Heiland  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- Take necessary action
- Approval or signature
- Comment
- Prepare reply
- Discuss with me
- For your information
- See remarks below

FROM Branden Blim

DATE 1/31/84

REMARKS

Per your request, attached is a copy  
of #R 4144.

98TH CONGRESS  
1ST SESSION

# H. R. 4144

To amend the provisions of titles 18 and 28 of the United States Code commonly called the "enabling Acts" to make modifications in the system for the promulgation of certain rules for certain Federal judicial proceedings, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

OCTOBER 18, 1983

Mr. KASTENMEIER introduced the following bill; which was referred to the  
Committee on the Judiciary

---

## A BILL

To amend the provisions of titles 18 and 28 of the United States Code commonly called the "enabling Acts" to make modifications in the system for the promulgation of certain rules for certain Federal judicial proceedings, and for other purposes.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 That this Act may be cited as the "Rules Enabling Act of
- 4 1983".

1                   **RULES ENABLING ACT AMENDMENTS**

2           **SEC. 2. (a)** That title 28 of the United States Code is  
3 amended by striking out section 2072 and all that follows  
4 through section 2076 and inserting in lieu thereof the follow-  
5 ing:

6           **“§ 2072. Rules of procedure; power to prescribe**

7           “The Judicial Conference shall have the power to pre-  
8 scribe rules of practice and procedure (including pleading and  
9 all other such incidental matters) for cases (including all  
10 bankruptcy matters) in the district courts (including before  
11 magistrates thereof) and the courts of appeals of the United  
12 States.

13           **“§ 2073. Rules of procedure; method of prescribing**

14           “(a)(1) The Judicial Conference shall appoint commit-  
15 tees, consisting of a balanced cross section of bench and bar,  
16 and trial and appellate judges, to assist the Conference by  
17 recommending rules to be prescribed under section 2072 of  
18 this title. The term of a member of such a committee is five  
19 years.

20           “(2) No person shall serve as a member of any one of  
21 the committees appointed under subsection (a) of this section  
22 for a total of more than ten years.

23           “(b)(1) A separate committee appointed under subsec-  
24 tion (a) of this section shall consider each of the following  
25 areas:

1           “(A) Civil rules.

2           “(B) Criminal rules.

3           “(C) Evidence.

4           “(D) Bankruptcy.

5           “(E) Appellate procedure.

6           “(2) In addition to the committees listed in paragraph  
7 (1) of this subsection, there shall be appointed under subsection  
8 (a) of this section a standing committee on rules of practice  
9 and procedure, which shall review each recommendation  
10 of each of the committees so listed for consistency with each  
11 other and existing rules and recommend to the Judicial Conference  
12 such changes as may be necessary to maintain that  
13 consistency and otherwise promote the interest of justice.

14           “(c)(1) Each meeting for the transaction of business  
15 under this chapter by any committee appointed under subsection  
16 (a) of this section shall be open to the public, except  
17 when the body so meeting, in open session and with a majority  
18 present, determines that all or part of the remainder of  
19 the meeting on that day shall be closed to the public. A transcript  
20 of each such meeting in open session shall be maintained by the  
21 committee and made available to the public.

22           “(2) Any meeting for the transaction of business under  
23 this chapter by a committee appointed under subsection (a) of  
24 this section shall be preceded by sufficient notice to enable all  
25 interested persons to attend.





1 out the item relating to section 2072 and all that follows  
2 through the item relating to section 2076 and inserting in  
3 lieu thereof the following:

“2072. Rules of procedure; power to prescribe.

“2073. Rules of procedure; method of prescribing.

“2074. Rules of procedure; submission to Congress; effective date.”

#### 4 COMPILATION AND REVIEW OF LOCAL RULES

5 SEC. 3. Section 2071 of title 28 of the United States  
6 Code is amended by adding at the end the following: “The  
7 Judicial Conference shall periodically compile the rules pre-  
8 scribed under this section by courts other than the Supreme  
9 Court of the United States and orders made under section  
10 332(d)(1) of this title so as to provide a current record of such  
11 rules. After a preliminary review by the circuit judicial coun-  
12 cils (in consultation with their advisory committees created  
13 under section 333 of this title) the Judicial Conference shall  
14 periodically review such rules for consistency with rules pre-  
15 scribed under section 2072 of this title.”.

#### 16 CONFORMING AND OTHER TECHNICAL AMENDMENTS

17 SEC. 4. (a)(1) Title 18 of the United States Code is  
18 amended by striking out chapter 237.

19 (2) The table of chapters for part II of title 18 of the  
20 United States Code is amended by striking out the item relat-  
21 ing to chapter 237.

22 (b)(1) Section 3402 of title 18 of the United States Code  
23 is amended by striking out the second paragraph.

1           (2) Section 636(d) of title 28 of the United States Code  
2 is amended by striking out "section 3402 of title 18, United  
3 States Code" and inserting "section 2072 of this title" in lieu  
4 thereof.

5           (c) Section 9 of the Act entitled "An Act to provide an  
6 adequate basis for the administration of the Lake Mead Na-  
7 tional Recreation Area, Arizona and Nevada, and for other  
8 purposes" approved October 8, 1964 (Public Law 89-639) is  
9 amended by striking out the sentence beginning "The provi-  
10 sions of title 18, section 3402".

11           (d) Section 22(b) of the Organic Act of Guam is amend-  
12 ed by striking out ", in civil cases" and all that follows  
13 through "bankruptcy cases".

14           (e) Section 25 of the Organic Act of the Virgin Islands  
15 is amended by striking out ", in civil cases" and all that  
16 follows through "bankruptcy cases".

○

THE WHITE HOUSE

Office of the Press Secretary

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For Immediate Release

February 17, 1984

The President today signed the following legislation:

H.J. Res. 290 which permits duty free entry into the United States of the personal effects, equipment, and related articles of foreign participants in the 1984 Olympics in Los Angeles;

H.R. 2898 which (1) provides that approximately 4,770 acres of public land in the State of Utah be held in trust for the Utah Paiute Tribe and (2) establishes a \$2.5 million trust fund for the Tribe; and

S. 379 which relieves three organizations in Mississippi of liability to repay Federal disaster relief funds erroneously given them after flooding in April 1979.

# # #

THE WHITE HOUSE

WASHINGTON

February 27, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: Proposed DOJ Report on H.R. 4144, a Bill  
to Amend the Procedures Used to Promulgate  
Rules for Various Federal Judicial  
Proceedings

OMB has asked for our views on a proposed Justice Department report on H.R. 4144. You will recall that this bill would transfer the Supreme Court's authority to promulgate rules of procedure to the Judicial Conference. OMB earlier asked for our views on the bill itself. By memorandum to you dated February 17, I outlined the bill's provisions and noted that I had no strong feelings either way on the policy question of whether the Supreme Court or the Judicial Conference should promulgate the rules of procedure. Mr. Hauser, on your behalf, signed a "no objection" memorandum for OMB's Branden Blum that I had prepared.

Justice's report takes no position on the proposed transfer of rulemaking authority from the Supreme Court, but mildly opposes the bill on a variety of grounds. In particular, Justice contends that the bill would make the already cumbersome rulemaking procedure even more so. Justice also objects to deletion of language in the current Rules Enabling Act prohibiting rules abridging, enlarging, or modifying substantive rights. The bill confers only authority to promulgate rules of practice and procedure, however, and Justice recognizes that deletion of the language probably will not expand the scope of the rule-making authority, but nonetheless recommends against the deletion in an excess of caution.

I have no objection to Justice's proposed report, a position that I do not regard as inconsistent with the fact that we had no objection to the bill itself. If Justice wants mildly to oppose the bill, I see no reason for us to stop them. There is, however, a substantive error in the Justice report that should be corrected. On page 1, in the first paragraph of the "Summary of the Bill" section, the Justice report notes one effect of the bill: "The legislative veto provision would be repealed." In fact, however, there is no legislative veto provision in the current rulemaking

statutes governing civil (28 U.S.C. § 2072), criminal (18 U.S.C. § 3771) or bankruptcy rules (28 U.S.C. § 2075). Only the provision governing rules of evidence, 28 U.S.C. § 2076, contains a legislative veto. The other provisions contain a "report and wait" procedure specifically upheld as constitutional in INS v. Chadha, slip op., at 14 n. 9. An appropriate revision is suggested in the attached memorandum to Branden Blum.

Attachment

THE WHITE HOUSE

WASHINGTON

February 27, 1984

MEMORANDUM FOR BRANDEN BLUM  
LEGISLATIVE ATTORNEY  
OFFICE OF MANAGEMENT AND BUDGET  
Orig. signed by FFF

FROM: FRED F. FIELDING  
COUNSEL TO THE PRESIDENT

SUBJECT: Proposed DOJ Report on H.R. 4144, a Bill  
to Amend the Procedures Used to Promulgate  
Rules for Various Federal Judicial  
Proceedings

Counsel's Office has reviewed the proposed report by the Department of Justice on H.R. 4144. While we noted no legal objection to H.R. 4144 itself in our memorandum of February 17, we also have no objection to Justice raising policy concerns if it desires to do so.

In the first paragraph of the summary section of the report, however, the statement that "The legislative veto provision would be repealed" could easily be misleading. Of the four separate sections that would be replaced by H.R. 4144, only one -- 28 U.S.C. § 2076 (rules of evidence) -- contains a legislative veto. The provisions governing civil rules (28 U.S.C. § 2072), criminal rules (18 U.S.C. § 3771), and bankruptcy rules, on the other hand, contain constitutional "report and wait" procedures. See INS v. Chadha, slip op., at 14 n. 9. We recommend adding "in the enabling statute governing the rules of evidence," or something similar, between "provision" and "would."

FFF:JGR:aea 2/27/84  
cc: FFFielding/JGRoberts/Subj/Chron

cc: Richard G. Darman

THE WHITE HOUSE

WASHINGTON

February 27, 1984

MEMORANDUM FOR BRANDEN BLUM  
LEGISLATIVE ATTORNEY  
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING  
COUNSEL TO THE PRESIDENT

SUBJECT: Proposed DOJ Report on H.R. 4144, a Bill  
to Amend the Procedures Used to Promulgate  
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FFF:JGR:aea 2/27/84

cc: FFFielding/JGRoberts/Subj/Chron

WHITE HOUSE  
CORRESPONDENCE TRACKING WORKSHEET

FB050

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

Name of Correspondent: James Murr

MI Mail Report User Codes: (A) \_\_\_\_\_ (B) \_\_\_\_\_ (C) \_\_\_\_\_

Subject: Proposed DJS on H.R. 4144, a bill to amend the procedure used to promulgate rules for various Federal judicial proceedings.

ROUTE TO:	ACTION	DISPOSITION
Office/Agency (Staff Name)	Action Code Tracking Date YY/MM/DD	Type of Response Code Completion Date YY/MM/DD
<u>CUHOLE</u>	ORIGINATOR <u>DD 840223</u>	<u>1/1</u>
<u>CUAT 18</u>	<u>DD 840223</u>	<u>S 840228</u> <u>10:00 AM</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

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**FOR OUTGOING CORRESPONDENCE:**

Type of Response = Initials of Signer  
Code = "A"  
Completion Date = Date of Outgoing

Comments: See ID 201763 CU





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

February 22, 1984

LEGISLATIVE REFERRAL MEMORANDUM

TO: LEGISLATIVE LIAISON OFFICER

208347ca

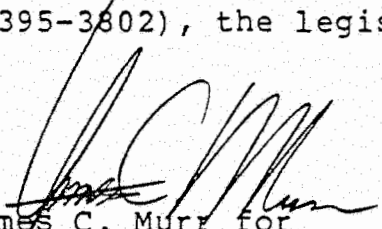
Administrative Office of the United States Courts  
General Services Administration

SUBJECT: Proposed DOJ report on H.R. 4144, a bill to amend the procedure used to promulgate rules for various Federal judicial proceedings.  
(Note: A hearing is scheduled for March 1 before a subcommittee of the House Judiciary Committee)

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  
10:00 A.M. Tuesday, February 28, 1984.

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: Frank Seidl  
Fred Fielding ✓  
John Cooney



Office of the Assistant Attorney General

Washington, D.C. 20530

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. 4144, the "Rules Enabling Act of 1983." For the reasons discussed below, the Department recommends against enactment of this legislation.

I. Summary of the Bill

H.R. 4144 would revise the procedures for promulgation of the Federal Rules of Civil, Criminal, and Bankruptcy Procedure and of the Federal Rules of Evidence. It would consolidate all rules enabling provisions into an amended 28 U.S.C. § 2072. The Supreme Court would be relieved of the responsibility for issuing rules of procedure and evidence, and that authority would be transferred to the Judicial Conference of the United States. The existing delayed effective date procedure would be retained, but instead of 90 days (180 for rules of evidence) a deferred effective date of nine months would be substituted. The legislative veto provision would be repealed. Current language forbidding any modification of a substantive right in connection with amendments to the civil and bankruptcy rules would be omitted. The requirement that the bankruptcy rules be consistent with other laws would be eliminated.

The bill contains a number of provisions directed to the rulemaking process for which there is no current counterpart. The Judicial Conference would be required to establish separate advisory committees on civil, criminal, bankruptcy, appellate, and evidence rules. The term of a committee member would be five years and a member could serve for no longer than ten years. Any meeting of an advisory committee would have to be open to the public unless the committee determines in open session to close the meeting. Transcripts of public meetings would have to be prepared and made available to the public.

H.R. 4144 would also require the Judicial Conference to compile periodically the local rules adopted by the various federal courts and any orders of the circuit councils. After a preliminary review by the circuit councils, the Judicial

Conference would periodically review such rules and orders for consistency with the Federal Rules.

## II. Discussion

The Department of Justice takes no position on the proposed elimination of the Supreme Court's role in the rulemaking process, and instead defers to the views of the Supreme Court and the Judicial Conference. However, if it is decided to reduce the Supreme Court's role, we would suggest that consideration be given to retaining rulemaking authority in the Court, while authorizing the Court to delegate the responsibility to the Judicial Conference.

We oppose the bill's detailed provisions regarding committee structure and operating procedures. The bill appears to mandate establishment of the various advisory committees, even when a committee may not be necessary. Furthermore, the ten-year statutory limitation on membership terms might create transition problems if members are forced out of a committee during a critical stage of rule drafting or consideration. We believe that the creation and composition of the rules committees should be left within the discretion of the Judicial Conference.

The open meetings provision of the bill, proposed 28 U.S.C. § 2073(c), would impose requirements that would make the rulemaking process more complex and lengthy. We believe that the requirement of open public meetings would inhibit the candor and free exchange of ideas necessary to the consideration of controversial rule proposals and effective rule drafting. These provisions might also open the door to procedural challenges to the rules themselves if these provisions were not strictly adhered to. In our view, the current system is working well; moreover, the Judicial Conference's recently adopted Statement of Operating Procedures is designed to encourage public participation in the rulemaking process.

Extending the existing 90-day deferred effective date to nine months is also objectionable. The rulemaking process is already extraordinarily slow. However, like the Judicial Conference, we could support a compromise that would extend the minimum time for congressional review of proposed rules amendments to six months. We also join the Judicial Conference in its opposition to the provision in H.R. 4144 that would require rules amendments to be transmitted to the Congress by March 15 of a given year instead of May 1.

Finally, we are concerned about the bill's elimination of the proscription currently contained in the civil and bankruptcy rules against modification of substantive rights. For example, current section 2072 of title 28 contains the following statement:

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

We urge that restrictive language along the lines of the above-quoted sentence be retained in the Rules Enabling Act, because its deletion might invite judicial rulemaking that would abridge substantive rights, or at least cause confusion that might result in increased litigation. Since proposed section 2074 would provide that any rule promulgated by the Judicial Conference "shall supersede -- (1) any contrary provision of law then in effect," absence of the proscription against modifying substantive rights might be viewed by some (judges or litigants) as an invitation to the courts to legislate. 1/

We do not believe that in fact the bill's elimination of the restrictive language would enlarge the authority of the Judicial Branch to engage in rulemaking. The authority granted by H.R. 4144 to the Judicial Conference is only "to prescribe rules of practice and procedure." The limiting language in existing section 2072 of title 28 can most reasonably be interpreted merely as the converse of that affirmative grant of authority. Thus, even without such language, we believe that under this bill the Judicial Conference would not have any greater authority than is now granted to the Supreme Court under the current Rules Enabling Acts. Moreover, we note that even in the absence of explicit language in an Enabling Act, the courts have enforced limitations on their rulemaking authority that have roots in

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1/ The history of the bankruptcy rules is illustrative. The Bankruptcy Reform Act of 1978, Pub. L. 98-598, Sec. 247, repealed the authorization for the issuance of bankruptcy rules inconsistent with the provisions of other laws. The Justice Department supported the repeal, contending that a large number of procedural rules inconsistent with the statutory procedures had been issued, causing a great deal of confusion. Bankruptcy Act Revision, Hearing before the Subcomm. on Civil and Constitutional Rights, House Comm. on the Judiciary., 94th Cong., 2d Sess. at 2107 (1976). A similar view was expressed by the Securities and Exchange Commission. Ibid. at 2205-06. The concerns of the Department and the SEC were prompted by the extensive revisions of the bankruptcy rules in 1973 and 1975, which superseded many provisions of the Bankruptcy Act. In drafting the Bankruptcy Reform Act of 1978, Congress attempted to remove many procedural matters from the bankruptcy statute and decided that the judiciary should not have the power to amend the Bankruptcy Code through the rules process. H. Rep. No. 95-595, 95th Cong. 1st Sess. pp. 292-93; S. Rep. No. 95-989, 95th Cong., 2d Sess. pp. 157-58.

separation of powers considerations, 2/ and we assume the Judicial Conference and the courts would continue to be sensitive to those considerations in the exercise and interpretation of the rulemaking authority.

Nonetheless, although we do not believe that repeal of the language in section 2072 would actually enlarge the rulemaking authority of the Judicial Branch, we recognize that the repeal could possibly be interpreted by some as an indication of congressional intent to do so. Since it must remain clear that the legislating function resides only in Congress, we recommend that some language explicitly preventing judicial rulemaking from modifying substantive rights be included in any Rules Enabling Act.

### III. Conclusion

In conclusion, the Department of Justice recommends against enactment of H.R. 4144. We believe the bill would preclude the flexibility necessary for judicial rulemaking. It would impose additional burdens on the rulemaking process and create the possibility of litigation challenging federal rules, not on their merits, but on the basis of alleged violations of these proposed procedural mandates. We believe these matters should be left to the discretion of the Judicial Conference rulemaking bodies.

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,

Robert A. McConnell  
Assistant Attorney General

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2/ For example, it has been held consistently that the Supreme Court cannot, through the exercise of the rulemaking power, enlarge, modify, or restrict the jurisdiction of the federal courts. See, e.g., *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941); *Bendix Aviation Corp. v. Glass*, 195 F.2d 267, 270 (3d Cir. 1952); *Standish v. Gold Creek Mining*, 92 F.2d 662, 663 (9th Cir. 1937).



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET

DATE: 2/28

TO: John Roberts

FROM: Greg Jones (x3856) *GJ*

I would like to clear this Justice letter on Presidential libraries legislation; but before I do, I would like the concurrence of WH Counsel.

It is consistent with what Justice has said in the past and is, in my view, unobjectionable.

Could you please take a minute to look the letter over?

Many thanks.

*no obj. by  
phone  
aa  
2/28/84*

OMB FORM 38  
REV AUG 73



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

SPECIAL

February 16, 1984

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer

General Services Administration

Department of the Treasury

*new about 2/23/84*

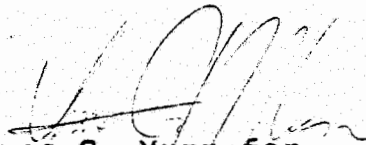
SUBJECT: Justice views on H.R. 2446, a bill entitled the  
"Former Presidents Facilities and Services Reform Act  
of 1983."

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

COB WEDNESDAY, FEBRUARY 22, 1984.

Direct your questions to Gregory Jones (395-3856), of this office.

  
James C. Murr for  
Assistant Director for  
Legislative Reference

Enclosures

cc: J. Roberts  
S. Smith  
M. Chaffee



Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Jack Brooks  
Chairman  
Committee on Government Operations  
House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 2446, a bill entitled the "Former Presidents Facilities and Services Reform Act of 1983." Our comments are confined to the constitutional issues raised by H.R. 2446. We understand that the ~~Department of the Treasury, the General Services Administration and the Office of Management and Budget~~ will also convey their views on this legislation. *has*

The Department of Justice opposes enactment of this legislation.

Title III - Section 303

Section 303 of H.R. 2446 authorizes the Secretary of the Treasury to provide for the extension or reinstatement of protection to a former President, his spouse or children beyond the period provided for in section 302(b) of H.R. 2446. Section 303(a) permits the Secretary of the Treasury to authorize protection for a period of one year in the case of a former President and six months in the case of a former President's spouse or minor child upon a finding that "a serious threat warranting such protection exists." However, protection can be extended beyond these initial periods only upon:

the written request of the individual desiring such protection and upon the approval of the advisory committee established by the first section of the joint resolution entitled "A joint resolution to authorize the United States Secret Service to furnish protection to major Presidential or Vice Presidential candidates" approved June 6, 1968 (82 Stat. 170; 18 U.S.C. 3056 note). (Emphasis added)



The advisory committee referred to in the quoted language of section 303(a)(2) consists of the Speaker of the House, the minority leader of the House of Representatives, the majority leader of the Senate, the minority leader of the Senate and one additional member selected by other members of the advisory committee. The evident intent of this provision is that the advisory committee should play an active and possibly determining role in providing for extensions of Secret Service protection to former Presidents and their families.

It is fundamental that officers who perform Executive duties must be appointed pursuant to the Appointments Clause of the Constitution. Art. II, section 2, cl. 2, Buckley v. Valeo, 424 U.S. 1 (1976). Those who are vested with authority that amounts to "the performance of a significant governmental duty exercised pursuant to a public law," Buckley v. Valeo, supra at 141, must be appointed in a manner consistent with that clause. In brief, such individuals must be appointed by the President by and with the advice and consent of the Senate, or if authorized by Congress, by the President alone, the courts or the heads of departments. Buckley v. Valeo, supra. at 124-41.

The Secret Service, as part of the Department of the Treasury, is an Executive Branch agency. It carries out basic law enforcement activities assigned to it by federal law. To the extent that the advisory committee, which consists of members of the Legislative Branch, will exercise effective control over decisions about Secret Service activities and thus will perform significant Executive functions, section 303 of H.R. 2446 is constitutionally objectionable. This is the case because the advisory committee members are not appointed in a manner consistent with the Appointments Clause.

We would add that 303(c)(1) establishes an "Advisory Panel on Secret Service Protection," the nine members of which are appointed by the Comptroller General. The role of the Advisory Panel appears to be limited to making recommendations, and not exercising "significant Executive functions." To the degree that the Advisory Panel's functions are so limited, the objections raised to the advisory committee are not pertinent to the panel.

#### Title I - Section 103

Section 103 of H.R. 2446 would amend present law, 44 U.S.C. 2203(c), to read as follows:

"(c) During his term of office, the President shall substantially complete the disposal of his Presidential records which no longer have administrative, historical, informational, or evidentiary value. Prior to disposing of any such records, the President shall obtain the

written views of the Archivist concerning the proposed disposal of such Presidential records and may not dispose of any records with respect to which the Archivist notifies the President that he intends to take action under subsection (e).".

Present 44 U.S.C. 2203(c) is similar to section 102 and provides:

(c) During his term of office, the President may dispose of those of his Presidential records that no longer have administrative, historical, informational, or evidentiary value if -

(1) the President obtains the views, in writing, of the Archivist concerning the proposed disposal of such Presidential records; and

(2) the Archivist states that he does not intend to take any action under subsection (e) of this section.

Section 103, like present law, appears to place in the Archivist the authority to make decisions concerning disposal of Presidential records. We believe that both the present and proposed provision must assume that the Archivist, in performing this function, is guided by the President and subject to this authority.

The Archivist is an appointee of the Administrator of the General Services Administration. See 44 U.S.C. 2102. The Administrator is himself a Presidential appointee who occupies a position within the Executive Branch and serves at the pleasure of the President, see 40 U.S.C. 751(b), as do other heads of Executive departments and agencies. As is true in general regarding such officials, they are ultimately responsible to the President and the President may instruct them in the performance of their duties in a manner consistent with applicable law.

Officials, such as the Archivist, who perform Executive functions must report ultimately to the heads of their respective departments and agencies, who, in turn, must report to the President. In order to fulfill his constitutional duty to take care that the laws are faithfully executed, the President must be able to supervise the execution of the laws within the Executive Branch. This follows from the principle, embodied in Article II of the Constitution, that the Executive power is vested in the President. See Myers v. United States, 272 U.S. 52, 163-64 (1926). In order to be consistent with the Constitution, section 103 must be interpreted to recognize the principle that the President is the ultimate authority in determining the disposal of records.

## Title I in General

Finally, as now written, Title I of the bill would authorize the Administrator of GSA to submit to Congress a prospectus for the establishment of a central Presidential library, to provide for the temporary storage of the Presidential records of former Presidents, and to take certain steps "in administering the central Presidential library." The bill does not, however, explicitly give the Administrator the authority to establish a central Presidential library, and only implicitly authorizes administration of such library. Although we believe the intent of the bill is to give the Administrator such authority, we cannot read its terms as now written to provide such authority. We therefore must object to the bill unless revised to state explicitly the Administrator's authority to establish and administer a central Presidential library.

### SUMMARY

For the above reasons, the Department of Justice strongly opposes enactment of H.R. 2446.

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

Sincerely,

ROBERT A. McCONNELL  
Assistant Attorney General

THE WHITE HOUSE

WASHINGTON

February 29, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS /S/  
SUBJECT: Enrolled Bill H.R. 4956 -- Extension  
of the Export Administration Act

Richard Darman has asked for comments on the above-referenced enrolled bill by 4:00 p.m. today. The bill would simply change the expiration date of the Export Administration Act from today, February 29, to March 30. As you know, we are prepared to issue an executive order continuing the protections of the Act. This will not be necessary if the President signs this bill before midnight, and I am advised that the actual enrolled bill should be received in time for such action.

Attachment

THE WHITE HOUSE

WASHINGTON

February 29, 1984

MEMORANDUM FOR RICHARD G. DARMAN  
ASSISTANT TO THE PRESIDENT

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

SUBJECT: Enrolled Bill H.R. 4956 -- Extension  
of the Export Administration Act

Counsel's Office has reviewed the above-referenced enrolled bill, and finds no objection to it from a legal perspective. To avoid any possible difficulties with a lapse in export controls, the bill should be signed prior to midnight. If such action is taken, the previously cleared executive order should not, of course, be issued.

FFF:JGR:aea 2/29/84

cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

February 29, 1984

MEMORANDUM FOR RICHARD G. DARMAN  
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING  
COUNSEL TO THE PRESIDENT

SUBJECT: Enrolled Bill H.R. 4956 -- Extension  
of the Export Administration Act

Counsel's Office has reviewed the above-referenced enrolled bill, and finds no objection to it from a legal perspective. To avoid any possible difficulties with a lapse in export controls, the bill should be signed prior to midnight. If such action is taken, the previously cleared executive order should not, of course, be issued.

FFF:JGR:aea 2/29/84

cc: FFFielding/JGRoberts/Subj/Chron