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WITHDRAWAL SHEET

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DOC NO	Doc Type	Document Description	No of Pages	Doc Date	Restrictions
1	MEMO	ROBERTS TO FIELDING RE REMOVAL FROM PROMOTION LIST	1	8/22/1983	B6

564

Freedom of Information Act - [5 U.S.C. 552(b)]

B-1 National security classified information [(b)(1) of the FOIA]
B-2 Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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B-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
B-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
B-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

E.O. 13233

C. Closed in accordance with restrictions contained in donor's deed of gift.

THE WHITE HOUSE

WASHINGTON

August 22, 1983

MEMORANDUM FOR PAUL B. THOMPSON
LEGAL COUNSEL
NATIONAL SECURITY COUNCIL

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Presidential Introductory Statement for book containing major speeches delivered by Ambassador Max Kampelman at the Madrid CSCE Follow-up Meeting

Counsel's Office has reviewed the proposal that the President write an introduction to the collection of speeches by Ambassador Kampelman to be published by Freedom House. In the past, the President has generally adhered to a policy of declining such requests to write introductions. Any departure from this policy will make it more difficult to deny similar requests from other groups in the future.

Leonard Sussman, Executive Director of Freedom House, has advised us that the book will be priced only to cover costs, that all proceeds will go to Freedom House (a 501(c)(3) organization), and that the book will not be commercially marketed but rather made available to Freedom House supporters. Both the State Department and the National Security Council recommend approval of a Presidential introduction as in the national interest. In light of all the foregoing, we will defer to the judgment of the State Department and NSC should they determine that foreign policy considerations warrant a departure from our general policy.

Sussman has advised us that his organization needs the text of our introduction by close of business today.

FFF:JGR:aea 8/22/83

cc: FFFielding
JGRoberts
Subject
Chron

THE WHITE HOUSE

WASHINGTON

August 22, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Letter to the President from Chairman of the Interstate Commerce Commission -- Reese Taylor

Richard Darman has asked for our views on a letter to the President from ICC Chairman, Reese Taylor. On July 29, Taylor wrote the President, advocating additional deregulation of the surface transportation industry. The Administration has three such proposals pending, covering freight carrier, water carrier, and freight forwarder aspects, respectively. Action on the proposals has stalled, however, and Taylor's letter urges a renewed commitment to the package.

Our office is not qualified to comment on the merits of the deregulation proposals. I suspect the letter was routed to us because of the ICC's independent status. Nothing about that status, however, precludes full consideration of the views of the ICC Chairman concerning pending legislation. The attached memorandum to Darman declines to take a view on the merits, but notes that there are no bars to consideration of Taylor's letter.

Attachment

THE WHITE HOUSE

WASHINGTON

August 22, 1983

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING /S/
COUNSEL TO THE PRESIDENT

SUBJECT: Letter to the President from Chairman of the Interstate Commerce Commission -- Reese Taylor

Counsel's Office has reviewed the letter to the President from Reese Taylor, Chairman of the Interstate Commerce Commission. Although the ICC is an independent regulatory agency, nothing about that status precludes its Chairman from expressing his views on legislative proposals to the President, nor is the President at all constrained in considering those views. Our office has no view on whether the Administration should or should not proceed with deregulation of the surface transportation industries.

Attachment

FFF:JGR:aea 8/22/83

cc: FFFielding
JGRoberts
Subj.
Chron

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 22, 1983

TO: DIANNA G. HOLLAND

FROM: JOHN G. ROBERTS

SUBJECT: Appointment of Mayor V. M. Bremberg, Roger De Weese, and Clifton Caldwell to the Advisory Council on Historic Preservation

I have reviewed the Personal Data Statements submitted by the above-referenced individuals, who are being considered for appointment to the Advisory Council on Historic Preservation. The President is authorized to make such appointments pursuant to 16 U.S.C. § 470i.

All three individuals have demonstrated interest and expertise in the area of historic preservation. Mayor Bremberg may be appointed under 16 U.S.C. § 470i(a)(6) ("one mayor appointed by the President"), while Caldwell and De Weese qualify as experts in historic preservation under 16 U.S.C. § 470i(a)(9). Caldwell has served on Texas historic preservation commissions and De Weese is a landscape architect who has been active in several historic preservation projects.

The Personal Data Statements reveal no associations or holdings that would preclude these appointments.

Attachments

THE WHITE HOUSE

WASHINGTON

August 22, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Department of Justice Report on Subcommittee Markup of S. 645, the "Courts Improvements Act of 1983"

OMB has sent us the Justice Department's proposed report to Senator Thurmond on S. 645, the so-called "Court Improvements Act of 1983." This omnibus bill has cleared the Subcommittee on Courts and is now before the Judiciary Committee. The Administration has previously supported Title I (abolition of mandatory jurisdiction of the Supreme Court) and Title II (abolition of civil priorities), and has previously opposed Title IV (creation of a State Justice Institute). These positions are reiterated in the proposed letter, and I have no objection to them.

Title III would direct OPM to conduct a study of judicial benefits. The original bill increased judicial survivors annuities, but the subcommittee switched to the general study approach. The letter takes no position, stating that it is "most appropriate" for the Executive to defer to the Congress and Judiciary on such matters. I do not know why that is so. The Executive has a critical interest in attracting candidates for the bench, and should assume a larger role in improving judicial benefits. Title III in its present version only calls for a study, however, so I see no need to object to Justice's approach at this time.

Title V would create a bipartisan Federal Courts Study Commission, with representatives from each of the three branches and the state judicial systems, to sit for ten years. Justice supports such a commission - long a pet proposal of the Chief Justice - but supports reducing its life-span to three years. My own view is that the one thing that is not needed in this area is more study, but it is always difficult to resist the call for more research and evaluation. I see no reason not to defer to Justice on the desirability of a commission. The commission would be purely advisory and accordingly the fact that some members would be appointed by the Chief Justice and congressional leaders presents no difficulty.

Title VII would exempt juidicial salaries from standard administrative adjustments, requiring specific legislation to effect any increase. This proposal is a reaction to United States v. Will, 449 U.S. 200 (1980), in which the Supreme Court ruled that increases in judicial salaries which automatically went into effect under general provisions could not be rolled back as with other federal employee salaries. You will recall that existing legislation calls for substantial annual increases under comparability provisions unless Congress acts before a specified date to reduce the increase. Congress invariably rolls back such increases, but, with its typical slippage, usually not until a day or two after they go into effect. In Will, the Justices - in a rare display of unanimity - discharged the distasteful but profitable task of ruling that the increases for federal judicial salaries could not be revoked, citing the judicial compensation clause of the Constitution. Avoiding such back-door increases in judicial salaries strikes me as a good government reform, not because the salaries should not be augmented but because such action should not be taken through inadvertance with constitutional ramifications. Justice opposes the provision, however, on the ground that it will make judicial salary increases harder to obtain. Congress has already taken action in appropriations bills to avoid the Will decision, so the matter is not of sufficient consequence to justify an objection.

Title IX amends the judicial disqualification statute to provide that disqualification not occur until after certification in class action suits. Justice's letter points out that while some reform may be desirable, to address particular problems which have arisen, the proposal as drafted is too broad. I have no objection.

Title VII, perhaps the silliest of the provisions of the bill, would create a new office with the Anglomaniacal title of "Chancellor of the United States." The proposal is another of the Chief Justice's pet projects, so it is not surprising that the new American Chancellor would be appointed by and serve at the pleasure of the Chief, and have the duty of assisting the Chief in the performance of his non-judicial functions. The Chief would select the Chancellor from among Courts of Appeals judges. Justice essentially supports the proposal, suggesting only a few minor modifications. The bill does not specify whether the Chancellor will wear a powdered wig.

Any time a new office is created, and appointment to that office is not by the President, there is an appointments clause issue. Art. II, § 2. The appointments clause does permit appointment of inferior officers by "the Courts of Law", but this would not cover appointment by the Chief Justice alone. The question, therefore, is whether the Chancellor is an "Officer of the United States", who must

accordingly be appointed by the President, with the advice and consent of the Senate. I have no difficulty concluding that he is not, since his duties are purely internal matters of judicial administration, perhaps equivalent to the Clerk of the House. The title "Chancellor of the United States" suggests something more, but that appears to be a function of the pretentiousness of the title rather than the substance of the job. I see no need to create the office of "Chancellor", but also no serious reason to oppose it if it will make the Chief Justice happy.

Title VI of the bill would establish the Intercircuit Tribunal, composed of nine regular judges and four alternates, chosen by the Supreme Court for three-year terms from among active and senior circuit judges. The Tribunal would receive cases referred by the Supreme Court for five years, and sit until it had disposed of all cases referred to it. You are familiar with this proposal, and my objections to it. (See attached memoranda.) Justice supports the proposal, but its support is contingent on the provisional character of the Tribunal and the pursuit of reforms to attack the underlying causes of the Supreme Court's alleged caseload problem. Justice also favors limiting the Tribunal's lifespan to three years. It is my understanding that this modified support position is the result of the deliberations conducted under the auspices of the Cabinet Council. This approach is a significant improvement over Justice's original position, although I would still prefer outright opposition. It is, however, probably not fruitful to continue to pursue our objections at this point. We should discuss.

Attachments

JGR:aea 8/22/83

cc: Subj.
Chron

THE WHITE HOUSE

WASHINGTON

April 19, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Department of Justice Recommendations on Creation of an Intercircuit Tribunal

Jonathan Rose has transmitted for your consideration the conclusions of the Department of Justice with respect to the Chief Justice's proposal to create an intercircuit tribunal between the Courts of Appeals and the Supreme Court. Shortly after the Chief Justice announced his proposal the Attorney General formed a committee within the Department, chaired by Paul Bator and composed of most of the Assistant Attorneys General, to formulate a Department position. The committee has now completed its work, and issued a ten-page report.

In a marked departure from previous Department positions on national court of appeals proposals, the committee recommended that the Department support creation of a temporary (five year) intercircuit tribunal to hear cases referred by the Supreme Court. The decisions of the tribunal would be nationally binding, subject to further review by the Supreme Court. The committee proposed that the tribunal be composed of 7 or 9 court of appeals judges, rather than, as currently proposed in the pending bills, shifting panels of 5 or 7 drawn from a pool of 28 court of appeals judges. The committee also recommended that the Chief Justice select the judges to sit on the new court, subject to approval by the Supreme Court. The current bills provide for selection of the judges by Circuit Councils. Assistant Attorney General for Civil Rights Reynolds dissented from the committee report and filed a statement detailing his reservations.

As I explained in my February 10 memorandum to you on this subject, I think creation of a new intercircuit tribunal is exceedingly ill-advised. Nothing in the Department of Justice committee report dissuades me from this view. The President we serve has long campaigned against government bureaucracy and the excessive role of the federal courts, and yet the Department committee would have his Administration support creation of an additional bureaucratic structure to permit the federal courts to do more than they already do. What is particularly offensive from the unique

perspective of our office is the committee recommendation that judges be appointed to the new tribunal in a manner that not only constitutes an unprecedented infringement on the President's appointment powers, but would go far in undermining the significance of our prior judicial appointments.

The basic reason given by the committee to support creation of an intercircuit tribunal is the excessive workload on the Supreme Court. While some of the tales of woe emanating from the Court are enough to bring tears to the eyes, it is true that only Supreme Court Justices and schoolchildren are expected to and do take the entire summer off. Even assuming that the Justices have reached the limit of their capacity, it strikes me as misguided to take action to permit them to do more. There are practical limits on the capacity of the Justices, and those limits are a significant check preventing the Court from usurping even more of the prerogatives of the other branches. The generally-accepted notion that the Court can only hear roughly 150 cases each term gives the same sense of reassurance as the adjournment of the Court in July, when we know that the Constitution is safe for the summer. Creating a tribunal to relieve the Court of some cases -- with the result that the Court will have the opportunity to fill the gap with new cases -- augments the power of the judicial branch, ineluctably at the expense of the executive branch. In this respect it is highly significant to note that the committee conceded that the executive branch is <u>not</u> adversely affected by the Court's workload: "The Department has a high success rate with its petitions for certiorari; and no Division reports substantial dissatisfaction with its ability to get conflicts resolved."

It is also far from certain that the proposed tribunal will in fact reduce the workload of the Court. As noted above, it seems probable (to me, at least) that if the new tribunal relieves the Court of 40 cases, the Court's eventual response will be to take 40 new cases it otherwise would not have to fill the void. Even aside from this, the new scheme will increase the workload by (1) making initial review of a petition more complicated and time-consuming, since a new option -- referral to the tribunal -- must be considered; (2) requiring review of the decisions of the new tribunal; and (3) increasing filings as lawyers perceive increased opportunities for review after decision by the Court of Appeals. In his memorandum to you, Rose states that "Only actual experience with such a tribunal can take the arguments for and against an enlarged appellate capacity at the national level out of the realm of conjecture and provide a

concrete evidentiary basis for assessing this approach." This is total abdication of reason, tantamount to arguing that the only way to determine if a bridge can hold a 10-ton truck is to drive one across it. And the critical assumption -- that this is only a five-year experiment -- strikes me as unfounded. Once the tribunal becomes a part of the federal judicial bureaucracy there will be no chance to abolish it, particularly if, as I strongly suspect, the Supreme Court promptly fills its caseload to capacity even with the aid of the tribunal.

The most objectionable aspect of the committee's report is its recommendation that the Chief Justice select the members of the new court, subject to approval by the Supreme Court. The power of the tribunal -- to reverse Courts of Appeals and provide nationally-binding legal interpretations -- is significantly different from the power currently exercised by sitting Court of Appeals judges. When those judges were appointed and confirmed it was not envisioned that they would exercise such power. The proposal would create essentially new and powerful judicial positions, and the President should not willingly yield authority to appoint the members of what would become the Nation's second most powerful court. The "precedents" cited by the committee -- appointment of district judges to sit on circuit courts, and selection of members of specialized judicial panels -- strike me as qualitatively different from the proposal under consideration. Such "precedents" do not, in any event, explain why we should sacrifice the Constitutionally-based appointment power of the President.

Further, requiring approval of the Supreme Court for appointments ensures that the new tribunal will be either bland or polarized, depending on whether the Court splits the seats (a Bork for Rehnquist, a Skelly Wright for Marshal) or proceeds by consensus (I cannot immediately think of an example agreeable to both Rehnquist and Marshal). In either case the new court will assuredly not represent the President's judicial philosophy -- and will have the authority to reverse decisions from courts to which the President has been able to make several appointments that do reflect his judicial philosophy. Under the committee proposal a Carter-appointed judge (there definitely will have to be some on the new court) could write a nationally-binding opinion reversing an opinion by Bork, Winter, Posner, or Scalia -- something that cannot happen now.

The Justice Department must soon respond to inquiries from the Senate subcommittee considering the pertinent bills, and Rose accordingly would appreciate "a prompt White House response." I await your guidance on what type of response to prepare.

THE WHITE HOUSE

WASHINGTON

February 10, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Chief Justice's Proposals

The Chief Justice devoted his Annual Report on the State of the Judiciary to the problem of the caseload of the Supreme Court, a problem highlighted by several of the Justices over the course of last year. The Chief Justice proposed two steps to address and redress this problem: creation of "an independent Congressionally authorized body appointed by the three Branches of Government" to develop long-term remedies, and the immediate creation of a special temporary panel of Circuit Judges to hear cases referred to it by the Supreme Court -- typically cases involving conflicts between the Courts of Appeals.

It is difficult to develop compelling arguments either for or against the proposal to create another commission to study problems of the judiciary. The Freund and Hruska committees are generally recognized to have made valuable contributions to the study of our judicial system -- but few of their recommendations have been adopted. I suspect that there has been enough study of judicial problems and possible remedies, but certainly would not want to oppose a modest proposal for more study emanating from the Chief Justice.

The more significant afflatus from the Chief Justice is his proposal for immediate creation of a temporary court between the Courts of Appeals and the Supreme Court, to decide cases involving inter-circuit conflicts referred to it by the Supreme Court. The Chief would appoint 26 circuit judges -- two from each circuit -- to sit on the court in panels of seven or nine. The Chief estimates that this would relieve the Supreme Court of 35 to 50 of its roughly 140 cases argued each term. The Supreme Court would retain certiorari review of decisions of the new court.

It is not at all clear, however, that the new court would actually reduce the Court's workload as envisioned by the Chief. The initial review of cases from the Courts of Appeals would become more complicated and time-consuming. Justices would have to decide not simply whether to grant or

deny certioriari, but whether to grant, deny, or refer to the new court. Cases on certiorari from the new court would be an entirely new burden, and a significant one, since denials of certiorari of decisions from the new court will be far more significant as a precedential matter than denials of cases from the various circuits. The existence of a new opportunity for review can also be expected to have the perverse effect of increasing Supreme Court filings: lawyers who now recognize that they have little chance for Supreme Court review may file for the opportunity of review by the new court.

Judge Henry Friendly has argued that any sort of new court between the Courts of Appeals and the Supreme Court would undermine the morale of circuit judges. At a time when low salaries make it difficult to attract the ablest candidates for the circuit bench, I do not think this objection should be lightly dismissed. Others have argued that conflict in the circuits is not really a pressing problem, but rather a healthy means by which the law develops. A new court might even increase conflict by adding another voice to the discordant chorus of judicial interpretation, in the course of resolving precise questions.

The proposal to have the Chief Justice select the members of the new court is also problematic. While the Chief can be expected to choose judges generally acceptable to us, liberal members of Congress, the courts, and the bar are likely to object. In addition, as lawyers for the Executive, we should scrupulously guard the President's appointment powers. While the Chief routinely appoints sitting judges to specialized panels, the new court would be qualitatively different than those panels, and its members would have significantly greater powers than regular circuit judges.

My own view is that creation of a new tier of judicial review is a terrible idea. The Supreme Court to a large extent (and, if mandatory jurisdiction is abolished, as proposed by the Chief and the Administration, completely) controls its own workload, in terms of arguments and opinions. The fault lies with the Justices themselves, who unnecessarily take too many cases and issue opinions so confusing that they often do not even resolve the question presented. If the Justices truly think they are overworked, the cure lies close at hand. For example, giving coherence to Fourth Amendment jurisprudence by adopting the "good faith" standard, and abdicating the role of fourth or fifth guesser in death penalty cases, would eliminate about a half-dozen argued cases from the Court's docket each term.

So long as the Court views itself as ultimately responsible for governing all aspects of our society, it will, understandably, be overworked. A new court will not solve this problem.

THE WHITE HOUSE

WASHINGTON

August 23, 1983

MEMORANDUM FOR ARAM BAKSHIAN, JR.
DEPUTY ASSISTANT TO THE PRESIDENT
AND DIRECTOR OF SPEECHWRITING

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT /S/

SUBJECT: Draft Presidential Remarks: Fundraiser for Congressman Lagomarsino

Counsel's Office has reviewed the above-referenced remarks, and finds no objection to them from a legal perspective. We assume that the 26 percent figure appearing at page 2, line 19 is a typographical error.

FFF:JGR:aea 8/23/83

cc: Richard Darman
Fred F. Fielding
John G. Roberts
Subject
Chron

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 23, 1983

TO: FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Draft Presidential Remarks: Fundraiser for Congressman Lagomarsino

Richard Darman has requested that comments on the above-referenced remarks be sent directly to Aram Bakshian by 6:00 p.m. today. The remarks review Lagomarsino's career and discuss Administration policies in the area of the economy and Central America. The remarks conclude with a reference to the "disgraceful" redistricting in California. The President has made similar comments concerning the redistricting in the past, and I do not consider his evaluation objectionable in a political speech.

Attachments

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 23, 1983

TO: FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Invitation to Craig Fuller to participate in French-American Foundation's Meeting in St-Paul-de-Vence, France Sept. 30 - Oct. 3

Craig Fuller has asked if there is any problem with his accepting an invitation from the French-American Foundation (FAF) to attend a meeting of young leaders sponsored by FAF in St-Paul-de-Vence, France, September 30 - October 3. FAF would reimburse Fuller for travel and other expenses.

FAF is a 501(c)(3) organization whose purpose is to strengthen relations between France and the United States. The meeting to which Fuller has been invited will consist of discussion of foreign, economic, social, and cultural policy issues of concern to both countries. Such discussion should probably be viewed as within the scope of Fuller's official duties. Payment of expenses by FAF is nonetheless permissible under 5 U.S.C. § 4111, which provides that "payment of travel, subsistence, and other expenses incident to attendance at meetings, may be made to and accepted by an employee,...if the...payments are made by [a 501(c)(3) organization]." Acceptance of expenses from FAF does not create an actual or apparent conflict of interest with Fuller's duties. A memorandum noting no legal objection to Fuller's acceptance of the invitation is attached.

Attachment

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 23, 1983

TO: DIANNA G. HOLLAND

FROM: JOHN G. ROBERTS

SUBJECT: Appointment of Nell Kuonen to the Klamath River Compact Commission

H.P. was gracious enough to deposit this item on my desk upon his departure. Mrs. Kuonen is to be appointed to be United States Representative to the Klamath River Compact Commission. The Compact, established by Public Law 85-222, is intended to promote cooperation between California and Oregon in the development and use of the Klamath River Basin. Among other things, the Compact establishes rules for acquisition of water rights.

Article IX of the Compact created the Commission, consisting of representatives from California, Oregon, and the federal government. The federal representative has no vote, and action may be taken by the Commission only if the California and Oregon representatives concur. Congress agreed to a federal representative in section 5 of P.L. 85-222.

Mrs. Kuonen has been active in Klamath County, Oregon affairs for some time, and has demonstrated interest in the subject matter of the Commission. I have reviewed her Personal Data Statement and see nothing that would preclude her appointment. Mrs. Kuonen does have economic interests in the Klamath River Basin, but they do not represent an inherent conflict, particularly in light of the non-voting status of the federal representative.

Attachment

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 23, 1983

TO: DIANNA G. HOLLAND

FROM: JOHN G. ROBERTS

SUBJECT: Draft $1,500 Benefactor Letter for the Princess Grace Foundation

This item was handled orally by Richard Hauser and myself. Mr. Hauser advised Joe Canzeri by telephone on August 23 that our office would interpose no objection to the letters, provided that the first sentence of the last paragraph of the Founding Patron letter was deleted. Canzeri agreed to delete the offending sentence.

Attachment

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 23, 1983

TO: FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Presidential Seal Inquiry

Mary B. Lhowe, Education Editor of The Journal-News (West Nyack, N.Y.) has written the Photo Office to request a copy of the Presidential Seal. Lhowe states that she plans to use the Seal as an illustration to accompany an article on federal financing of education, to run on August 28. The Photo Office referred the question to me.

Lhowe's contemplated use is permitted by subsection 1(f) of Executive Order 11649. I have prepared a letter for your signature advising Lhowe that the permitted uses of the Seal are limited by law, and that she may only use the Seal for the purpose she specified.

Attachments

WITHDRAWAL SHEET

Ronald Reagan Library

Collection Name	*Withdrawer*
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1	MEMO ROBERTS TO FIELDING RE REMOVAL FROM PROMOTION LIST	1	8/22/1983	B6	564

Freedom of Information Act - [5 U.S.C. 552(b)]

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E.O. 13233

C. Closed in accordance with restrictions contained in donor's deed of gift.

THE WHITE HOUSE

WASHINGTON

August 24, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Civil Aeronautics Board Decisions in Miami - Madrid - Tel Aviv and Vacation Air, Inc.

Richard Darman's office has asked for comments by 2:00 p.m. today on the above-referenced CAB decisions, which were submitted for Presidential review as required by § 801(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1461(a). Under this section, the President may disapprove, solely on the basis of foreign relations or national defense considerations, CAB actions involving either foreign air carriers or domestic carriers involved in foreign air transportation. If the President wishes to disapprove such CAB actions, he must do so within sixty days of submission (in these cases, by September 5 and 19, respectively).

The orders here have been reviewed by the appropriate departments and agencies, following the procedures established by Executive Order No. 11920 (1976). OMB recommends that the President not disapprove, and reports that the NSC and the Departments of State, Defense, Justice and Transportation have not identified any foreign relations or national defense reasons for disapproval. Since these orders involve domestic carriers, judicial review is theoretically available. Hence, the proposed letter from the President to the CAB Chairman prepared by OMB includes the standard sentence designed to preserve availability of judicial review, as contemplated by the Executive Order for cases involving domestic airlines.

The Miami - Madrid - Tel Aviv order authorizes service by Air Florida on the specified route; the Vacation Air order authorizes charter service by that carrier. My review confirms OMB's description of these orders as "routine, noncontroversial matters."

A memorandum for Darman is attached for your review and signature.

Attachment

THE WHITE HOUSE

WASHINGTON

August 24, 1983

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING /S/
COUNSEL TO THE PRESIDENT

SUBJECT: Civil Aeronautics Board Decisions in Miami - Madrid - Tel Aviv and Vacation Air, Inc.

Our office has reviewed the above-referenced CAB decisions and related materials and has no legal objection to the procedure that was followed with respect to Presidential review of such decisions under 49 U.S.C. § 1461(a).

We also have no legal objection to OMB's recommendation that the President not disapprove these orders or to the substance of the letter from the President to the CAB Chairman prepared by OMB.

FFF:JGR:aea 8/24/83

cc: FFFielding
JGRoberts
Subj.
Chron

THE WHITE HOUSE

WASHINGTON

August 24, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Proposed Response to Congressman Levitas' Letter of July 19, 1983, to the President Concerning Legislative Vetoes

Robert McConnell has now responded to our memorandum of August 4, which requested prompt guidance from the Justice Department concerning a response to Congressman Levitas' proposal to convene a Conference on Power Sharing to explore the ramifications of the legislative veto decisions. Justice suggests that the Deputy Attorney General reply to Levitas, and that the reply generally reject the call for such a conference.

I agree with Justice's view that there is no need to involve the President personally in this dispute (particularly in light of the President's position as a candidate in favor of the legislative veto, an irony Levitas noted in his letter). I also agree with the substance of Justice's response, although I question the need to suggest the availability of the Administrative Conference as an alternative to Levitas' proposal.

Attachments

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 24, 1983

TO: JOHN COONEY
GENERAL COUNSEL
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS

SUBJECT: Levitas proposal

As we discussed. I would like to let Justice know that we agree by close of business, so let me know as soon as possible if you have any comments or edits.

Many thanks!

Attachment

THE WHITE HOUSE

WASHINGTON

August 25, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Request to Use Quotation from the President on Book Jacket

Lt. General (Ret.) Daniel O. Graham, associated with High Frontier, wrote a book on the subject of defense against nuclear attack and dedicated it to the President. Graham sent the President an autographed copy, and the President, on June 3, replied with a gracious note applauding Graham and the High Frontier project. Graham's publisher, Devin Adair Company, would like to use a quotation from the letter on the book jacket and "will do so unless your office has an objection."

I doubt that we can legally prevent Devin Adair from accurately quoting the President's letter on the book jacket. Such a quotation could, however, be construed by the public as an endorsement by the President of the commercially-marketed book. Our standard policy is not to approve any use of the President's name in a manner that could be so construed. Devin Adair publishes conservative books, and is generally very supportive of the Administration, so it may be willing to forego the quotation if we object.

Attachment

THE WHITE HOUSE

WASHINGTON

August 25, 1983

MEMORANDUM FOR FRED F. FIELDING

THRU: RICHARD A. HAUSER

FROM: JOHN G. ROBERTS

SUBJECT: Release of Nixon White House Special Files

The Presidential Recordings and Materials Preservation Act, note following 44 U.S.C. § 2107 (Tab A), was enacted in 1974 to control disposition of the Nixon White House papers. The Act directed the Administrator of GSA to obtain possession and control of all Nixon White House papers, § 101, and to promulgate regulations (Tab B) governing public access to those papers, § 104. The regulations were to take into account several enumerated factors including "the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials," § 104(a)(5).

President Nixon challenged the constitutionality of the Act on separation of powers, executive privilege, Presidential privilege, privacy, and bill of attainder grounds. A highly-splintered Supreme Court (seven separate opinions) ultimately upheld the Act against all these challenges. Of particular interest in the present context, the Court rejected the separation of powers and privilege claims on the ground that the Act and regulations recognize the need to permit interested parties "to assert any legally or constitutionally based right or privilege" barring disclosure. § 104(a)(5); 41 C.F.R. § 105-63.401-1(a). See Nixon v. Administrator of General Services, 433 U.S. 425, 444, 450 (1977).

On August 12, 1983, by notice published in the Federal Register, 48 F.R. 36655 (Tab C), the Archivist of the United States announced his intention to make available to the public 628 cubic feet of material (1.5 million pages) from the Special Files Unit of the Nixon White House files. According to the notice, the Special Files Unit "was established in 1972 to provide a central storage location for materials perceived as sensitive." Pursuant to the regulations, 41 C.F.R. § 105-63.401(b), copies of this notice were sent to the incumbent President,

President Nixon, and former staff members reasonably identifiable as responsible for creating documents in the file. The regulations provide and the notice specifies that any party has 30 days to object to disclosure and "notify the Administrator in writing of the claimed right or privilege and the specific materials to which it relates." 41 C.F.R. § 105-63.401-1(a). Objections must be received before September 12.

I contacted the Archivist, Robert Warner, and the Director of Presidential Libraries, David Peterson. Both admitted to having no idea how we were to evaluate the 1.5 million pages of documents about to be released. The Act, regulations, and particularly the Supreme Court decision, however, place considerable emphasis on the incumbent President's opportunity to do so as mitigating any privilege problems presented by the Act. With the concurrence of Mr. Hauser, I will be meeting with David Peterson and other Archives officials at the site of the Nixon files in Alexandria tomorrow morning. An attorney from OLC familiar with document work, Mark Rotenberg, will join me. Our purpose is to obtain some sense of what screening process the documents have been through, how they are indexed, and - to the extent possible - precisely what they are.

The Archives alerted Nixon's attorney, Stan Mortenson, of our inquiry, and Mortenson called me to ascertain our position. I told him we had no position yet but were simply trying to determine whether we had a role in the whole process and what it should be, and trying to get a better sense of what the files contained. Mortenson indicated he had no objection to our meeting with the archivists and discussing their screening process, and generally what the files contained. I suggested we would not at this point need to see the actual files, so he concluded that he would not have to confront the issue of whether to grant us permission to do so. (I avoided any discussion of whether such permission was necessary.)

Attachments

THE WHITE HOUSE

WASHINGTON

August 26, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: DOJ proposed report on H.R. 1968, a bill to provide greater discretion to the Supreme Court in the selection of cases for review

OMB has provided us with a copy of the proposed Justice Department report on H.R. 1968, a bill that would largely eliminate the mandatory appellate jurisdiction of the Supreme Court. This bill, which would ease the caseload problem by eliminating the need for the Court to decide mandatory appeals of little broader significance, has long been supported by the Administration. It has actually passed both Houses at different times. Justice's proposed report reiterates Administration support, and attaches past testimony on the subject.

Attachment

THE WHITE HOUSE

WASHINGTON

August 26, 1983

MEMORANDUM FOR DIANNA G. HOLLAND

FROM: JOHN G. ROBERTS

SUBJECT: Appointment of James Clayburn La Force, Jr., Midge Decter, Sandra Smoley, George Gordon Graham, Donna Carlson West, John Douglas Driggs, Richard L. Berkley, Edward J. King, John M. Perkins, Erma Davis, and Betsy Brian Rollins to the President's Task Force on Food Assistance

The above-named individuals are to be appointed to the President's Task Force on Food Assistance. The intention to establish such a task force has been announced, see 19 Weekly Compilation of Presidential Documents 1086 (August 2, 1983), but the executive order creating the task force has yet to be signed, pending clearance of the prospective appointees. The draft executive order, prepared by Peter Rusthoven, provides that the task force shall be composed of no more than fifteen persons who are not full-time federal employees. The task force is to examine federal programs intended to render food assistance to the needy.

I have reviewed the Personal Data Statements submitted by the individuals listed above, and see nothing that would preclude their appointments. Several of the prospective appointees, such as Rollins, Driggs, and Graham, are active in food relief projects or research of one sort or another, but I do not view such activity as presenting an inevitable conflict with a review of federal programs in the area. The prospective membership of the task force has been criticized in media accounts as unbalanced. It is difficult to determine the validity of this charge from their Personal Data Statements, since they typically do not include the appointees' views on the merits. The newspaper account was also based on an incomplete list of prospective members.

I have not yet received completed forms from Kenneth W. Clarkson, W.R. Poage, and J.P. Bolduc.

Attachment

Critics See Reagan Food Panel Bias Against Welfare

By Bill Peterson
Washington Post Staff Writer

Supporters of federal food programs accused President Reagan yesterday of stacking a new study commission on hunger with conservatives and outspoken opponents of welfare and anti-hunger programs.

None of the eight persons reportedly selected for the commission "has a track record in support of federal food assistance," and four have records opposing such aid, said Robert Greenstein, who headed the Agriculture Department's Food and Nutrition Service during the Carter administration.

"This appears to be a commission set up to exonerate Reagan policies in these programs, and it may even recommend further budget cuts," added Greenstein, director of the Center on Budget and Policy Priorities, a nonprofit research group.

Reagan is expected to formally announce the members of the Task Force on Food Assistance shortly, but White House officials have confirmed the names of eight prospective members.

One is economist Kenneth Clarkson. As associate director of the Office of Management and Budget for human resources for a year until last April, he helped fashion an administration budget that called for cutting the food stamp program by $1 billion and child nutrition programs by $300 million a year.

Clarkson, in a 1975 book, called the food stamp program a failure and suggested several minimum-cost diets, including one 3,000-calorie-a-day diet of wheat and pancake flour, cabbage, spinach and pork liver.

Nancy Amidei, director of the Food Research and Action Center, said Clarkson's appointment was symbolic of the administration's attitude toward hunger.

"This is the same administration that said ketchup was a vegetable, so we shouldn't be surprised if it appoints someone who thinks hungry people should live on a diet of pigs' liver, pancake flour and cabbage," said Amidei, a deputy assistant secretary in the Carter administration's Health and Human Services Department.

Another expected appointee, Dr. George Graham of Johns Hopkins University, wrote a paper under contract to OMB in 1981 that the Reagan adminstration used to justify efforts to cut the women-infants-children feeding program (WIC).

He has also said, in testimony before the Senate Agriculture Committee, that revelations of hunger and malnutrition in 1968 "were gross distortions of the facts."

The two Democrats asked to serve on the panel, former Massachusetts governor Edward J. King and former House Agriculture Committee chairman W.R. (Bob) Poage of Texas, have opposed welfare or food programs. Poage declined to serve on the commission. Others expected to be named are: J. Clayburn LaForce Jr., dean UCLA's school of management; John Driggs, Republican former mayor of Phoenix; Sandra Smolley, a Republican member of the Sacramento County Board of Supervisors; John Perkins, a Mississippi clergyman; and Betsy Rollins, director of a Durham, N.C., soup kitchen, whose name Sen. Jesse Helms (R-N.C.) advanced.

Perkins, the only black in the group, wrote a 1976 book calling the welfare system "one of the most wasteful and destructive institutions created in recent history."

Driggs is board chairman of Second Harvest, a group that last year distributed 30 million tons of food to 45 food banks around the country. At its convention last May it passed a resolution calling on Reagan and Congress to "provide adequate funding to support food stamps, WIC and other federal feeding programs."

Yesterday Driggs said, "I don't come to the commission with a fixed position on federal programs."

THE WHITE HOUSE

WASHINGTON

August 26, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Release of Nixon Special White House Files

As indicated in my previous memorandum on this subject, I met this morning with David Peterson, Director of Presidential Libraries, and Jim Hastings, Chief of the Nixon Files Project. I was accompanied by Mark Rotenberg of the Office of Legal Counsel. Peterson and Hastings explained that the 1.5 million documents scheduled for release on September 26 were the first batch of papers to be released under the Presidential Recordings and Materials Preservation Act and the regulations promulgated pursuant to that Act. The Special Files Unit was set up by the Nixon White House in 1972 to include what were perceived to be sensitive materials. Files were included in the Special Files Unit retroactively, so the Special Files Unit includes material from the beginning of the Nixon Presidency.

The screening process by which the Archivist determined which materials should be restricted from public access was the result of a settlement agreement between GSA and Nixon in 1979. The Archivist restricted from public access documents in the following categories:

a) material not available to the public pursuant to agency policy or statute (e.g., grand jury material, names of Secret Service agents or discussion of Secret Service methods),

b) National Security material or other classified documents,

c) material which would interfere with the right to a fair trial (Hastings indicated that no such material had been located),

d) material the release of which would constitute an invasion of personal privacy (the most frequently invoked restriction),

e) trade secrets,

f) investigative information that would reveal sources, investigative methods, or interfere with an ongoing investigation.

As is evident from the foregoing list, the Archivist did not screen the documents for deliberative materials. Hastings also advised that he exercised some discretion to determine that classified material was improperly classified, and such material is scheduled to be released to the public. The indices and finding aids for the documents are of absolutely no assistance in determining if any executive privilege materials are scheduled to be released to the public. The indices do little more than list chronologically the broad type of document found in a particular file. For example, the indices tell us that container #3 contains material in the President's handwriting dated October 16 through October 31, 1969. The material is not further described.

I see no conceivable way, and neither Peterson nor Hastings were able to suggest any, for us to complete a document by document review prior to September 12. Nor, in light of the nature of the indices, is there any way for us to focus our search on any particular subset of the documents likely to contain executive privilege material. (A possible exception to this is review of material considered by the President personally, although that alone constitutes 69 cubic feet of textual material.) In addition to determining our own position with respect to the documents, we will doubtless be called upon to take a position with respect to claims that will be raised by the former President and former staff members. We should discuss as soon as possible.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 29, 1983

TO: RICHARD A. HAUSER

FROM: JOHN G. ROBERTS

SUBJECT: President's Radio Address of August 20: 650 Convictions Claim

According to Lt. Col. Stephen Luster, Executive Assistant to the Defense Department Inspector General, the 650 convictions figure is drawn from the last three semi-annual reports filed with Congress by the Defense IG, and is accurate. Anyone who is interested may obtain copies of the reports from Mary Jane Calaise, Assistant Inspector General for Management (phone: 695-9568).

Luster emphasized that the convictions referred to are not those obtained by the new joint Defense - Justice anti-fraud unit. The President did not say they were in his remarks, although the juxtaposition of the two sentences may have led some listeners to make that connection.

Attachment

the one that exposed these abuses -- abuses that had been going on for years. It was Defense Secretary Cap Weinberger's people -- his auditors and inspectors -- who ordered the audits in the first place and conducted the investigations. We're the ones who formed a special unit to prosecute defense-related fraud cases. And in just an 18-month period, the Defense Department has obtained 650 convictions. That's something I thought you deserved to know.

'Til next week, thanks for listening and God bless you.

THE WHITE HOUSE

WASHINGTON

August 29, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Justice's views on S. 1287, a bill to authorize appropriations for the Public Buildings Service of the General Services Administration for fiscal year 1984

The Department of Justice proposes to advise Chairman Howard of the House Committee on Public Works that two provisions of the above-referenced bill are unconstitutional. The provisions would require the concurrence of the Senate and House Public Works Committees before certain funds were obligated by GSA and before GSA selected the new building to house the International Trade Commission. Justice's letter correctly points out that such "committee vetoes" are clearly unconstitutional under INS v. Chadha.

Attachment

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 29, 1983

TO: RICHARD A. HAUSER

FROM: JOHN G. ROBERTS

SUBJECT: S. 645 - Courts Improvement Act of 1983

I discussed the latest version of Justice's proposed report on S. 645 with Mr. Fielding earlier this morning. (The report was analyzed in my memorandum of August 22, a copy of which is attached.) Mr. Fielding concluded that we should reiterate our philosophic objection to the Intercircuit Tribunal, and a memorandum doing so is attached for your review and signature.

Attachments

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 29, 1983

TO: DIANNA G. HOLLAND

FROM: JOHN G. ROBERTS

SUBJECT: Appointment of John D. Saxon to the President's Commission on White House Fellowships

The President is authorized to appoint members of the President's Commission on White House Fellowships by Executive Order 11183, as amended. Mr. Saxon was named a White House Fellow by President Carter in 1978, and served as a Special Assistant to Vice President Mondale. He currently serves as a counsel to the Senate Select Committee on Ethics. Senator Heflin (D-Alabama) is Vice Chairman of that committee, and Saxon was active in Heflin's 1978 campaign.

I have reviewed Saxon's Personal Data Statement, and see no conflict of interest problems that would preclude his appointment.

Attachment

THE WHITE HOUSE

WASHINGTON

August 29, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Letter to the President regarding transportation of illegal drugs into Allegheny County, Pennsylvania (Grand Jury investigation summary attached)

James B. Lees, Assistant District Attorney from Pittsburgh, has written the President to advise him of the results of a report recently filed by an Allegheny County grand jury. The grand jury was investigating organized crime and drug trafficking. It focused on trafficking at the Pittsburgh airport, and concluded, *inter alia*, that the federal government was directing no resources to stopping domestic drug transportation (as opposed to importation).

The Justice Department should handle the response on the merits. I have drafted a transmittal memorandum, and an acknowledgment letter to Lees.

Attachments

THE WHITE HOUSE

WASHINGTON

August 30, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Letter from Larry Smith to Jack Sparks

Jack Sparks, Chairman of the Board of Whirlpool, called John Stiner of Virginia Knauer's office to complain about a letter he had received from one Larry Smith. Sparks suggested that the letter be reviewed by our office, and Stiner forwarded it to me.

Smith's letter is extremely offensive and suggests Smith has exploitable "contacts" within the Administration, which he is willing to put to work for clients for $1,000 per day, plus expenses. As evidence of his clout, Smith appends a May 8, 1981, letter from Senator Laxalt to Mr. Deaver, advising that Justin Dart asked for a "photo opportunity" for Smith.

I do not know who Smith is, nor do I think it matters. I have prepared an appropriately stern letter to Smith, and one to Sparks advising him of our action.

Attachments

THE WHITE HOUSE

WASHINGTON

August 30, 1983

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS

SUBJECT: Letter to James Baker Regarding Iranian Jewish Cases Pending Before the Immigration and Naturalization Service

Rabbi Sherer, President of an organization of Orthodox Jews, has written the Attorney General urging him to provide some system of expeditious review of asylum claims by Iranian Jews. Rabbi Lubinsky, Government Affairs Director of the organization, wrote Mr. Baker, enclosing a copy of the Sherer letter, and Mr. Baker has referred the correspondence to us. When I inherited this matter from H.P., I called the Justice Department for a copy of the Attorney General's response to Sherer. Justice could not find any response. Presumably the letter was referred to INS and lost forever. I recommend a formal transmittal to ensure that any reply to Lubinsky is consistent with Justice's reply to Sherer. Such a transmittal will also afford Justice an opportunity to reply to Sherer, if they have in fact lost his original letter.

Attachments

THE WHITE HOUSE

WASHINGTON

August 30, 1983

MEMORANDUM FOR DIANNA G. HOLLAND

FROM: JOHN G. ROBERTS

SUBJECT: Appointments of Willa Ann Johnson and Maudine R. Cooper to the President's Commission on White House Fellowships

I have reviewed the Personal Data Statements submitted by Mesdames Johnson and Cooper for appointment to the President's Commission on White House Fellowships. The Commission was established by Executive Order 11183, as amended. The President is authorized to appoint to the Commission "outstanding citizens from the fields of public affairs, education, the sciences, the professions, other fields of private endeavor, and the Government service." Both Johnson, a Senior Vice President of the Heritage Foundation, and Cooper, Vice President of the National Urban League, would seem to qualify. (This morning's Post carried a story that Cooper would be nominated by Mayor Barry to be the Director of the D.C. Office of Human Rights. I see no way in which this would affect her appointment to the Commission.)

Neither Johnson's nor Cooper's PDS revealed any conflicts that would preclude their appointments. I would point out, however, that Cooper has been a virulent critic of the Administration's civil rights policies. Those in favor of this Presidential appointment for Ms. Cooper should consider whether such an honor will give added credibility to her highly critical charges.

Attachment

THE WHITE HOUSE

WASHINGTON

August 30, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Election Improprieties Surrounding Robert G. Spencer, in Youngstown, Ohio

Mrs. Margaret Spencer has written you concerning alleged vote fraud that cost her son, Robert, the Democratic Party nomination for mayor of Youngstown. Robert Spencer lost the bitterly-fought primary by 94 votes. Mrs. Spencer, enclosing newspaper clippings to substantiate her charges, contends that the Democratic "machine", with ties to organized crime, resorted to illegal tactics to defeat Robert.

I have prepared a memorandum transmitting this correspondence to the Justice Department. I do not recommend any reply from you to Mrs. Spencer advising her of this referral, since such a reply could easily be misinterpreted by an over-zealous mother, and announced to the media, as the commencement of a Justice Department investigation.

Attachments

THE WHITE HOUSE

WASHINGTON

August 30, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Freedom of Information Act Request of Professor Athan Theoharis Regarding Clyde Tolson File

Professor Athan Theoharis of Marquette University filed an FOIA request with the FBI for documents concerning former FBI Associate Director Tolson. A June 27, 1969, memorandum from the President was found in the files, and the Bureau has asked for our views on its release. The memorandum reflects the President's decision to establish an action task force on narcotics, marijuana, and dangerous drugs. I see no reason to withhold the memorandum. It is not pre-decisional, but rather announces to specified Cabinet officers the President's final decision.

Attachment

THE WHITE HOUSE

WASHINGTON

August 31, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Remarks of Stuart M. Statler Before the Kenna Club: "Much Ado About Legislative Veto"

Stuart Statler, a member of the Consumer Products Safety Commission, has favored you with a copy of his recent address concerning the effect of the Chadha decision. The address contains much with which you will disagree, and one glaring error. Statler indicates he agrees with the Court's decision, but then supports the proposed Agency Accountability Act of 1983. In describing that act on page 8, Statler notes that under it there would be a general "report and wait" period of 30 days, and a committee of either House could delay rules an additional 60 days by reporting out a joint resolution. Statler seems unaware that the latter provision would itself be unconstitutional under Chadha, since it would give legal effect (delaying rules for 60 days) to action taken by a committee rather than by both Houses with presentment to the President.

Statler criticizes the Levitas proposal to require affirmative legislation before any regulation could go into effect, and his critique is sound. He goes on, however, to suggest that Congress could respond to Chadha by taking away certain executive branch controls over "independent" administrative agencies, such as OMB's budget proposal authority and the authority of the Justice Department to represent the agencies in court. Statler then runs far afield and proposes various solutions to the EPA contempt controversy, including letting Congress sue to enforce subpoenas in federal court, fining agency heads who decline to turn over documents, and automatically invoking a special prosecutor. There is so much wrong with so much of what Statler suggests that it is probably best simply to acknowledge receipt of his speech and tell him you look forward to reading it.

Attachment

THE WHITE HOUSE

WASHINGTON

August 31, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Legislative Veto/Coal Leases

Craig Fuller has alerted us to the possibility of a legislative veto fight concerning Secretary Watts' coal leasing program. I have advised the Justice Department working group, which was already aware of the issue and actively working on it in any event. I will raise the question again at the next scheduled meeting of the working group, September 8, and keep you advised of any developments.

No response to Fuller or other immediate action by our office is necessary.

Attachment

THE WHITE HOUSE

WASHINGTON

August 31, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Article on Legislative Acquiescence as a Tool of Statutory Interpretation: An Affront to the Constitution, Logic, and Common Sense

Bruce Fein has asked for our views on a draft article he has authored criticizing the doctrine of legislative acquiescence as a tool for statutory interpretation. The article reflects both the strengths and weaknesses of Bruce's crystalline logic: it is clear and forceful but somewhat brittle in its inflexibility.

When invoking the doctrine of legislative acquiescence, a court confronted with a question of statutory interpretation gives weight to what Congresses subsequent to the enacting Congress have said on the question, or accords significance to the fact that subsequent Congresses have been aware of certain interpretations, by courts or agencies, and have not taken action to overturn these interpretations. Fein persuasively argues that according weight to the views of subsequent Congresses permits those Congresses, in effect, to legislate without adhering to the Constitutional formula for legislation, including, most significantly, passage by both Houses and presentment to the President. Fein stresses the incompatability of the doctrine of legislative acquiescence with the Court's recent pronouncements in Chadha.

While I will not feign objectivity on the point, I do have a strong objection to Fein's citation of Justice Rehnquist's opinion for the Court in Dames & Moore v. Regan, 453 U.S. 654 (1981), as an example of the offensive doctrine of legislative acquiescence. Dames & Moore, the Iranian assets case, considered the constitutionality of an exercise of executive power within the framework of the analysis announced by Justice Jackson in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)(concurring opinion). As noted by Justice Rehnquist, that analysis turns in large measure upon a consideration of whether the challenged action by the President in the uncertain area of concurrent authority with Congress was taken with Congressional acquiescence and approval or in the face of Congressional

opposition. Reliance on evidence of Congressional acquiescence in such a context is a far cry from reliance on such acquiescence as evidence of legislative intent on particular issues of statutory interpretation. Unless Fein is willing to take on Jackson's time-tested analysis in the Steel Seizure case, Dames & Moore should not be included in Fein's rouges' gallery of examples.

I have attached a memorandum for your review and signature. If you are reluctant to become involved, I will be happy to respond directly.

Attachments