MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 11, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Draft Statement Before Members of Subcommittee on Alcoholism and Drug Abuse on DEA's Views on "Look-Alike Drugs"

A representative of DEA (as yet unidentified) proposes to deliver the above-referenced statement on July 14. The testimony concerns "look-alike" drugs, which are legal, non-controlled substances designed and marketed to resemble controlled substances and mimicking their effect, though on a smaller scale. For example, a typical "look-alike" is a legitimate caffeine capsule with the same shape and coloring as a popular, illegal "speed" capsule. The testimony notes three general problems with the "look-alike" industry: (1) "look-alikes" can be abused when taken in large quantities, (2) they contribute to acceptance of the view that drugs should be consumed not for medicinal purposes but for pleasure, and (3) serious consequences attend the confusion between "look-alikes" and the real things -- e.g., someone accustomed to taking six caffeine "look-alike" tablets could easily kill himself if he took six of the speed tablets the "look-alikes" were designed to resemble.

The testimony notes DEA's success in promulgating a model act addressed to the "look-alike" problem, its efforts to educate appropriate officials concerning the problem, the role of the legitimate pharmaceutical industry in declining orders to produce "look-alikes," and inter-agency cooperative efforts. In general the testimony urges caution in addressing the problem through federal legislation.

The second sentence on page 6 bemoans the fact that "no single Federal agency has jurisdiction over all facets of this drug abuse problem." Such language plays directly into the hands of those who support creation of a drug czar, and could be very embarrassing to the Administration should this debate be joined anew. We should recommend deletion of the sentence.

Attachment

THE WHITE HOUSE

WASHINGTON

July 11, 1983

MEMORANDUM FOR GREGORY JONES
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Draft Statement Before Members of Subcommittee on Alcoholism and Drug Abuse on DEA's Views on "Look-Alike Drugs"

Counsel's Office has reviewed the above-referenced draft testimony. The second sentence on page 6 should be deleted, since it plays into the hands of those who favor creation of a "drug czar" with jurisdiction over all aspects of the drug abuse problem, something the Administration has strongly opposed. We have no other objections.

FFF:JGR:aw 7/11/83

cc: FFFielding
JGRoberts
Subj.
Chron

ID # _____ CU

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Subject: Draft Statement before Members of Subcommittee on Alcoholism and Drug Abuse re DEA's views on "look-alike drugs"

ROUTE TO:	ACTION		DISPOSITION		
Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CU Holland	ORIGINATOR	83/07/11			/ /
CU AT18	Referral Note: A	83/07/11		S	83/07/13
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DRAFT
July 14, 1983

Chairman Humphrey and Members of the Subcommittee on Alcoholism and Drug Abuse:

Thank you for this opportunity to provide you with DEA's views on the status of the problem of look-alike drugs. Over the past two years much has been done at the federal and state levels to attempt to bring this activity under control. From DEA's perspective, these initiatives have had a significant impact on the look-alike problem. The precipitous growth of this phenomenom seen in 1980 and 1981 has been arrested and, in a number of areas, there has been a substantial decline in the availability of look-alikes. I hasten to add however that a problem remains, albeit in a different form and of a smaller magnitude. We are faced with a dynamic situation in which some of those involved appear willing and capable of adapting rather than going out of business. Because of the combined Federal and State attack, the look-alike industry has changed considerably over the past two years; so much so that if legislation were passed based on the problem as it existed in 1981, most of today's problem would fall outside its scope. The changing nature of the problem makes it magnitude difficult to assess. Nevertheless, I will attempt to characterize the look-alike situation as I see it today and then describe the actions taken by DEA, their impact and our future direction.

Nature of the Look-Alike Problem

In spite of the sudden explosive growth of this problem, look-alikes have been around for a number of years. In the mid-seventies, an organization known as Peashooter was selling bogus amphetamines to truck drivers in many Southern states. The head of this organization eventually started his own company devoted solely to the production and distribution of look-alikes.

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By 1980, this phenomenon had spread across the nation. By 1981 it was estimated that at least 10 companies were manufacturing look-alikes and over 200 wholesalers were distributing them. During 1979 and 1980 DEA laboratories analyzed 1462 exhibits and over 500,000 dosage units of look-alikes.

During this period the term look-alikes referred to tablets, capsules or other substances containing noncontrolled, over-the-counter (OTC) ingredients, which closely resembled well-known, highly abused controlled drug products. Distributors were advertising these products as the legal way to get high, directly implying that the look-alikes could be sold as controlled substances. The look-alikes were sold in containers without proper labels, warnings or descriptions of the contents. Quality control was virtually nonexistent. Unethical entrepreneurs were making huge profits by using loopholes in society's legal and regulatory apparatus to peddle drugs and the concept of drug abuse to the nation's youth.

In late 1981 the Federal and state governments became actively involved in the battle against look-alikes. Some of the regulatory loopholes were closed but unfortunately others were found. Today the problem we face refers predominantly to those products which, although not manufactured to closely resemble controlled drug products, are promoted in the same manner and contain the same ingredients as those resembling controlled products. Many of the look-alike products, at least at the manufacturer level, are now sold in properly labelled containers with appropriate warnings. Usually the active ingredients and their quantities are identified on the label. Many of the look-alikes bear trademarks which the manufacturers say prevent them from being confused with other products. Further some of the look-alikes are imprinted with National Drug Code (NDC) numbers and have specific brand names.

They are advertised as stimulants, diet aids, appetite suppressants, decongestants and sleep aids. Generally, the more recent generations of look-alikes are not overtly represented as controlled products.

Once these products reach the street, or retail level user, however,they are may be removed from their labelled bottles and contain no warnings or precautions about their use. The message to the user is the same as with the original look-alikes: that drugs should be used for thrills and not solely for legitimate medical reasons. Despite all the publicity surrounding look-alikes, there appears to be a number of people who still perceive them to be real controlled substances. Still others who are well aware of the contents and effects of look-alikes, continue to abuse them. In either case look-alike stimulants mimic the appearance or effects of amphetamine-type products and generally contain one or more of the following OTC ingredients: caffeine, ephedrine, pseudoephedrine and phenylpropanolamine. The depressant look-alikes mimic the appearance or effects of sedative or hypnotic drugs such as Quaalude, Valium and Librium and generally contain combinations of the following ingredients: acetaminophen, salicylamide, doxylamine and chlorpheniramine.

Although they are legitimately used as nasal decongestants, analgesics, or for the relief of cold, allergy or asthma symptoms, the look-alike ingredients can produce mild stimulant or depressant effects and have caused serious injury to those who ingest large quantities. Moreover, many use look-alikes along with alcohol. There have been several documented reports of cerebral hemmorrhage and severe hypertension associated with the use of stimulant look-alikes. Reactions to look-alikes may range from nervousness, insomnia or drowsiness to tachycardia, sharp rises in blood pressure, cerebral hemmorrhage, cardiac arrhythmias and temporary psychotic episodes. Emergency rooms have reported many episodes of adverse reactions associated with the use of look-alikes or their ingredients. A number of deaths associated with look-alike use have been reported with caffeine intoxication as the likely cause of death. In 1981, a new category for look-alikes was established for the Drug Abuse Warning Network (DAWN) to help determine the extent of this public health problem. During the period June 1981, through March 1983, 92 emergency room mentions were attributed directly to substances reported as look-alikes with the majority involving drugs obtained by street buys. Furthermore, many of the emergency room visits attributed to amphetamines and speed may be the result of look-alike abuse. It is important to note, however, that during the entire year of 1982, 48 emergency room mentions were reported by DAWN compared to 43 during only 6 months of 1981. Thus far in 1983 only 1 report of an emergency room episode attributed to look-alikes has been recorded in DAWN.

In addition to the health hazards inherent in taking look-alikes themselves, the risk of serious drug overdose from real controlled substances is greatly increased for look-alike users who unknowingly consume equal numbers of a real controlled product. This is most troublesome when depressants are involved. Health care professionals in emergency rooms, poison control centers and drug abuse clinics may be deceived by the look-alikes. They are hampered in determining and providing appropriate medical care in drug overdose cases.

Perhaps most important of all, the advertising and distribution of look-alike drugs in any form gives the impression of societal acceptance of the use of drugs for recreational purposes. This counteracts the efforts of the many drug abuse educational programs supported by government and public organizations. The look-alikes have helped to create a market for stimulant and depressant use. Children and others who wouldn't normally abuse drugs are introduced to look-alikes and told they're safe and legal. The end result of the look-alike phenomenon is a glamorization and legitimacy of the concept of recreational drug use, particularly among children. The use of psychoactive substances for mood alteration - - even in the form of look-alikes if condoned, can only further add to our national drug abuse problem.

DEA Initiative

Since look-alikes contain only noncontrolled substances, DEA has no specific jurisdiction over look-alike products under the Controlled Substances Act (CSA). Unfortunately, it appears that no single Federal agency has jurisdiction over all facets of this drug abuse problem. I am pleased to report, however, that there has been a high degree of cooperation among Federal agencies in sharing information and devising and implementing strategies to effectively combat the problem. Additionally, each agency involved, specifically DEA, FDA and the United States Postal Service has set up independent programs using current resources and within the framework of existing laws and regulations to attack the look-alike problem. The activities undertaken by DEA and an assessment of their impact to date are as follows:

1. Drafting of a Model Act for Concerned States to Adopt

In November 1981, DEA drafted and distributed to the states a Model Imitation Controlled Substances Act. A revised version was distributed in February, 1982. The Model Act makes it unlawful for anyone to manufacture, distribute, possess or advertise an imitation controlled substance. An imitation controlled substance is defined as a noncontrolled substance which by overall dosage unit appearance or by representation made, would lead a reasonable person to believe that the substance is a controlled substance. At this time, 41 states have passed some form of legislation against look-alikes; another 8 states have legislation pending; 4 states have additional look-alike legislation pending.

The DEA Model Act does cover products not resembling controlled products but promoted or represented in the same manner as those resembling controlled products. An informal survey conducted by DEA's Office of Diversion Control in the Spring of 1983 showed that those states reporting a decrease in the availability of look-alikes all have look-alike legislation. Delaware, the first state to pass look-alike legislation and equally important, to enforce it has reported a dramatic decrease in the availability of look-alikes. It is noteworthy that a recent FDA seizure of millions of look-alike dosage units occurred in Michigan, one of the few states without look-alike legislation. The impact of state look-alike legislation is encouraging.

For state legislation to be effective, however, it is essential that the laws be enforced and violators prosecuted, particularly at the manufacturer and distributor levels. DEA is aware of nine states which have reported prosecutions under their look-alike laws. The Alabama and Illinois look-alike laws have been challenged in court and both declared constitutional.

A somewhat similar situation occurred with the drug paraphernalia industry. DEA drafted model legislation in 1979 which has been adopted by 25 states as of September 1982, and has been successful in supressing this one time powerful industry. More than 20 Federal District Courts have upheld the Model Paraphernalia Act. The look-alike legislation drafted by DEA is patterned after the paraphernalia legislation and gives local jurisdictions similar authority over look-alikes.

2. Preparation of Documentation Describing the Look-Alike Problem, its Dangers and Effects, for Use in Support of the Model Act:

Information packages have been distributed to DEA field offices for use by personnel who are requested to provide information or testimony in support of state look-alike legislation. DEA personnel have made presentations concerning look-alikes to state legislatures, professional organizations, law enforcement personnel and parent and community groups in an effort to encourage their support of state look-alike legislation. A number of articles concerning look-alikes have been written by DEA personnel and published in trade journals of the pharmaceutical industry.

3. Enlisting the Support and/or Action of the Legitimate Pharmaceutical Industry

In an effort to limit the availability of capsules used to manufacture look-alikes, DEA asked the three domestic capsule manufacturers to voluntarily refuse orders to suspected look-alike manufacturers. This effort appears to be successful in that the popular black/black and yellow/yellow capsules are in extremely short supply as indicated by look-alike advertisements. There is evidence that look-alike manufacturers have looked to foreign capsule producers for their supplies. Some of the foreign suppliers are subsidiaries of domestic capsule manufacturers. The foreign subsidiaries have instituted similar safeguards to those of the parent company. A domestic company informed us of an order for 50 million black/black and yellow/yellow capsules placed to one of its foreign subsidiaries by a third party in the United Kingdom. It was determined that the order was by a United States look-alike firm who was unable to obtain these capsules domestically. The request was not honored.

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DEA is aware of at least one domestic brokerage house who has ordered capsules from foreign sources for look-alike manufacturers in the United States. When confronted by DEA personnel this firm agreed to stop selling to the look-alike companies.

Industry cooperation and information exchange has also resulted in a successful lawsuit filed by a legitimate manufacturer of controlled substances against a look-alike producer for trademark infringement.

4. Fostering Intergovernmental Agency Cooperation and Providing Active Support to Other Agency Efforts

Because no single Federal agency has clear-cut jurisdiction over the look-alike problem, it was imperative that the relevant Federal agencies coordinate their efforts against look-alike drugs. DEA has taken the initiative to establish interagency governmental groups at both the policy making and working levels. Representatives of the Drug Enforcement Administration, the Food and Drug Administration, the Federal Trade Commission, U.S. Postal Service, the Internal Revenue Service, and the National Institute on Drug Abuse meet periodically to discuss the dynamics of the look-alike problem, to identify changing trends in distribution and abuse patterns, and to report on each agency's activities or need for interagency support. Additionally, DEA has supported the efforts of the U.S. Postal Service and the FDA by supplying intelligence and by providing laboratory analyses and expert testimony in court against look-alike manufacturers and distributors. DEA has worked with the FDA and the U.S. Postal Service in an attempt to develop an effective and realistic Federal legislative package. In Furtherance of this effort DEA and FDA have sponsored a joint meeting of the state attorneys general for their input and ideas.

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In order to ascertain the magnitude of the impact of the DEA, FDA, U.S. Postal Service and state government initiatives on the look-alike problem the DEA Office of Diversion Control reviewed DEA laboratory data for the period January, 1979 through March, 1983. This study showed that the number of look-alike exhibits and dosage units analyzed peaked in 1980 at 868 and 329,305 respectively. By 1982 there was a 55.8% decrease in the number of exhibits (383) and an 82.3% decrease in the number of dosage units (58,316) of look-alikes analyzed. (See figure 1)

The laboratory data further showed that during the period 1979 through 1981, over 75% of the look-alike exhibits were capsules. In 1982 and 1983 capsules and tablets each accounted for roughly 50% of the exhibits. (See figure 2) Further, black and yellow capusles, the most popular stimulant look-alikes, made up over 47% of the look-alike exhibits in 1979 and 1980 compared to 30% in 1981 and 24% in 1982. Additionally products such as 20/20's, U-Zoom's, and Capricorns began appearing in late 1981 and increased in 1982. The percentage of stimulant look-alikes containing the triple combination of caffeine, ephedrine, and phenylpropanolamine increase from 16.5% in 1979 to approximately 70% in 1981 and 1982. Following FDA's declaration in August, 1982 that this triple combination is a new drug and required a New Drug Application prior to marketing, this combination was found in only 27% of the exhibits analyzed in the first three months of 1983. (See figure 3)

The above study shows that the DEA and other government initiatives, begun in late 1981, have significantly reduced the availability of look-alikes and that these look-alikes have been replaced, albeit to a much lesser degree, with products not resembling or directly represented as controlled products but containing some of the same ingredients as the original look-alikes.

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These findings were reinforced at a meeting between DEA, FDA and the U.S. Postal Service and a group of state attorneys general. This meeting was held to discuss the status of the look-alike problem and what further state and federal regulations or criminal sanctions could be brought to bear on this problem. Representatives from 6 states were present. In general they were pleased with the efforts of the government agencies in reducing the look-alike problem but also concerned about the transition to products not resembling controlled products. They encouraged federal involvement in the look-alike battle but only to the extent that resources allow and would not be taken away from more serious drug abuse problems.

The state representatives and federal agencies agreed to work closely together and to use and expand existing authorities to combat the changing look-alike problem. Further, although the state representatives agreed that much of the problem can be and has been handled at the state level, the federal agencies agreed to continue to explore new approaches.

I know the need for federal legislation in response to the look-alike problem is of interest to this subcommittee. Further legislation is among the options we have considered in determining future strategies. A number of things must be kept in mind when considering new legislation. First, much has been done using existing and less radical means at the federal level and through new and existing state laws. Because of these actions the problem has decreased.

Secondly, the products in question are now very close to those legitimately marketed diet aids and stimulants sold in most drug stores. For the purposes of a criminal statute, it is extremely difficult to define the offenses in such a way which would separate the so called look-alikes from legitimate over-the-counter diet and sleep aids. S. 503 is an attempt to do just that. It is our view, however, that this legislation attempts to describe a very broad offense using imprecise terms not specifically defined. It is likely that efforts to enforce this statute would generate considerable and largely successful litigation challenging the legislation.

The problem as it exists today simply does not lend itself to conventional federal criminal legislative measures which would be productive in eliminating the manufacturing and distribution of these products. DEA's Model Imitation Controlled Substances or similar legislation can be used by states to adequately control the problem at the street or retail level where the pills are removed from labelled containers and represented to be controlled products or where manufacturers and distributors market true look-alikes. In cases where manufacturers and distributors market products indistinguishable from the diet aids and sleep aids found in most drug stores other issues should be resolved. The serious question of the safety, efficacy and true medical need for both categories of over-the-counter products may need further examination. Perhaps the focus could be shifted to the medical indications for these products and their ingredients, the type and manner of advertising, the age of those permitted to purchase these products and the types of establishments permitted to sell them. These are all areas in which DEA does not have the necessary expertise to effectively resolve these issues.

Nevertheless DEA does consider the look-alike industry, even in its modified form, as a contributor to the drug abuse problem. As such we will continue to work together with other federal agencies and states within the scope of our existing statutory authority to help further reduce the problem of look-alike drugs.

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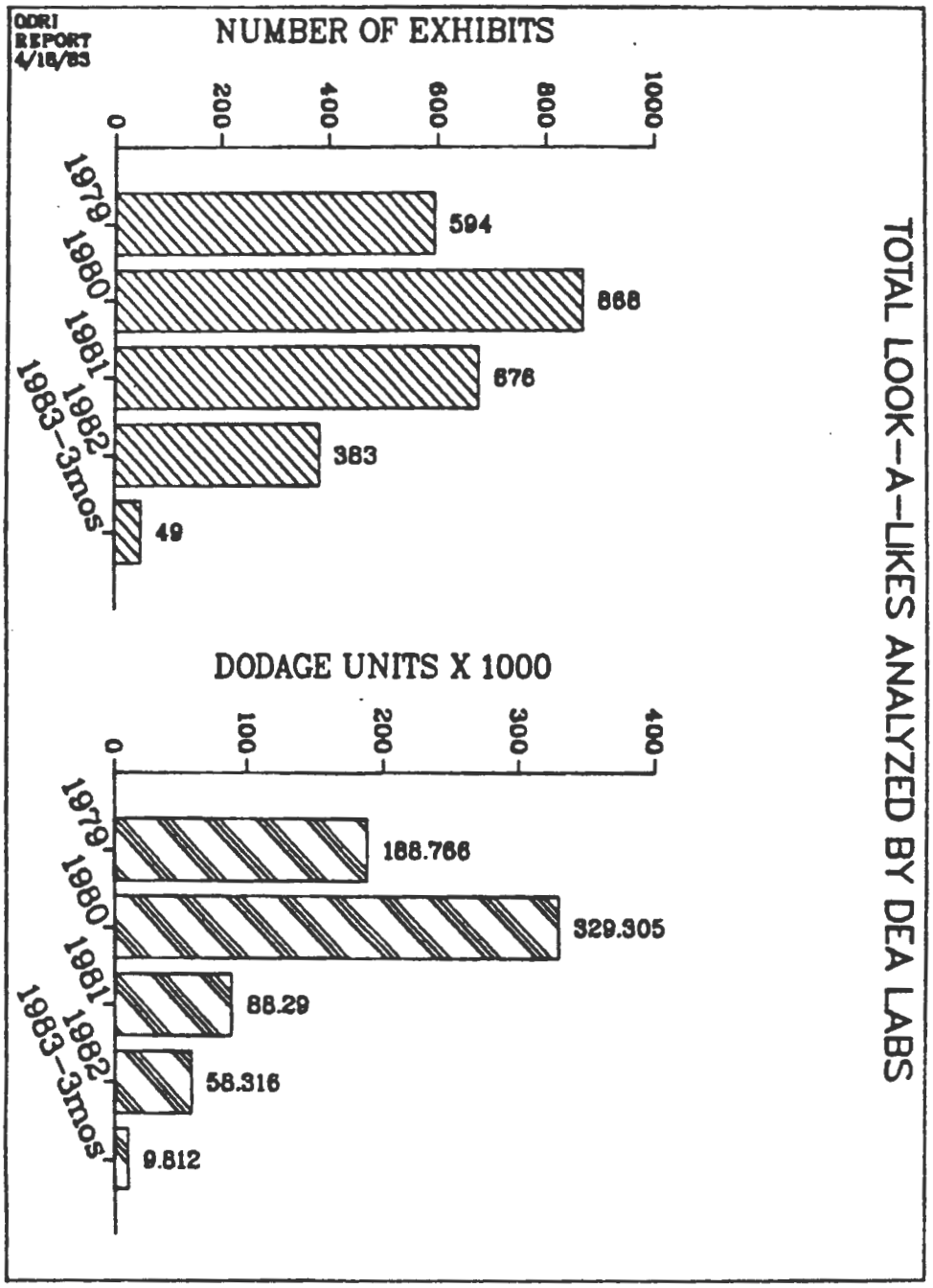

Figure 1

DRAFT

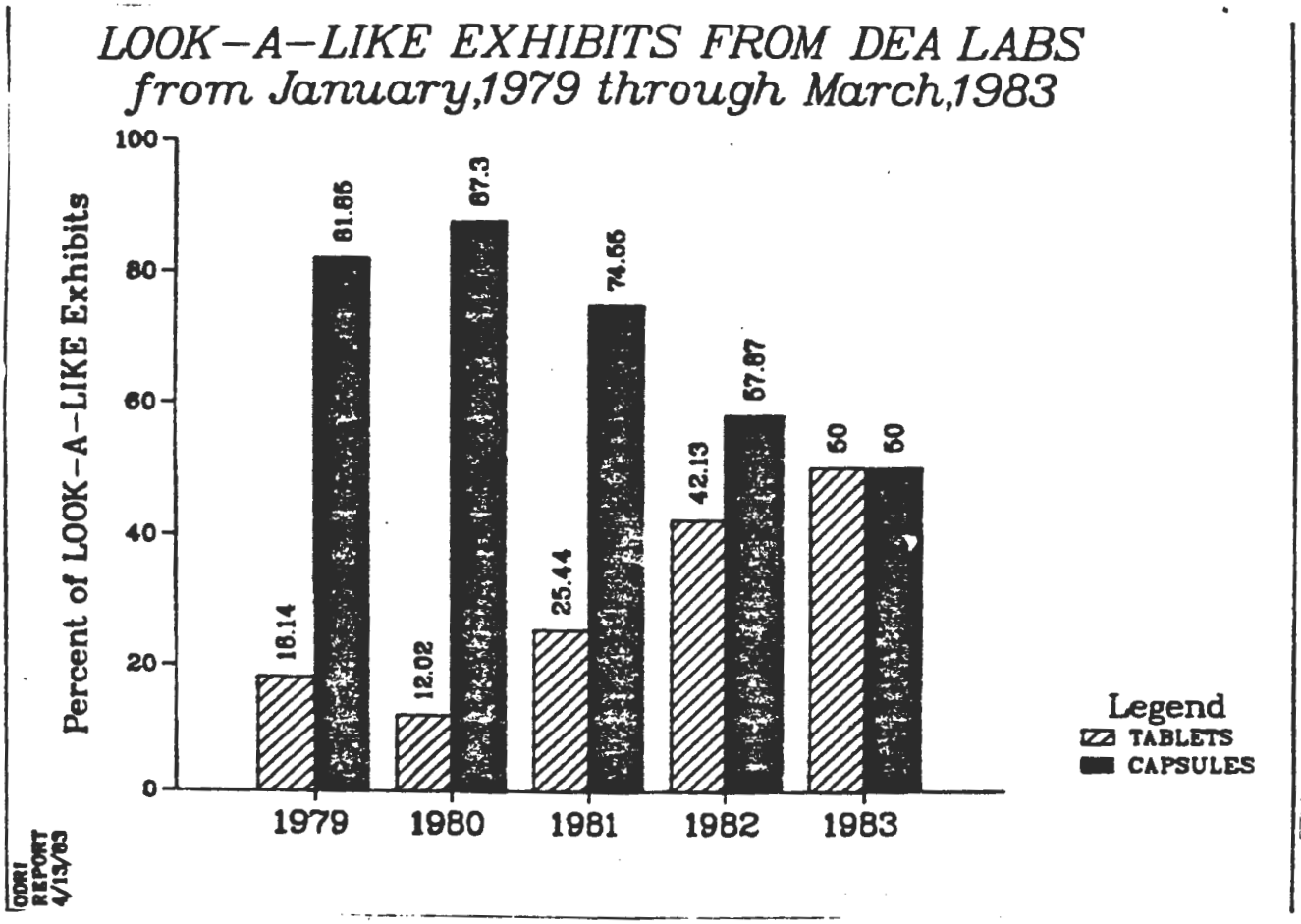

FIGURE 2

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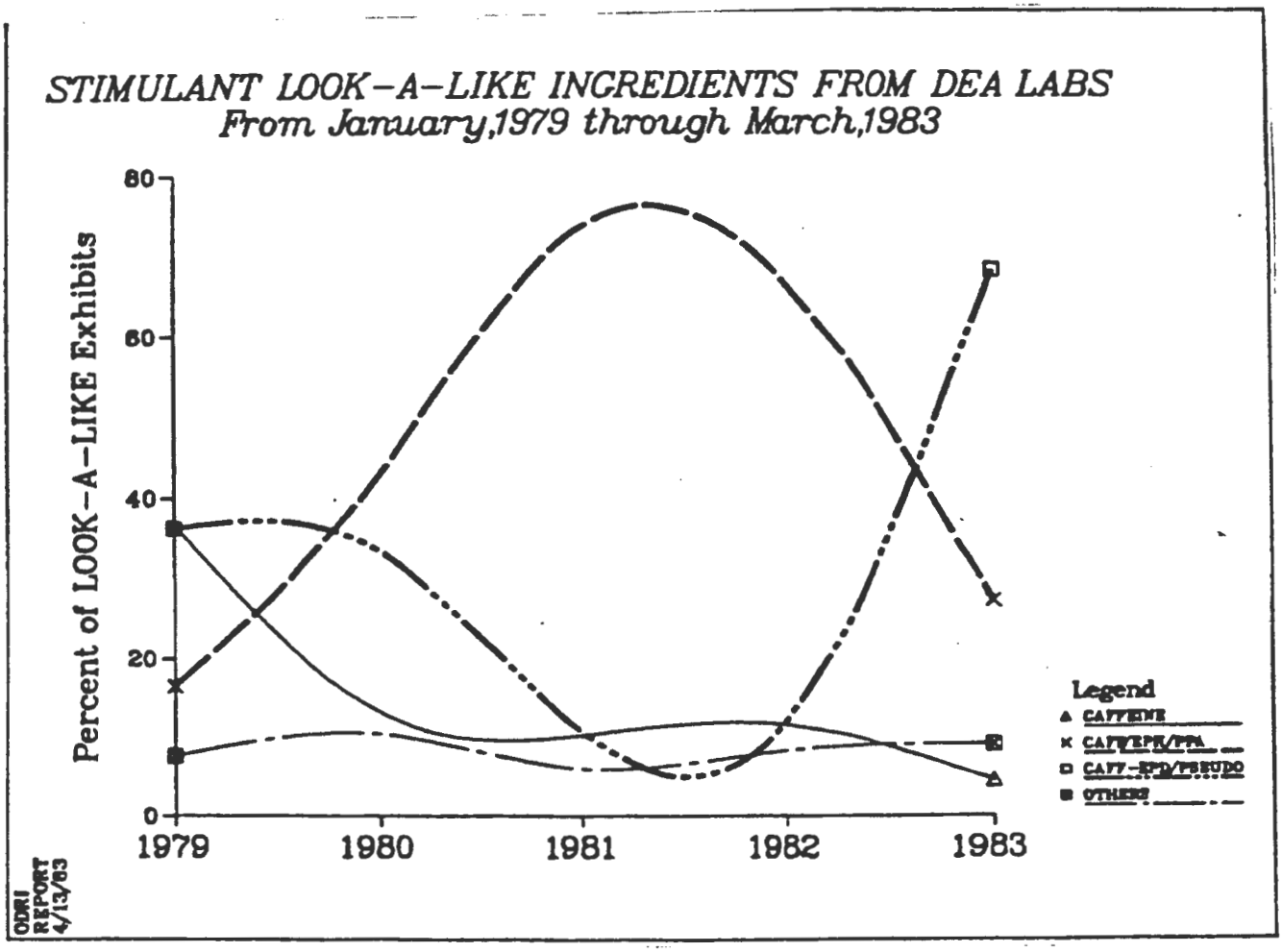

FIGURE 3

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 14, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Proposed Testimony of Alfred S. Regnery Before the Senate Subcommittee on Juvenile Justice Concerning Confidentiality of Juvenile Records

The above-referenced testimony is to be delivered on July 19. The testimony is very general in nature, indeed rambling, but basically concludes that juvenile court records of serious habitual offenders should be as accessible for justice system purposes as adult criminal records. This would avoid the frequent phenomenon of serious habitual juvenile offenders being treated as if they had a clean slate when they first encounter the adult criminal justice system. The testimony states that Regnery's Office of Juvenile Justice and Delinquency Prevention is reviewing state codes on the question of record access and supporting research in the area, and plans to draft model code provisions for the states.

There is what I take to be a Freudian slip on page 4 of the testimony, where Regnery is discussing the difference between the view of juvenile justice that places priority on protecting the child and the view that places priority on protecting society. He states that "these two points of view are completely antithetical . . . ." Presumably a "not" has been inadvertently dropped.

Attachment

THE WHITE HOUSE

WASHINGTON

July 14, 1983

MEMORANDUM FOR GREGORY JONES
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING FFF, PAK
COUNSEL TO THE PRESIDENT

SUBJECT: Proposed Testimony of Alfred S. Regnery Before the Senate Subcommittee on Juvenile Justice Concerning Confidentiality of Juvenile Records

Counsel's Office has reviewed the above-referenced proposed testimony and finds no objection to it from a legal perspective. On page 4, line 15, we assume "not" should be inserted between "are" and "completely."

FFF:JGR:aw 7/14/83

cc: FFFielding
JGRoberts
Subj.
Chron

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Name of Correspondent: Gregory Jones

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

Subject: Testimony of Alfred Regnery on access to juvenile records of serious, habitual lawbreakers appearing in adult court for the first time (July 19, 1983)

ROUTE TO:		ACTION		DISPOSITION		
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CU4011		ORIGINATOR	83/07/13			1 1
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Alfred S. Regnery

DRAFT

Testimony before Senate Subcommittee
on Juvenile Justice:
Confidentiality of Juvenile Records

July 19, 1983

First, I would like to thank Subcommittee Chairman, Senator Specter, for giving me the opportunity to testify on a significant issue for the juvenile justice system.

Police, prosecutors and judges are becoming increasingly concerned about the lack of easy and timely access to juvenile records of serious, habitual young offenders appearing in adult courts for the first time. In addition, what records are available are often of poor quality.

The extent and nature of the problem has been studied by the Rand Corporation (Greenwood, Petersilia, Zimring, 1980) which found that only some 3% of prosecutors had access to complete juvenile records.

In addition, 75% of the prosecutors Rand surveyed said that "serious administrative problems and resource constraints limited their ability to search for juvenile records except in unusual circumstances." Overall, half of the prosecutors in the national survey reported that "they would normally receive little or no juvenile record information." This was true for even the most serious young adult offenders. When records were obtained, they were often incomplete and arrived too late to assist in the charging decision.

There are important uses for prior offense records, perhaps at most of the key decision points in the juvenile and criminal process, including arrest, bail determination, charging, plea negotiation, and sentencing. To the extent records are not available when and where needed, the entire

justice system is compromised as a viable crime control mechanism. This diminishes the public's trust in the system and reduces any fear or respect for the system by the criminal, and thereby diminishes the deterrence value of the entire justice system.

I would also note here that all habitual or serious offender programs are completely dependent on record information for identification of such offenders early in the juvenile or criminal justice process.

A number of investigators, some present here today, have dealt with the reasons and remedies for the shortcomings in the records area, as well as with their consequences.

Most observers agree that the culprit in this breakdown in the juvenile/criminal justice machinery is the two-track justice system we have built and maintained. This two-track or dual system exists as a result of state juvenile codes and administrative provisions which require separate storage of juvenile and adult court records.

Because of this separate storage requirement, other code provisions on confidentiality, and a virtual morass of administrative policies and procedures governing access, records of serious juvenile repeat offenders are often not available at crucial stages of criminal court processing, up to and including sentencing. Too often, the result is that a first-time adult offender with a lengthy and serious juvenile record frequently starts with a clean slate in criminal court, delaying for 7 to 10 years his identification as an habitual offender.

As early as 1978, James Q. Wilson and Barbara Boland questioned the propriety of the two-track system. The separate system for juveniles often does not share its information with the adult system. They recommend centralizing serious criminal history records for offenders of

all ages.

The Attorney General's Task Force on Violent Crime, appointed in 1981, agreed. The Task Force recommended that at the very least, fingerprints and photographs of violent juvenile offenders be placed in the F.B.I. Information Bank so they can be retrieved by prosecutors.

Recent reports and articles appearing in criminal justice literature indicate that there is growing interest in a review of existing provisions governing juvenile record confidentiality and utilization.

We are aware of at least one state, Maryland, that has a working group of its own, striving to examine their situation with regard to juvenile records access in connection with a repeat offender program they have established in several jurisdictions.

The several efforts summarized above, particularly the Attorney General's Task Force recommendations, are leading us closer to developing a national consensus on juvenile records use. I expect that the hearing before this committee, today, will add measurably to the achievement of that goal. At the same time, it should be stressed that the many issues surrounding this topic are by no means resolved.

There are differences among state codes governing records use, often reflecting real differences in the policies and philosophy. In addition, it appears that the actual availability of records for various purposes does not always correspond with what the juvenile codes allow and variations exist among jurisdictions pertaining to record quality, and their management and retrieval systems.

There are differences involving fingerprinting and photographing of juveniles, sealing or expunging of records, and on the handling of different types of records -- law enforcement data, official court files, and social

histories.

This is but a brief sketch of the legal, procedural, and technical issues to be reviewed and resolved to reach consensus on the appropriate use of juvenile records. It is intended to convey the complexity of the subject matter.

We would be remiss, I believe, if we failed to recognize another dimension of the topic. This has to do more specifically with the human element, the people who make or interpret the laws and policies on records use.

Much controversy surrounds this topic because of the divergent philosophies and values held by officials of the juvenile and criminal justice systems. I expect that in any randomly selected group of such officials there would be, on the one side, those who stress rehabilitation and protection of the child, and on the other, those who stress protection for society. While these two points of view are completely antithetical, there is some fear that reassessing the confidentiality of records may lead to the demise of the juvenile court. In fact, neglecting to review the use of juvenile records would be the greater threat. The recent popularity of waiver provisions is a prime example of community and judicial frustration with the juvenile system.

Legislatively established original jurisdiction of the court already covers children between 16 and 19 years of age. In addition, a number of states do not specify a lower age limit when a child can be waived to criminal court -- I believe South Dakota allows the waiver at age 10. At the same time, there are provisions for retention of juvenile jurisdiction (once under correctional restraint) through age of majority or longer.

Thus, it appears that who is a juvenile and who is adult for juvenile

and criminal court purposes varies over a range of 10 years or more. It seems to me that there is an irony in this with regard to record confidentiality. At least, this seems to show that the juvenile and criminal systems cannot be viewed as substantially discrete or separate, nor are their clients identifiable as composing discrete categories. In one state, a person 9 or 10 years old can be an adult criminal, while in another, he is treated as a juvenile delinquent until 19 or 20 with corresponding confidentiality of records.

The time has come to establish some equivalance between juvenile and adult records access and use for serious offenders. There are several areas that must be addressed in order to make headway in this area.

First of all, I believe that some model criteria for optimum level juvenile record utilization must be established. Although the federal government should not dictate what each state does in this area, a national model might be helpful to all states.

The availability of juvenile records would enhance the credibility of both the juvenile and the adult justice systems. Proper utilization of records would increase the certainty and integrity of intervention with serious, habitual offenders, by increasing the accountability of such offenders to the justice system and to the public. Contrary to the argument that nothing seems to have been proven to work against crime, I believe there is some evidence from research and program evaluations that the proper mix of secure custody, for those who need it, and of discipline, rehabilitation and reintegration back into the community make a difference.

In addition, record management, including creation, storage, retrieval and control must be improved. This would assure better quality of

records and access to them, and would also guard against record proliferation and abuse. Under properly maintained systems, the records of serious habitual juvenile offenders should be as accessible for justice system purposes as adult criminal records.

To assist in the resolution of the record confidentiality and utilization issues, OJJDP has undertaken several projects. We are now reviewing all state juvenile code provisions pertaining to record confidentiality and utilization. In the course of this review, we will communicate with justice system practitioners to determine what they consider the most important needs and procedures to be in this area. From this, we plan to develop draft model code provisions together with policies and procedures for their implementation. To the extent uncertainty exists regarding the proper approaches, we will support research to find the answers.

We expect to develop information on where and how juvenile records ought to be used, what the best record management systems are, what code and procedural improvements are required to facilitate record availability and use, and what benefits accrue to the justice systems and the public from improvements in these areas. Further, we expect to provide the information obtained to the practitioner field through publications, conferences, and training programs.

During the course of these activities, we will seek and appreciate continuing guidance and support from this Committee, from the Department of Justice, from our own National Advisory Committee, and from practitioners in the field.

JGR Subj.
Textual copy

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 18, 1983

FOR: FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: H.R. 3497 -- Proposed Amendments to the Federal Rules of Criminal Procedure

OMB has asked for our views as soon as possible on a proposed letter from Robert McConnell opposing H.R. 3497. H.R. 3497 would prevent the proposed amendments to the Federal Rules of Criminal Procedure currently lying before Congress from going into effect until specifically provided by Act of Congress. Under 18 U.S.C. § 3771 the Supreme Court may propose such rules or amendments, which go into effect ninety days after reported to Congress, in the absence of contrary legislation. H.R. 3497 is just such contrary legislation.

Justice opposes H.R. 3497 because Justice generally supports the proposed amendments to the rules, specifically amendments authorizing conditional guilty pleas, verdicts by 11-member juries when a twelfth juror becomes incapacitated, and extension of the life of a regular grand jury. I see no reason to question Justice's conclusion that the amendments are a net plus.

No legislative veto problems are presented by the procedure established pursuant to 18 U.S.C. § 3771. This is a classic "report and wait" provision. Its counterpart with respect to the Civil Rules was approved in Sibbach v. Wilson, 312 U.S. 1 (1941). The Chief Justice's opinion in INS v. Chadha specifically cited the Civil Rules provision, indicating that it did not present the problems associated with the legislative veto. Slip op. at 14 n. 9.

If you agree, I will telephone Greg Jones to advise that we interpose no legal objections.

ID # _____ CU

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CORRESPONDENCE TRACKING WORKSHEET

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Subject: H.R. 3497 - Proposed amendments to the Federal Rules of Criminal Procedure

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO			
Mike Uhlmann		Take necessary action	☐
Richard Hauser ✓		Approval or signature	☐
Karen Wilson		Comment	☐
		Prepare reply	☐
		Discuss with me	☐
		For your information	☐
		See remarks below	☐

FROM Greg Jones (x3856) 1 DATE 7/15/83

REMARKS

The attached letter from Justice opposes a provision of a bill (HR 3497) that would indefinitely [redacted] delay the effective date of the new Rules of Criminal Procedure.

According to Justice, this bill is scheduled for markup on Tuesday, 7/19; so we need to clear by Monday afternoon.

Please let me know what you think by noon on Monday, 7/18.

cc: Jim Murr

SPECIAL

OMB FORM 4
Rev Jul 82

U.S. Department of Justice
Office of Legislative Affairs

DRAFT

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Peter W. Rodino, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on that portion of H.R. 3497 which would indefinitely delay the proposed amendments to the Federal Rules of Criminal Procedure. The effect of enacting H.R. 3497 would be to require passage of additional legislation in order for the proposed amendments to take effect. The proposed amendments were transmitted by the Chief Justice on April 28, 1983 pursuant to the Rules Enabling Acts, 18 U.S.C. 3771-3772 and 28 U.S.C. 2072.

The Department strongly opposes delaying the effective date of the proposed amendments to the Federal Rules of Criminal Procedure (the "proposed Rules"). 1/ We believe that the Rules Enabling Act process will instutute, on balance, useful reforms. Some of the proposals indeed are innovative and have our strong support. Specifically, proposed Rule 11(a)(2) would create a new form of "conditional" guilty plea designed to obviate unnecessary trials which must currently be demanded by a defendant simply to preserve his right to appeal the denial of a dispositive pretrial motion. Proposed Rule 23(b) would empower a district judge to proceed to a binding verdict with the remaining eleven jurors if after retiring for deliberations, e.g. following a multi-week trial as recently occurred in two of our cases, one of the twelve jurors becomes incapacitated. This situation now necessitates a retrial unless the defendant consents to a verdict by the remaining jurors. The proposed Rule offers a solution that operates to preserve scarce judicial and prosecutorial resources while not diminishing, in any material way, the defendant's right to a fair trial. Proposed Rule 6(g), likewise, would improve the criminal justice system by allowing

1/ We take no position at this time on the proposed amendments to the Federal Rules of Civil Procedure.

wise, would improve the criminal justice system by allowing a court to extend the life of a regular grand jury which was due to expire before having completed its investigations. This flexibility would not benefit only the government; it would benefit the defendant as well by shortening the time in which the investigation (which otherwise would have to be reinstituted before a new grand jury) was conducted, and by guarding against the temptation of the expiring grand jury to return a precipitous indictment.

As you are aware, the proposed Rules have undergone careful development and scrutiny. Indeed, in this instance, the process, in requiring the proposed Rules to undergo several layers of review by all segments of the interested legal community, took approximately three years. We believe that the product which resulted is deserving of implementation on August 1, 1983. Although we do not favor each and every aspect of the proposed Rules, and we recognize that other persons may have like criticisms of individual provisions, 2/ we strongly believe that the process has overall produced a sound group of amendments that should not be further prevented from taking effect as scheduled on August 1, 1983.

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

Sincerely,

ROBERT A. McCONNELL
Assistant Attorney General

2/ The Department does not support the proposed change to Rule 12(i) to require the government to disclose information to the defense at pretrial suppression hearings. We are concerned that this change will generate non-meritorious motions to suppress evidence, made primarily with the objective of acquiring disclosure of statements by the government's witnesses, thus facilitating the manufacturing of spurious defenses.

98TH CONGRESS
1ST SESSION

H. R. 3497

To defer proposed amendments to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.

IN THE HOUSE OF REPRESENTATIVES

JUNE 30, 1983

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

---

A BILL

To defer proposed amendments to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That notwithstanding section 2072 of title 28 and sections 3771 and 3772 of title 18, United States Code, the amendments to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure as proposed by the Supreme Court of the United States and transmitted to the Congress by the Chief Justice on April 28, 1983, shall not take effect until and to the extent specifically provided by Act of Congress.

O

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 19, 1983

FOR: FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Proposed Testimony of Deputy Assistant Attorney General Knapp re: S. 1146, a Bill to Address the Use of Aircraft in Drug Offenses

By memorandum dated July 18, you noted no legal objection to the above-referenced testimony, to be delivered on July 21. A dispute has arisen between Transportation and Justice over an aspect of the testimony, and we have been asked to "weigh in" as soon as possible. The bill would direct the FAA Administrator to revoke the airman certificate of a pilot or crew member if the airman were convicted of a drug offense and served as an airman in connection with the violation, or if the airman were determined, after notice and hearing, to have served as an airman in connection with the transport by aircraft of a controlled substance. Justice's proposed testimony would expand the section to direct revocation of the certificate if the airman as an airman were determined to have furthered a drug offense, e.g., by knowingly flying a drug kingpin to a meeting.

Transportation objects that no safety considerations are involved in this proposed category, so the FAA should not be required to revoke certificates. Safety considerations are typically present when the plane actually carries drugs, as the pilots often fly low and without lights to avoid capture.

I side with Justice. If an airman is knowingly flying a drug dealer to a secret meeting, he could well fly without lights, etc., just as if he were carrying drugs themselves. The whole purpose of this bill is to fight drug trafficking, so the FAA's argument that it should only revoke air certificates when safety is implicated rings hollow. With the Air Force monitoring drug traffickers, the IRS seizing their assets, and the Park Service destroying their fields, the FAA can pitch in by revoking their flight certificates.

Dick Williams of Carlton Turner's office has proposed a compromise, whereby the bill would authorize (as opposed to direct) the Administrator to revoke certificates in the one category that has engendered the dispute. This makes eminent good sense, and with your permission, I will tell OMB that we support it. They would like to resolve the matter tonight or tomorrow morning.

I see no reason for the compromise. Also, it could lead to inconsistent actions by the FAA — 7/19

JGR Subj.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 18, 1983

FOR: FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Proposed Testimony of Deputy Assistant Attorney General Knapp re: S. 1146, a Bill to Address the Use of Aircraft in Drug Offenses

We have been asked for our views on the above-referenced testimony, scheduled to be delivered before the Subcommittee on Aviation of the Senate Commerce Committee on July 21. The testimony generally supports the main provisions of S. 1146, which would provide for the revocation of the FAA certificates of persons convicted of drug offenses (other than simple possession) involving aircraft. Knapp proposes that revocation be based on conviction or an FAA determination of involvement in drug trafficking offenses, since airmen are often granted immunity to testify against principals and, under the bill, the certificates of such airmen could not be revoked. The testimony also supports a section in S. 1146 which would make it a crime to forge FAA certificates for use in drug trafficking.

The testimony opposes a provision in S. 1146 making it a crime to use aircraft in drug trafficking. Justice considers this duplicative, since such use of an aircraft is already punishable under the general drug trafficking provisions. Justice sees no need based on its experience to specify the mode of transportation of the drugs. I have no objections.

Attachment

THE WHITE HOUSE

WASHINGTON

July 18, 1983

MEMORANDUM FOR GREG JONES
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Proposed Testimony of Deputy Assistant Attorney General Knapp re: S. 1146, a Bill to Address the Use of Aircraft in Drug Offenses

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

FFF:JGR:ph 7/18/83
cc: FFFielding
JGRoberts
Subject
Chron.

ID # _____ CU

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Subject: Statement of James I. K. Knapp re: S. 1146 (problem of the use of aircraft in illegal drug offenses) on July 21, 1983

ROUTE TO: Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
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6/81

To Greg Jones

DRAFT

STATEMENT

OF

JAMES I. K. KNAPP
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE

SUBCOMMITTEE ON AVIATION

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
UNITED STATES SENATE

CONCERNING

S. 1146

ON

JULY 21, 1983

I am pleased to be here today to present the views of the Department of Justice on S. 1146, a bill which is aimed at the problem of the use of aircraft in illegal drug offenses.

As you know, the Administration and this Department are strongly committed to doing everything possible to stem the flow of illegal drugs into the United States. We regard this bill as a potential source of help in this effort and support in concept all but one of its five operative sections.

Sections two, three, and four of the bill, which provide for the revocation of airman certificates[1]/ and aircraft registration certificates[2]/ of persons committing drug offenses, other than simple possession offenses, where an aircraft is involved, are of primary concern to the Federal Aviation Administration. While we support the general thrust of these provisions, I will later point out a potential problem that may be presented in the way in which section two is drafted.

Turning first to those portions of the bill which create new criminal offenses, I note that section five in effect creates a new criminal offense of using an aircraft to knowingly transport a controlled substance in violation of state or federal law relating to controlled substances, other than simple possession. The section would accomplish this result by amending section 902

1/ Possession of the proper airman certificate is necessary for anyone to serve as an airman in connection with aircraft operation or maintenance. (49 U.S.C. 1422). The term "airman" includes pilots, crew members, navigators, mechanics and air traffic controllers. 49 U.S.C. 1301.

2/ All aircraft must be registered to operate. 49 U.S.C. 1401.

of the Federal Aviation Act of 1958 (49 U.S.C. 1472) to add a new subsection (a) to provide for criminal penalties for persons who violate section 610(a)(2) of the Act (49 U.S.C. 1430(a)(2)) while involved in illegal drug transportation. Section 610(a)(2), in turn, forbids any person to serve as an airman without a valid airman certificate or in violation of any of a number of FAA orders, rules, or regulation. Under present law there is a civil, but not a criminal, penalty for a violation of the section. The new subsection to be added to 49 U.S.C. 1472 would provide for imprisonment for up to five years and a fine of up to $25,000 for any person who knowingly and willfully violates section 610(a)(2) in connection with the transportation by aircraft of any controlled substance where such transportation is prohibited by state or federal law or is provided in connection with any act prohibited by state or federal law relating to controlled substances, other than simple possession.

The Department of Justice does not support this provision because it is duplicative of existing prohibitions in title 21. Essentially, the proposed new offense would criminalize a particular method of committing the offense of drug "transportation", a concept already covered by the proscription in 21 U.S.C. 841 against distribution of or possession with intent to distribute a controlled substance. Moreover, another drug statute, 21 U.S.C. 952, specifically covers the importation or smuggling in of controlled substances.

Criminalizing a particular method of committing this crime, namely by using an airplane without a valid airman certificate or while in violation of an FAA regulation, is not desirable because it may lead to proliferation of laws creating separate crimes for particular methods of violating an existing general prohibition. In short, we see no need, in light of current statutes, for a separate offense of transporting drugs by airplane, any more than there is need for a separate statute covering smuggling of drugs by vessel or motor vehicle. The interest of the government is adequately protected by the basic prohibitions against drug importation and distribution, which include the ability to forfeit the aircraft used in the offense in many instances. In addition, the proposed penalty of up to five years in prison for the use of an aircraft is unlikely to act as a deterrent in light of the existing penalty structure which provides for up to fifteen years' imprisonment for importation of or possession with intent to distribute the most serious drugs such as heroin or cocaine.

On the other hand, the Department of Justice supports section six of the bill which would make two amendments to section 902(b) of the Federal Aviation Act of 1958 (49 U.S.C. 1472(b)). This section of the Act presently provides for a $1,000 fine and one year's imprisonment for forging or counterfeiting a certificate such as an airman certificate or aircraft registration certificate, using a forged certificate, or displaying false identification markings on an aircraft. Section six of

the bill would first expand the coverage of section 1472(b) to include the sale and possession with intent to use a fraudulent certificate. Second, it would increase the penalties for a violation of the section to a felony punishable by a $25,000 fine and five years' imprisonment for anyone who violates it with the intent to commit a violation of state or federal law relating to controlled substances, other than simple possession, and for anyone who sells a forged certificate knowing that the purchaser intends to use it in such a controlled substance offense.

The use of false certificates and aircraft markings clearly facilitates the use of aircraft in illegal drug transactions, particularly by those persons whose airman or registration certificates have already been revoked for one drug offense involving an airplane. The Congress recognized the pervasive use of false identification in criminal activity generally with the enactment of P.L. 97-398, the False Identification Crime Control Act of 1982, which prohibits, among other things, the transfer or production of false federal identification documents. The term "identification document" is defined as one intended for or commonly accepted for the purpose of identification of an individual. While the False Identification Act would cover the forging or sale of an airman certificate, it may not cover those offenses involving a registration certificate and clearly does not reach the use of false aircraft markings. Thus, section six

of the bill is necessary and would provide an appropriate new weapon in the federal government's efforts to combat illegal drugs.

Similarly, as I previously indicated, the provisions of sections two, three, and four dealing with the revocation by the FAA of airman and aircraft registration certificates of persons who use an aircraft in a drug offense would also appear to be a welcome addition in the battle to make our borders more secure against illegal drugs. Although these sections are of primary concern to the FAA, I would like to point out one problem area with respect to section two that the Subcommittee may wish to address.

The section would require that the Administrator of the FAA revoke an airman certificate of any person who has been convicted of a violation of a state or federal law relating to controlled substances, other than simple possession, if the Administrator determines that the person served as an airman in connection with the violation. It also would require the Administrator to revoke the airman certificate of any person who he determines after notice and a hearing "knowingly served in any capacity as an airman in connection with the transportation by aircraft of any controlled substance" if the transportation is prohibited by state or federal law relating to controlled substances.

While the intent of the section is clearly to require the Administrator to revoke the airman certificate of the pilot or crew member of a plane used in furtherance of a drug offense, it

would fail in this objective if the pilot or airman was not convicted of an offense and if drugs were not actually transported on the aircraft. By way of illustration, as drafted the section would not cover a pilot who knowingly flew a major drug trafficker to the Caribbean for a meeting to arrange a drug deal with a supplier for a shipment at a later date unless the pilot was charged with and convicted of an offense such as conspiracy to import a controlled substance. If, for example, the pilot was granted immunity from prosecution in exchange for his testimony against the major trafficker, his certificate could not be revoked. We would suggest that the FAA Administrator be directed to revoke an airman certificate whenever the holder thereof has been convicted of a controlled substance violation while serving as an airman in connection with such an offense, or whenever the Administrator determines either (1) that the holder has served as an airman in connection with an offense involving the transportation by aircraft of a controlled substance, or (2) that he has served as an airman in furtherance of an offense, such as a conspiracy, involving a violation of a state or federal law relating to a controlled substance.

Mr. Chairman, that concludes my prepared remarks and I would be pleased to answer any questions the Subcommittee may have.