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1.

THE WHITE HOUSE

WASHINGTON

November 1, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Statement of William F. Baxter Regarding the Need for Joint R&D Legislation

OMB has provided us with a copy of testimony Assistant Attorney General William F. Baxter proposes to deliver on November 3 before the Joint Economic Committee concerning joint R&D legislation. Baxter has already testified before the Judiciary Committees of both Houses of Congress on the Administration's proposal in this area, the National Productivity and Innovation Act. This testimony supplements his previous statements on the subject. Baxter's testimony begins by noting how uncertain legal precedents and the existence of treble damages inhibit joint R&D ventures. Since such ventures will become economically more important in the years ahead, Congress should pass those provisions of the National Productivity and Innovation Act which explicitly sanction pro-competitive joint R&D ventures, and eliminate treble damages for antitrust violations based on such ventures.

Baxter's proposed testimony goes on to support the remaining portions of the National Productivity and Innovation Act, which strengthen the licensing and other rights of intellectual property owners and limit the doctrine of misuse as applied to those owners. Here Baxter is more direct in criticizing existing judicial interpretations, arguing that those interpretations are incorrect in viewing intellectual property, such as a patent, as inevitably in conflict with the goals of the antitrust laws.

Baxter's testimony concludes by objecting to pending alternative proposals in Congress, which would specify the structure of permitted joint R&D ventures and provide some oversight by the Government. As Baxter puts it, private enterprise responding to market forces, not Government bureaucrats, will ensure the most productive technological advances. I have reviewed the proposed testimony, and have no objection to it.

Attachment

THE WHITE HOUSE

WASHINGTON

November 1, 1983

MEMORANDUM FOR WILLIAM A. MAXWELL
LEGISLATIVE ANALYST
OFFICE OF MANAGEMENT AND BUDGET

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

SUBJECT: Statement of William F. Baxter Regarding the Need for Joint R&D Legislation

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

FFF:JGR:aea 11/1/83
cc: FFFielding
JGRoberts
Subj
Chron

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Name of Correspondent: William Maxwell

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Subject: Statement of William F. Baxter re: The need for Joint R&D Legislation

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U.S. Department of Justice

Washington, D.C. 20530

DRAFT

STATEMENT

OF

WILLIAM F. BAXTER
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE

JOINT ECONOMIC COMMITTEE

CONCERNING

THE NEED FOR JOINT R&D LEGISLATION

NOVEMBER 3, 1983

I appreciate the opportunity to discuss with the Committee the need for legislation to stimulate joint R&D ventures. The Administration has recently developed a package of reforms, entitled the National Productivity and Innovation Act, which is designed to increase the incentives for private sector R&D of all kinds. I have testified on the Administration's proposal before the Judiciary Committees of both Houses of Congress, and I am providing the members of this Committee with copies of the prepared statement that I presented to the Senate Judiciary Committee last week. That statement describes in detail the Department's views in this area. I would like to focus briefly on three points in my prepared remarks today: the need for reform to remove antitrust impediments to joint R&D; the greater need for reform to remove impediments to the licensing of technology; and the importance of assuring that the reforms implemented by Congress preserve procompetitive flexibility in the design and carrying out of joint R&D.

I understand that the primary purpose of this hearing is to determine whether the antitrust laws should be amended to stimulate joint R&D. The short answer is yes; however, the need for reform arises more from perceptions, or misperceptions, than from the actual state of the law. The problem is the lack of case law concerning the treatment of joint R&D ventures under the antitrust laws.

There are some precedents involving non-R&D joint ventures that can be read as applying a per se prohibition against joint ventures. 1/ Those precedents are rather old. Moreover, other decisions dealing with R&D evince judicial sympathy toward collaborative R&D efforts. 2/ In the only recent case involving the antitrust legality of a joint R&D venture, the court held that the legality of joint R&D ventures was to be judged under a rule of reason and not a per se rule. 3/ In addition, we at the Department of Justice have taken pains to indicate that the antitrust laws are entirely consistent with procompetitive joint R&D. Nevertheless, notwithstanding the Berkey case (the facts of which are admittedly unique) and the Department's efforts, there is little precedent to assure businessmen and their lawyers that the courts will not condemn joint R&D ventures out of hand.

It has been my experience that businessmen judge this lack of precedent--and the uncertainty that it creates--as a significant risk to the formation of joint R&D ventures.

1/ See Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951); United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950).

2/ See, e.g., United States v. Line Material Co., 333 U.S. 287, 310 (1948).

3/ Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 298-304 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980) (the case involved an agreement among Kodak and GTE to develop a "flipflash").

Businessmen fear that after making a substantial investment in a joint R&D venture they will be sued by a disgruntled competitor who was not included in the joint venture. And this risk increases as the success of the joint venture increases.

Moreover, the automatic availability of treble damages exacerbates the risk facing potential joint ventures. Under the antitrust laws, a defendant that is found to have committed a violation is automatically subject to three times the antitrust damage it causes. Not only do treble damages unduly magnify the risk that a court will condemn a procompetitive joint venture, but they also increase the incentives for challenges to a joint R&D venture in the hope of convincing a court that the venture itself or some aspect of it is a per se violation of the antitrust laws.

As a result of this risk, which overly cautious counsel at times overestimate, it appears that some businessmen have refrained from forming joint R&D ventures that would have been procompetitive. There is no way to determine the number of such ventures that have been deterred, but I am convinced that it is large enough to justify legislation.

One must keep in mine that technological changes have made collaborative R&D increasingly important. As the cost and sophistication of R&D grow, the economies that can be obtained from large scale R&D also tend to grow. As a result, it is likely that joint ventures will become increasingly important

to the efficient performance of R&D. Therefore, whatever the magnitude of the adverse deterrent effect of the antitrust risk on joint R&D in the past, it is likely to become even more significant in the future.

While legislation is appropriate to reduce the legal risk facing those considering the formation of joint R&D ventures, I believe that it is even more important to reduce the legal risks that attend the dissemination of new technologies once they have been created. Although joint R&D is becoming increasingly important, it is still the case that a great deal of private sector R&D will not be performed collaboratively even if the law is changed. Moreover, the incentives to make the necessary investment in any sort of R&D depend on the rewards that one can expect from that investment. Those rewards depend on the efficiency and speed with which the resulting technology can be exploited commercially. Similarly, the benefits that society can expect from the technology depend on the owner's ability to disseminate technology. Licensing and the ancillary restrictions frequently used in licensing enable the owners of intellectual property (e.g., patents, copyrights, and trade secrets) to employ the superior ability of other enterprises to develop and market technology more quickly and efficiently. It is therefore crucial that the courts and enforcement agencies be sensitive to the procompetitive benefits of such licensing.

Unfortunately, the courts and the enforcement agencies have all too often been unreasonably hostile to technology licensing. This hostility toward licensing has created not only perceived but also very real risks for those who engage in such licensing. In antitrust cases, the Supreme Court has depicted the patent system as inherently in conflict with antitrust goals and has placed restraints on the ability of patent owners to use their patents in order to avoid the "evils of an expansion of the patent monopoly by private engagements." 4/ One lower court recently stated that the patent grant "is in inevitable tension with the general hostility against monopoly expressed in the antitrust laws. . . . Therefore, courts normally construe patent rights narrowly in deference to the public interest in competition." 5/ While it is not semantically incorrect to characterize patents as "monopolies," it is improper to condemn them automatically as economic monopolies. 6/ Moreover,

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4/ Mercoid Corp. v. Mid-Continent Co., 320 U.S. 661, 665 (1944). See also United States v. Line Material, Inc., 333 U.S. 287 (1948); Ethyl Corp. v. United States, 309 U.S. 436 (1940); Carbice Corp. v. American Patent Development Co., 283 U.S. 27 (1931).

5/ United States v. Studiengesellschaft Kohle, m.b.H., 670 F.2d 1122, 1127 (D.C. Cir. 1981).

6/ See Baxter, "Antitrust Law and the Stimulation of Technological Invention and Innovation," unpublished discussion paper (July 1983), at pp. 37-40.

this hostility has led to the development by the courts of antitrust rules applicable to intellectual property licensing that have inhibited the procompetitive dissemination of technology.

The courts have not been alone in unnecessarily increasing the legal risks associated with intellectual property licensing. During the last decade, the federal antitrust enforcement agencies, particularly the Department of Justice, embraced enforcement policies that were unduly hostile towards intellectual property. Those policies indiscriminately condemned nine licensing practices (the "nine no-nos") as per se violations of the antitrust laws.

The courts and enforcement agencies have begun to take a more rational approach under the antitrust laws to intellectual property licensing. However, this avenue of change is slow, and a substantial risk of unreasoning judicial hostility remains. As with joint R&D, this risk is unnecessarily compounded by automatic treble damages. Some procompetitive licensing therefore surely continues to be deterred, and this adverse legal climate continues to reduce the willingness and ability of the private sector to invest in R&D and to disseminate the fruits of R&D.

The patent and copyright doctrines of misuse also deter procompetitive licensing. Under those doctrines the courts refuse to enforce the valid intellectual property rights of

those who have engaged in "misuse." The term misuse was originally synonymous with licensing practices that violated the antitrust laws. However, over time the courts began to employ per se misuse rules even more rigid than those employed under the antitrust laws. 7/ Moreover, the courts began to employ misuse to invalidate intellectual property on the basis of vague notions of what seemed "unfair" to them. Relying on the misuse doctrine, the courts have even condemned royalties that the judge found to be exorbitant and oppressive. 8/

Because the courts have used the antitrust laws and the misuse doctrines in a way that has intolerably raised the risks for licensing technology, it is essential that antitrust reform designed to remove impediments to private sector R&D address these problems. Dealing exclusively with the relationship of the antitrust laws to joint R&D will not do even half the job. Congress should seize the opportunity provided by its bipartisan recognition of the importance of R&D to a strong economy and do the entire job.

7/ See Baxter, supra n. 7, at nn. 71-74 for examples.

8/ American Photocopy Equipment Co. v. Rovico, Inc., 359 F.2d 745 (7th Cir. 1966). See also Remarks of Roger B. Andewelt before the Patent, Trademark and Copyright Section of the Bar Association for the District of Columbia, "Competition Policy and the Patent Misuse Doctrine" (November 3, 1982), for a detailed description of the misuse doctrine and its development.

However, in doing the job, Congress should be careful only to remove the obstacles currently impeding the private sector's willingness and ability to perform R&D and to disseminate its fruits. Many of bills pending in the Congress do not simply remove the obstacles but rather replace them with other obstacles. As I pointed out in my testimony before the Senate Judiciary Committee, those proposed solutions to the joint R&D problem that depend on government regulation and/or new statutory standards will raise the cost of joint R&D, discourage some procompetitive joint R&D, and encourage some anticompetitive joint R&D.

Congress should not attempt to out-guess the market as to the structure that joint R&D ventures should take. So long as a venture will not harm competition, it should be allowed to take the most efficient form its participants can devise. If, however, the venture either facilitates collusion on current output and prices or reduces the incentives to innovate, it is inappropriate to provide the venture with legal sanctuary from antitrust condemnation. The National Productivity and Innovation Act is designed to facilitate the functioning of the market in the least intrusive manner possible. That bill merely reduces the legal risk that the private sector now faces when performing R&D and exploiting technology. Private enterprise responding to market forces, not government

bureaucrats, will be free to determine the most efficient way to innovate in the myriad of circumstances that will arise throughout our economy.

That concludes my prepared remarks Mr. Chairman. I will be happy to answer any questions the Committee may have.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

November 7, 1983

FOR: FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Statement of J. Paul McGrath re: Toxic Waste Victim Compensation on November 8, 1983

OMB has provided us with a copy of testimony Assistant Attorney General McGrath proposes to deliver tomorrow before the Investigation and Oversight Subcommittee of the House Public Works Committee, concerning toxic waste victim compensation. The testimony does not announce any Administration positions, but simply reviews the composition and progress of the Toxic Torts Working Group, co-chaired by McGrath and Michael Horowitz. McGrath makes four observations:

-- the problem must be confronted in a comprehensive fashion, avoiding ad hoc responses to whatever toxic tort is chic at the moment (whether asbestos, agent orange, uranium poisoning, etc.);

-- any solution should consider not only those suffering from diseases for which a cause has been isolated, but also diseases for which a cause may or may not be discovered in the future;

-- the broader effect of proposed solutions on the legal system must be assessed;

-- causation will likely be the critical issue.

McGrath also warns that care must be taken to avoid the consequences of the black lung program, which ended up costing billions of dollars and expanded into an income distribution program reaching far beyond the original intended beneficiaries.

I have no objections. The testimony simply points out the parameters of debate on this subject without committing to any positions.

Attachment

THE WHITE HOUSE

WASHINGTON

November 7, 1983

MEMORANDUM FOR RON PETERSON
OFFICE OF MANAGEMENT AND BUDGET

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

SUBJECT: Statement of J. Paul McGrath re: Toxic Waste Victim Compensation on November 8, 1983

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

FFF:JGR:ph 11/7/83
cc: FFFielding
JGRoberts
Subject
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5/81

U.S. Department of Justice

Assistant Attorney General
Legislative Affairs

11/2/83

Mr. Fielding:

To coordinate contact:

Ron Peterson, OMB, 395-4700.

Attachment

-3

DRAFT

STATEMENT

OF

J. PAUL McGRATH
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
DEPARTMENT OF JUSTICE

BEFORE

THE

INVESTIGATIONS AND OVERSIGHT SUBCOMMITTEE

OF THE

HOUSE PUBLIC WORKS AND TRANSPORTATION COMMITTEE

CONCERNING

TOXIC WASTE VICTIM COMPENSATION

ON

NOVEMBER 8, 1983

I appreciate having the opportunity to testify on compensation for people harmed by exposure to toxic substances. The issue raised at this hearing is an extremely important one. For the last several decades we have placed a great strain on our tort system to resolve health-related claims, and now questions about the future of this system are being raised on all sides. Many have asked whether our current litigation and claims processes are working efficiently and cost-effectively. They have also asked whether sensible alternative schemes to litigation can be developed, and if they can be developed, whether they can be financed. And social scientists and other thinkers are asking where all this fits into our economic and social priorities.

We realize that the forces at work raise very difficult questions about whether the current system can survive without substantial change. The following are a few of the current trends:

1. The last decade has brought an explosion of knowledge about the causes or supposed causes of cancer and other serious diseases. Today it is possible to point a scientific, or at least a quasi-scientific, finger of suspicion at various substances for literally millions of cases of disease, although difficult questions of causation remain in the bulk of individual cases.

2. The last decade has brought an explosion of litigation, with more and better-financed attorneys and support personnel pointing toward an even-larger flood of litigation in the future.

3. The courts have greatly expanded the rights of claimants, liberalizing traditional rules concerning fault, knowledge, causation and injury.

These and other factors have created unprecedented numbers of claims against companies in many industries, seeking enormous dollar recoveries. In some cases the potential claims greatly exceed the assets of the defendant companies. In addition, it is no secret that the federal government also is faced with enormous potential liabilities in litigation.

All this raises the question whether our current tort and compensation systems can indeed cope. There is concern that these systems will not adequately compensate significantly injured victims of toxic torts. There is concern that defendant companies in some industries may face bankruptcy in unprecedented numbers. There is concern that the public Treasury may be subjected to enormous liability, perhaps diverting resources from other social programs. There is concern that the combined political pressure from all this may result in premature and inappropriate legislative solutions that we and our children may live to regret.

All this has presented this Administration with a host of difficult and unanswered questions which have led us to establish an interagency coordinating mechanism in an effort to do the best job we can to analyze and develop solutions in the area of toxic and environmental torts. This Toxic Torts Working Group is under the co-chairmanship of Michael Horowitz, Counsel to the Director of OMB, and myself, and it includes representatives from many agencies in the Executive Branch. Compensation issues involve many different agencies within the government: HHS because of its experience with administering income maintenance systems and medical care programs; EPA because of its environmental expertise; Labor because of its knowledge of workers compensation systems and occupational diseases; OMB because of its expertise in fiscal and budgetary matters; Justice because of the need for extensive legal analysis and to assess implications posed for the legal system as a whole; Treasury and the Council of Economic Advisors because of the economic considerations and the Office of Science and Technology Policy because of the broad scientific issues involved. The mandate of this group is very broad but relatively specific. We are not concerned with specific regulatory standards or controls in the management of toxic substances. Rather, our principal goal is to coordinate the government's analysis of proposed legislative means of alleviating toxic and environmental tort problems. Our mandate, put most simply, is to pull together the most complete information possible about the problems, to undertake the best

analyses of different possible legisltive solutions and to seek the best results for the country as a whole.

To date, our work is still at a preliminary stage. Different subcommittees of our group have been doing studies on various areas of significance, including analysis of legislation already proposed; studies of the environmental and toxic problems involved; a focus on the litigative realities and the ability of our torts system to handle them; an inquiry into what history teaches us, including the troubling lessons of the black lung program; and a compilation of information on what existing compensation programs are accomplishing. A number of people are involved in this work, and it is proceeding quickly. Even though we are still at a relatively early stage, a few observations can be made which suggest the complexity of this problem.

First, one of the things we recognized at the outset is that this is a broad problem which must be considered, analyzed and addressed in a comprehensive manner. In the past, various areas of toxic and environmental torts or injury have been dealt with on a piecemeal basis. There have been proposals to amend the hazardous waste statutes to deal with injuries from toxic waste sites. There have been separate proposals concerning asbestos-related illnesses, radiation-caused cancers, Agent Orange contamination and uranium mining diseases, to name a few. Some of the proposals do not appropriately recognize the difference between workplace and nonworkplace exposure. For the most part, these proposals have been considered in relative isolation from

each other. We have come to recognize that this kind of disjointed consideration of what are economically, socially and politically related topics makes no sense.

The fact is each day there is a growing recognition of an expanding range of environmental problems which may have potentially injurious effects on individuals and which result in pressure for legislative solutions. Yet adopting fragmented solutions raises problems of fairness to claimants not covered or those denied other benefits because of the resources devoted to particular compensation schemes, as well as issues of society's priorities and the scientific uncertainty regarding the causation of a particular disease. If we were to adopt a governmental solution for some of these problems but not others, disfavored claimants could properly charge that they had been treated unfairly. On the other hand, when we look at the whole range of problems as an amalgam, we recognize that financially and administratively an overall solution raises very extreme resource allocation issues.

A second general point is a further development of the fairness issue I raised earlier. The current push is for special solutions for those individuals suffering from cancer or other maladies where we have isolated or think we may have isolated a cause of the disease. Those victims of diseases, however, are only a fraction of people similarly afflicted. No doubt a high percentage of others suffer from similar diseases, although we may only discover the cause of their disease in the

future or we may never discover it. One might question whether it is fair to have a special compensation scheme for individuals who happen to suffer cancer from an identifiable cause, or one thought to be identifiable, but not for those suffering the identical disease where we have not yet identified the cause. Under the torts system such a result arguably makes equitable sense because the "wrongdoer" will pay. Under many of the schemes proposed as legislative solutions however, there would be no specific or known "wrongdoer" initially footing the bill; rather, society would be funding the relief more broadly through taxation, fees, general revenues or increased product costs.

Third, any answer to these interrelated problems will require us to analyze, question and perhaps make alterations in our fundamental legal institutions and procedures. For example, for many decades the torts system has provided a fairly effective mechanism for compensating victims of environmental hazards, at least in a great number of cases. Recently, however, some have asserted that the torts system is an inefficient and ineffective means of compensating victims or of transferring funds. In support of this assertion, statistics have been compiled which show that a high percentage of the dollars expended in the asbestos cases have been paid not to victims but to lawyers and paralegals and others who are simply part of the compensation system. The statistics referred to may well be accurate, but before reaching too much of a firm conclusion on the basis of them, at least two additional questions should be considered. First, do the high costs of

these cases simply reflect the fact that they are at a relatively early stage? It is a well-established fact that such litigation entails large upfront costs for computerizing documents and other background materials and otherwise preparing to defend massive litigation. Second, are the alternatives that have been proposed substantial improvements over the current situation, when all their costs and benefits are considered?

A fourth point relates to the very difficult issue of causation. The standard of causation will, of course, determine whether the program compensates those who truly deserve compensation. A standard that is too narrow may leave many who deserve compensation uncompensated. A standard that is too broad or too vague will undoubtedly benefit someone, but may not compensate those whom a program is intended to compensate, may benefit many more than is justifiable and may undercompensate a core class of intended beneficiaries. Furthermore, any causation standard that is developed as part of a toxic substances compensation program will significantly affect the standard of causation used in other areas particularly in tort litigation and workers compensation. In addition, we need to ask how we can develop causation standards which do not compromise the integrity of the scientific and medical decisionmaking process - that will not force it into premature and speculative conclusion in a search for false certainty.

There are many other more specific questions that have to be considered in analyzing this issue. For example: what type of

compensation should be awarded - only medical costs and lost earnings or should a program offer the full panoply of tort damages, including compensation for pain and suffering? Should a compensation program be structured as a regulatory tool or should it be used primarily for remedial purposes? How should a compensation program be funded? Should a program be administered on the federal or state level? How should changes in the compensation laws be related to other existing remedies? Should any compensation scheme be built on the tort system or should it be an administrative system with nonadverserial proceedings?

New legislation should be measured against remedies now available. The main bills now before Congress relating to compensation for exposure to toxic substances contain a number of possible alternatives to the current system. They vary in coverage, from bills that would cover workers and non-workers to those that would cover only non-workers. They vary greatly in administrative procedures and remedies, standards for liability, funding mechanisms, exclusivity of other remedies, court jurisdictions and review, and standards of causation. In examining these schemes, we need to answer very specific questions about their relative benefits, their other costs over time, the extent to which they may duplicate presently available remedies, the extent to which they fairly allocate transfer payments in a manner consistent with acceptable societal goals and the extent to which any legislative program can be kept within sensible bounds over the future.

The history of the last several decades teaches us two troubling lessons: compensation schemes have proven very difficult to control, and many times the total costs of such programs have been vastly understated at the time of passage. The terrible object lesson in the toxic and environmental hazard area is the black lung program. The billions of dollars it has cost the taxpayers were not even hinted at by its proponents; indeed, if its true costs had been known from the outset, it is difficult to believe that it would ever have been enacted into law. In addition, the black lung program demonstrates the tendency to add beneficiaries to any income distribution program who seem similarly situated to the original beneficiaries, thus multiplying the program's costs. The cold, hard reality is that whatever genius is used to fashion new legislation, we know there is a dire risk that the original sensible scheme will be turned into an economic monster. That risk creates large budgetary and fiscal dangers. Perhaps even more important, however, in an era of limited resources, it also threatens to reduce our future flexibility to deal with the other problems of our society.

This concern with constraints on our budget makes the creation of a federal cause of action for toxic torts attractive to some as the means for insuring compensation to victims. We should understand that it is not a "free" compensation system; by establishing a legal mechanism for the transfer of resources from one societal group to another, it operates no differently

than a tax or regulatory scheme. Indeed, on the whole it would operate less efficiently than a tax system because of the large transaction costs arising out of litigation. In addition, we should recognize that these cases would further burden an already crowded federal court system. It may satisfy a desire for "fairness", but establishing a private cause of action is not a "free" good.

The Administration is firmly committed to responsible policymaking in this area. Given the extraordinary potential costs and the fundamental changes to our legal system that could be generated by compensation programs, it is imperative that policy not be driven by anecdotal information or vague and unproven assertions of need. the Toxic Tort Working Group is intended to help achieve this goal.

THE WHITE HOUSE

WASHINGTON

November 14, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Proposed Justice Statement on S. 1876, a Bill to Allow Advertising of Any State-Sponsored Lottery, Gift Enterprise, or Similar Scheme

OMB has asked for our views by noon today on the attached testimony, which Deputy Assistant Attorney General Keeney proposes to deliver before the Senate Judiciary Subcommittee on Criminal Law on November 16. The testimony supports S. 1876, a bill that would ease existing restrictions in 18 U.S.C. §§ 1301, 1302, and 1307 on advertisement of state licensed and regulated lotteries. The existing laws were written in the nineteenth century, well before the rise of state sanctioned lotteries. S. 1876 would permit advertising in interstate and foreign commerce of any lottery scheme authorized, licensed, and regulated by state law.

The Department of Justice previously opposed easing federal lottery advertising restrictions, to avoid potential conflicts with the laws of those states in which lotteries are illegal. It is now Justice's view, however, that Bigelow v. Virginia, 421 U.S. 809 (1975) renders existing bans on out-of-state lottery advertisements constitutionally suspect. That decision held that advertisements for abortions to take place in states where abortions are legal could not be banned from appearing in states where abortions and the advertisements themselves were illegal.

I have no objection to the proposed testimony. I do not know if Justice's new position will antagonize religious supporters opposed to gambling on moral grounds. I bet not. If you think that danger does exist, however, I will brief Morton Blackwell on the reasons for Justice's position so that he may be prepared for any calls he might receive.

Attachment

THE WHITE HOUSE

WASHINGTON

November 14, 1983

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

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

SUBJECT: Proposed Justice Statement on S. 1876, a Bill to Allow Advertising of Any State-Sponsored Lottery, Gift Enterprise, or Similar Scheme

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

FFF:JGR:aea 11/14/83
cc: FFFielding
JGRoberts
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Name of Correspondent: James C. Murr

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Subject: Proposed Justice Statement on S. 1876, a bill to allow advertising of any State-sponsored lottery, gift enterprise, or similar scheme

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

SPECIAL

November 9, 1983

LEGISLATIVE REFERRAL MEMORANDUM

TO: LEGISLATIVE LIAISON OFFICER

United States Postal Service

Department of Commerce

SUBJECT: Proposed Justice statement on S. 1876, a bill to allow advertising of any State-sponsored lottery, gift enterprise, or similar scheme.

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

Please provide us with your views no later than

NOON MONDAY, NOVEMBER 14, 1983.

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

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: K. Wilson M. Horowitz F. Fielding

Department of Justice

- 8 1983

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DRAFT

STATEMENT

OF

JOHN C. KEENEY
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE

SUBCOMMITTEE ON CRIMINAL LAW
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

REGARDING

S. 1876

ON

NOVEMBER 16, 1983

I appreciate the opportunity to testify today concerning S. 1876, which would ease the restrictions on advertisement of state licensed and regulated gaming businesses. The Department of Justice supports the provisions of S. 1876.

The federal lottery laws, now sections 1301 and 1302 of Title 18, were originally enacted in the nineteenth century to attempt to prevent the spread of several privately owned and completely unregulated lotteries sanctioned by the legislatures of several states. Foremost among these was the Louisiana lottery.

Unforeseen at the time was the adoption of the lottery by several state governments as a major source of revenue during the 1960's and 1970's. Also unforeseen was that a majority of states would legalize and regulate many forms of lottery to help raise revenue for charitable and other worthy causes.

As a result of the widespread adoption of state-operated lotteries, section 1307 was added to Title 18 in 1975 to exempt those lotteries from the application of sections 1301, 1302 and other relevant sections. Section 1307 was amended in 1976 to allow broadcast advertising in adjacent lottery states and in 1979 to allow export of lottery technology to legal foreign lotteries.

S. 1876 seeks to allow the advertisement in interstate and foreign commerce of any lottery scheme so long as it is authorized, licensed, and regulated by a state acting under

authority of state law. Moreover, subsection (a) of section 1307 is moved up to become subsection (b)(2). The net effect of this latter change is to confine the narrow definition of lottery to subsection (b)--which deals with the shipment of lottery supplies--and apply the generally accepted and broader definition of "lottery" to subsection (a)--which deals with advertising.

Thus, S. 1876 would seem well suited for its stated purpose. Lotteries (that is all gaming schemes which involve consideration, a prize and decision by lot or chance) could be advertised in interstate commerce and by mail under the bill, so long as the lotteries were authorized, licensed, and regulated by a state. The lotteries which could be advertised would include roulette and wheel of fortune, among others.

Mr. Chairman, the Department of Justice has previously opposed expansion of advertising relative to lotteries. This stand was taken primarily to prevent conflict with the laws of states where lotteries are illegal as well as those which authorize lotteries but restrict the advertising permitted with respect thereto. In 1975, however, the United States Supreme Court decided the case of Bigelow v. Virginia, 421 U.S. 809, and, in our opinion, cast serious doubt upon enforceability of the lottery statutes as written.

Bigelow dealt with an advertisement placed in a publication circulated in Charlottesville, Virginia, which contained information on abortions available in the State of New York. At the time of publication, the Supreme Court's decision legalizing abortions had not been made and abortions were still unlawful in Virginia. Abortions had been legalized in New York.

Virginia, however, went further and prohibited publication of any information about abortions. The Charlottesville publisher was prosecuted and found guilty under this provision of Virginia law.

The case finally reached the United States Supreme Court, which held that the commercial speech represented by this advertising is protected by the First Amendment of the Constitution of the United States. It decided, further, that the purveyor of a business or service legal in the state in which it is carried on is free to advertise that business or service in any other state, even if the business or service would be illegal if carried on in the state in which the advertisement appears.

While it is true that Bigelow dealt with restraint under state law, we are not aware that the Constitution grants the Federal Government any greater power to restrain publication of information. Thus, we have serious doubts about the ability of the Federal Government to enforce the provisions of Chapter 61 of Title 18 as they apply to advertisement of lotteries legal in the state in which they are conducted.

At the same time, the Department of Justice believes that the state authorizing the lottery retains the power to force the lottery operators to conform to certain advertising standards as part of the state's regulatory scheme. In aid of such regulatory schemes, it may be advisable to confine advertising in interstate commerce to that authorized by the licensing and regulating state.

This ends my prepared testimony. I would be glad to answer any questions.

THE WHITE HOUSE

WASHINGTON

November 14, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Statement of Mark Richard: Oversight Hearings on the Federal Regulation of Lobbying Act (November 15, 1983)

Deputy Assistant Attorney General Richard proposes to deliver the attached statement before the Senate Committee on Government Operations tomorrow. The statement presents the Department's views on inadequacies in the Lobbying Act, 2 U.S.C. §§ 261-270, which requires registration of lobbyists and disclosure of certain information in connection with their activities. The statement contends that the Act is ineffective, inadequate, and unenforceable, largely because of restrictions on the Act imposed by the Supreme Court in United States v. Harriss, 347 U.S. 612 (1954). That decision held that the Act only applied to lobbyists who receive contributions from others, who directly and personally communicate with members of Congress (not staff) for the purpose of influencing legislation, and whose activities in substantial part are directed toward influencing legislation.

The testimony does not favor proposals to shift administrative responsibilities under the Act from the Clerk of the House and the Secretary of the Senate, and it points out that, largely because of the Harriss decision, the solution to any perceived problems in this area does not lie in increased enforcement efforts. On page 5, the sentence beginning on line 8 notes that the Clerk of the House and the Secretary of the Senate are mere repositories of records under the Lobbying Act "without any affirmative responsibility to investigate possible violations of the Act or to refer complaints to the Department." The tone and context in which this sentence appears suggest that the Congressional officers should have such responsibility. I recommend deleting "to investigate possible violations of the Act or", since I do not think we should support giving responsibility to investigate violations of federal law to Congressional officers. I have no other objections.

Attachment

To John W

Date 11/14 Time 4:35

WHILE YOU WERE OUT

M Brenden Bluma

of

Phone 3802

Area Code Number Extension

TELEPHONED	X	PLEASE CALL	
CALLED TO SEE YOU		WILL CALL AGAIN	
WANTS TO SEE YOU		URGENT	

RETURNED YOUR CALL X

Message called w/ change — still awaiting FFF

Operator

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23-020

THE WHITE HOUSE

WASHINGTON

November 14, 1983

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ANALYST
OFFICE OF MANAGEMENT AND BUDGET

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

SUBJECT: Statement of Mark Richard: Oversight Hearings on the Federal Regulation of Lobbying Act (November 15, 1983)

Counsel's Office has reviewed the above-referenced testimony. We recommend deleting "to investigate possible violations of the Act or" on page 5, lines 10-11. As written, the sentence implies that it would be better if the Clerk of the House and the Secretary of the Senate did have an affirmative responsibility to investigate violations of the Act. We consider it inappropriate for Congressional officers to be given authority to investigate violations of federal law. That is the responsibility of the Federal Bureau of Investigation and other entities in the Department of Justice and Executive branch. We have no objection to the Clerk of the House and Secretary of the Senate being directed to refer complaints or questions to the Department, but investigation goes too far.

FFF:JGR:aea 11/14/83
cc: FFFielding
JGRoberts
Subj
Chron

ID # _____ CU

WHITE HOUSE
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Name of Correspondent: Braden Blum

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

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WHLabs	ORIGINATOR	83/11/12			1 1
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Statement of

Mark Richard
Deputy Assistant Attorney General

Before the

COMMITTEE ON GOVERNMENT OPERATIONS

UNITED STATES SENATE

November 15, 1983

OVERSIGHT HEARINGS ON THE FEDERAL
REGULATION OF LOBBYING ACT

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to present the views of the Department of Justice on the Federal Regulation of Lobbying Act (2 U.S.C. §§261-70), and the role of lobbying in the United States from the perspective of the constitutionality and enforceability of efforts to disclose information about it.

The Department of Justice supports an improved, strengthened and clarified lobbying law. However, as Mr. Justice Jackson noted in his dissent from United States v. Harriss, 347 U.S. 612, 636, (1954): "to reach the evils of lobbying without cutting into the constitutional right of petition is a difficult and delicate task for which the Court's action today gives little guidance." This suggests that an appropriate legislative solution will be difficult to achieve. As the involvement of government in American society has increased, so have the private resources invested in the political process, including an increase in the number of persons and organizations whose voices seek to be heard on legislation. As the cost of such participation increases, some groups and persons cease to be effectively represented.

The lobbying law ideally would provide sufficient information regarding significant lobbying activities without

sacrificing or burdening constitutional safeguards in the area. By itself it cannot remedy the problem of those that are not represented.

THE 1946 LOBBYING ACT

Enacted in 1946, the current Lobbying Act's objective was to require public disclosure of lobbyists, their expenditures, and their financial supporters. As stated by the Supreme Court, "[The Act] wants only to know who is being hired, who is putting up the money, and how much." Harriss, supra at 625.

To achieve its objectives, the Act by its terms requires certain individuals and organizations who receive compensation or other consideration for attempting to influence federal legislation to register with the Clerk of the House of Representatives and the Secretary of the Senate. Such persons must file quarterly statements disclosing the identity of any person or organization they represent, the source of their funding, the expenditures made for lobbying purposes, and the legislative objectives they seek to achieve. The Act excludes from its coverage newspapers and other regularly published periodicals which urge the defeat or passage of legislation so long as they do not engage in lobbying activities outside the regular course of business. A violation of the Act is punishable by a fine, imprisonment, and a three year prohibition against any lobbying activity.

The constitutionality of the Act was upheld in United States v. Harriss, supra. The Court rejected the claims that the criminal sanctions of the Act violated the First Amendment and that the Act was unconstitutionally vague. However, the Court interpreted the Act so restrictively that it lost most of its vitality. First, it concluded that the Act applied only to lobbyists who receive contributions from others, thereby excluding those who expend their own money to influence legislation. Second, the Court held that the Act applied only to lobbyists who directly and personally communicate with members of Congress for the purpose of influencing legislation. Third, the Court construed the Act to apply only to persons whose activities in substantial part are directed toward influencing legislation, and only to contributions made principally to influence legislation.

With this background, I would like to address some of the specific concerns raised in Senator Durenberger's letter to the Attorney General inviting our testimony today. The Department has not changed its opinion that the 1946 Lobbying Act is ineffective, inadequate and unenforceable. Ineffective because it does not achieve its intended result; inadequate because the disclosures that result are not commensurate with the lobbying actually taking place; and unenforceable because the focus of the Harriss Court on contributions does not comport with the reality of modern lobbying practices.

In this connection, Harriss has enabled many persons to escape from the Act's provisions because (1) their lobbying activities were not their principal activity, (2) their communications were with Congressional staff members rather than with Congressmen, or (3) they did not receive contributions for the primary purpose of influencing legislation. The Act thus covers only a small portion of all lobbying activity.

The Department does not share the view that changes in the nature of lobbying in recent years establish the compelling government interest to legislate in this area. The Harriss Court itself recognized in 1946 that

> Present day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This is the evil which the Lobbying Act was designed to help prevent. Harriss supra, at 625.

Instead, increasing numbers of lobbyists, faced with no legal obligation to register under the Act as construed in Harriss, neglect to register or do so inadequately. The compelling government interest thus becomes more obvious.

The Department is not convinced that shifting the administering functions from the Clerk of the House and the

Secretary of the Senate to some other agency would necessarily better support the Act. There are advantages to having the records on Capitol Hill for the convenience of the Congress, the public, and the lobbyists. Presumably, Congressional employees would also be more sensitive than most to the nuances of lobbying practices, and would be in a better position to detect violations once the underlying questions of coverage were faced. However, to date these officers have served merely as repositories of the records without any affirmative responsibility to investigate possible violations of the Act or to refer compliants to the Department. Since neither the Clerk nor the Secretary routinely monitors violations of the Act, they make few referrals to the Department. Consequently, relatively few prosecutions have been brought. This is the situation Congress should examine.

The Department is not hopeful of strengthening the enforcement of the Act through administrative action, if by that is meant an increase in executive enforcement efforts; and while we agree that each house of Congress could, by rules applicable to its membership, increase the amount of information available regarding the activities of lobbyists, this would, strictly speaking, be outside the scope of the 1946 Act.

During the period between 1947 and the rendering of the Harriss decision in 1954, the Department made a fairly vigorous attempt to enforce the Act through criminal prosecution, without much success. During this period, approximately 50 investigations were initiated, which resulted in the prosecution of four distinct cases[1/] (some of which involved several defendants). In all of these cases the indictments were dismissed for failure to state a cause of action, including the Harriss indictment which ultimately was dismissed for failure to state a cause of action under the Act as the Court construed it. Since that time, the Department has shifted the focus of its efforts from prosecution to prompting compliance. The violations which have recently been referred to the Department are prompted by ignorance of the Act, or lack of understanding of its scope. It has not been the policy of the Department to utilize criminal sanctions to remedy such conduct.

Similarly, we would expect internal administrative Congressional rules to result in an increase in referrals of violations, but few if any prosecutable cases and little increase in compliance with the Act. The reason is that the

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1/ United States v. Slaughter, 89 F. Supp. 205 (D.D.C. 1950); United States v. U.S. Savings and Loan League, 9 F.R.D. 450 (D.D.C. 1949); United States v. Patterson, 206 F.2d 433 (D.C. Cir. 1953) and United States v. Harriss, supra.

lobbying business is not in the main conducted in such a way that registration is required under the Harriss opinion.

CONCLUSION

Mr. Chairman, the Department welcomes the opportunity to work with the Congress toward curing the defects in the present Lobbying Act, bearing in mind the careful balance to be drawn between First Amendment rights on the one hand, and the importance of protecting the integrity of the legislative process from special interests seeking favored treatment on the other. The Department, of course, stands ready to provide further assistance to the Committee in studying and correcting this problem.