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
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.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

November 7, 1983

FOR: FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Draft Proclamation:
National Christmas Seal Month

Dodie Livingston has asked for comments by 3:00 p.m. today on the above-referenced draft proclamation, which proclaims this month as National Christmas Seal Month. The proclamation, authorized and requested by S.J. Res. 188, has been approved by OMB. It reviews the impact of the various lung diseases and the work of the American Lung Association -- the Christmas Seal people -- in combatting the diseases. I have no legal objections. The draft is over-long, but Dodie Livingston plans to edit it.

Attachment

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

November 7, 1983

FOR: DODIE LIVINGSTON
SPECIAL ASSISTANT TO THE PRESIDENT
DIRECTOR, SPECIAL PRESIDENTIAL MESSAGES

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Draft Proclamation:
National Christmas Seal Month

Counsel's Office has reviewed the above-referenced draft proclamation and finds no objection to it from a legal perspective. We agree that the draft is too lengthy and should be shortened.

THE WHITE HOUSE

WASHINGTON

November 8, 1983

FOR: FRED F. FIELDING

FROM: JOHN G. ROBERTS

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

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

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

THE WHITE HOUSE

WASHINGTON

November 8, 1983

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

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

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

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

THE WHITE HOUSE

WASHINGTON

November 8, 1983

FOR: FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Draft Memorandum to Selected Departments and Agencies re the Interagency Committee on Women's Business Enterprise

Richard Darman has asked for comments by c.o.b. November 9 on the above-referenced draft memorandum. The memorandum, prepared by Becky Norton Dunlop, asks the appropriate department and agency heads to designate an individual to serve on the reactivated Interagency Committee on Women's Business Enterprise. This Committee, established by Executive Order 12138 (May 18, 1979)(copy attached), had become inactive, but the President announced his intention to reactivate it last May, originally naming Bay Buchanan as the new chairperson. The purpose of the Committee is to ensure and monitor implementation of the Executive Order, which mandates "affirmative action" to promote women's business enterprise.

You will recall that when we were consulted on this question (one-half hour before the announcement), we expressed reservations in light of the affirmative action language in the Carter executive order, including language supporting the acceptability of numerical set-asides. We did not block the announcement on this ground, however, because the affirmative action language was vague enought to fit (albeit uncomfortably) within this Administration's definiton of affirmative action, and because the Executive Order directed all departments and agencies to consult with the Department of Justice concerning what sorts of actions would be appropriate. We raised the question with the Justice Department (Civil Rights Division), and they had no objection to reactivating the Committee.

Buchanan's tenure as chairperson was short-lived, because of the requirement that those serving on the Committee be government employees. Dunlop was named to succeed Buchanan, and Nancy Risque and Ann Wrobleski have been named as representatives of the Executive Office of the President. The proposed memorandum asks agency heads to designate their representatives and to cooperate with the Committee. It

also states "I expect the heads of all departments and agencies to support this goal through federal programming which provides equitable opportunities for women business owners." This could be taken by some to justify quotas, but since it is phrased in terms of "opportunities," I have no objection.

A draft is attached for your signature, noting that we have no legal objection to the proposed memorandum.

THE WHITE HOUSE

WASHINGTON

November 8, 1983

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

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Draft Memorandum to Selected Departments and Agencies re the Interagency Committee on Women's Business Enterprise

Counsel's Office has reviewed the above-referenced draft memorandum, and finds no objection to it from a legal perspective. In the last sentences of the fifth and sixth paragraphs, however, "which" should be "that."

THE WHITE HOUSE

WASHINGTON

November 9, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Statement of John Keeney Regarding Credit Card and Computer Fraud H.R. 3570 and H.R. 3181 on November 10, 1983

Deputy Assistant Attorney General John Keeney proposes to deliver the attached testimony before the House Judiciary Subcommittee on Crime on November 10. Keeney's testimony discusses two bills, H.R. 3570 and H.R. 3181, which provide penalties for credit and debit card counterfeiting and other related fraud. H.R. 3570 also provides penalties for anyone who "uses a computer with intent to execute a scheme to defraud."

The testimony expresses strong support for the portions of both bills dealing with crimes involving credit and debit cards. Like other testimony delivered on behalf of the Administration on this subject, this statement suggests various amendments to the bill to correct problems caused by judicial decisions, such as the fact that illegal use of a credit card number, as opposed to the card itself, is not covered. The testimony also suggests that the provisions dealing with computer fraud be severed from the legislation, so that Justice and other agencies have more time to study possible solutions to the problem. I have reviewed the testimony, and find no objections to it.

Attachment

THE WHITE HOUSE

WASHINGTON

November 9, 1983

MEMORANDUM FOR GREGORY JONES
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Statement of John Keeney Regarding Credit Card and Computer Fraud H.R. 3570 and H.R. 3181 on November 10, 1983

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

FFF:JGR:aea 11/9/83
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 10, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

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

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

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

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

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
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
Subj
Chron

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

THE WHITE HOUSE

WASHINGTON

November 14, 1983

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ANALYST
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
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

THE WHITE HOUSE

WASHINGTON

November 14, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Letter to Mr. Baker Requesting the President's Sponsorship of the Naturalization of His Family as U.S. Citizens

William B. Marrash, an emigre from Lebanon, has written Mr. Baker to seek the President's help in obtaining naturalization for himself and members of his family. Mr. Marrash and his family were admitted to the United States in 1976, but they have not been able to accumulate the requisite period of residence for naturalization because Mr. Marrash has been working in London for G.D. Searle & Co. Indeed, Mr. Marrash prefaces his letter to Baker by noting that he works for the company run by one of Baker's predecessors, Donald Rumsfeld. Attached to the letter to Baker were copies of letters to various Congressmen, the President, and the Vice President, as well as various biographical materials concerning Marrash and his family.

Marrash's letter appears well-intentioned and sincere, but the White House should not become involved in any way in the processing of naturalization requests. I have prepared a memorandum referring the entire package to the INS General Counsel for whatever action and direct response may be appropriate. I assume that response will, among other things, advise Marrash that the President cannot grant citizenship by decree.

Attachment

THE WHITE HOUSE

WASHINGTON

November 14, 1983

MEMORANDUM FOR MAURICE C. INMAN, JR.
GENERAL COUNSEL
IMMIGRATION AND NATURALIZATION SERVICE

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Letter to Mr. Baker Requesting the President's Sponsorship of the Naturalization of His Family as U.S. Citizens

The attached materials are referred to you for direct reply and whatever action may be appropriate. We seek no favorable treatment for Mr. Marrash and ask only that his request be processed or handled in the same manner as other similar requests.

Many thanks.

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

THE WHITE HOUSE

WASHINGTON

November 14, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Anonymous Allegations Regarding ICC and FHA Administration Employee's Use of Government Cars for Personal Business

You will recall that Mr. Baker received an anonymous letter alleging misuse of government vehicles by FHA and ICC officials in New England. On October 25 I prepared two separate memoranda referring the allegations to James H. Burnley IV, General Counsel at Transportation, and John H. Broadley, General Counsel at the ICC, both of which you signed on the same day. On October 27 we received a reply from Broadley noting he had referred the matter to the appropriate ICC office; Burnley has now replied that he referred the matter to the Transportation IG. On the tracking sheet for the Burnley reply you asked: "Why didn't we send to ICC?" Answer: we did. Copies of the ICC correspondence are attached.

As with the Broadley reply, I do not think a response is necessary or appropriate to the reply from Burnley. Both replies simply advise us of the action taken and do not call for any sort of response.

Attachment

THE WHITE HOUSE

WASHINGTON

November 15, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Suggestion that Retired Supreme Court Justices be Eligible to Fill Vacant Seats on the Supreme Court (Article From Baltimore's "Daily Record")

Jay L. Spiegel has written, enclosing a copy of an article he wrote for Baltimore's Daily Record. The article points out the danger that the Supreme Court, with several aging members, may find itself short-handed for an extended period of time in the near future. With recusals, this could result in the absence of a quorum of six Justices (see 28 U.S.C. § 1) for numerous cases. Spiegel proposes a statute be enacted authorizing retired Justices to "fill in" until an ailing member of the Supreme Court is well or a vacancy filled.

There is already a fascinating but little-known statutory procedure for dealing with the problem of the absence of a quorum of the Supreme Court. Under 28 U.S.C. § 2109, cases brought to the Supreme Court by direct appeal from a district court that cannot be heard due to the absence of a quorum are to be remitted, by order of the Chief Justice, to the court of appeals for the circuit containing the district court. That court shall hear and finally decide the case either en banc or by a panel consisting of the three most senior circuit judges, as the order directs. In all other cases brought before the Supreme Court that cannot be heard due to the absence of a quorum, if a majority of the Justices qualified to sit determine that the case cannot be heard in the next ensuing term, the case shall be affirmed by order of the Supreme Court, and the affirmance shall have the same effect as affirmance by an equally divided court.

This latter procedure is the answer to the riddle of how a case can be affirmed by the Supreme Court when five qualified Justices believe it should be reversed: if the five wanting to reverse the case are the only ones qualified to sit, and they determine a quorum will not be available in the next term, then the case will be affirmed by order of the Supreme Court (albeit without precedential value).

The remittal procedure of 28 U.S.C. § 2109 has been used only once in the history of the Supreme Court, in the landmark antitrust case United States v. Alcoa, 322 U.S. 716 (1944), finally decided by the three most senior Second

Circuit judges, Learned Hand, Augustus Hand, and Thomas Swan, see 148 F.2d 416 (2 Cir. 1945). The affirmance procedure has been used twice, see Prichard v. United States, 339 U.S. 974 (1950); Sloan v. Nixon, 419 U.S. 958 (1974).

I have drafted a reply to Spiegel, noting that we have referred his suggestion to Justice's OLP (for want of any other idea) and also calling 28 U.S.C. § 2109 to his attention. The reply also notes Spiegel's error in considering Arthur Goldberg a retired Justice. Goldberg resigned; he did not retire.

Attachment

THE WHITE HOUSE

WASHINGTON

November 15, 1983

Dear Mr. Spiegel:

Thank you for your letter of November 4, and the accompanying copy of your article in the Baltimore Daily Record. That article proposed enactment of a federal statute permitting a retired Supreme Court justice to fill temporarily a vacant seat on the Supreme Court.

Current law does make provision for the absence of a quorum of the Supreme Court. Under 28 U.S.C. § 2109, cases brought to the Supreme Court on direct appeal from a district court are remitted to the court of appeals for the circuit in which the district court is located; other cases, if it is determined that they cannot be decided at the next ensuing term, are affirmed by an order that has the same effect as affirmance by an equally divided Court. The former procedure was used in United States v. Alcoa, 322 U.S. 716 (1944); the latter in Prichard v. United States, 339 U.S. 974 (1950) and Sloan v. Nixon, 419 U.S. 958 (1974). Your article, however, raises interesting concerns, and I have taken the liberty of forwarding it to the Department of Justice, Office of Legal Policy, for whatever review that office considers appropriate.

I would point out that former Justice Arthur Goldberg, unlike Justice Potter Stewart, resigned from the Court; he did not retire. Thank you again for sharing your interesting article with us.

Sincerely,

Fred F. Fielding
Counsel to the President

Mr. Jay L. Spiegel
110 W. 39 Street, #1315
Baltimore, Maryland 21210

FFF:JGR:aea 11/15/83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 15, 1983

MEMORANDUM FOR JONATHAN C. ROSE
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Suggestion that Retired Supreme Court Justices be Eligible to Fill Vacant Seats on the Supreme Court (Article From Baltimore's "Daily Record")

The attached letter from and article by Jay L. Spiegel, together with a copy of my reply, are submitted for whatever review, if any, you consider appropriate.

Attachment
FFF:JGR:aea 11/15/83
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 15, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: H.J. Res. 1 -- Equal Rights Amendment

Richard Darman asked for immediate comments on the attached proposed Administration policy statement. As you know, the Equal Rights Amendment is being considered in the House today on the suspension calendar -- only forty minutes of debate, with no consideration of amendments. The proposed policy statement objects to this procedure for a Constitutional amendment, without comment on the merits beyond reaffirming that the Administration supports equality of rights for all citizens.

After conferring with Mr. Hauser, I advised Darman's office that we had no legal objection to the proposed statement. I also advised that we would not object should policy offices in the White House desire to include a statement of our continuing opposition to the Equal Rights Amendment on the merits.

Attachment

THE WHITE HOUSE

WASHINGTON

November 16, 1983

Dear Mr. Saccani:

Thank you for your letter to the President, requesting that he serve as Honorary Chairman of the 1984 Tony Conigliaro Sports Benefit. We appreciate the kind thoughts contained in your letter.

I am sorry to have to inform you, however, that the President cannot accept your gracious invitation to serve as Honorary Chairman. I am certain you will appreciate that the President receives countless such invitations from charitable groups. Except for activities with which Presidents have traditionally been associated, such as the Red Cross, or activities in which the President has been personally involved in the past, the President has been compelled to adopt a policy of uniformly declining these requests, no matter how laudable the objectives of the charitable organization.

Adherence to this policy is necessary primarily out of considerations of fairness. The President cannot possibly accept all the invitations to serve as an honorary chairman he receives, and arbitrarily choosing some would be unfair to those not chosen. The White House also cannot permit the President's name to be used in connection with activities beyond our control or supervision, which would necessarily occur were the President to accept such invitations.

Please be assured that our need to adhere to this policy in this instance is in no sense an adverse reflection on you or the work of the Tony Conigliaro Benefit Committee. We wish you every success in your efforts.

Sincerely,

Fred F. Fielding
Counsel to the President

Mr. Donald R. Saccani
Mariner Distributing Co.
79 Mitchell Boulevard
San Rafael, California 94903

FFF;JGR:aea 11/16/83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 16, 1983

Dear Mr. Spiegel:

Thank you for your letter of November 4, and the accompanying copy of your article in the Baltimore Daily Record. That article proposed enactment of a federal statute permitting a retired Supreme Court justice to fill temporarily a vacant seat on the Supreme Court.

Current law does make provision for the absence of a quorum of the Supreme Court. Under 28 U.S.C. § 2109, cases brought to the Supreme Court on direct appeal from a district court are remitted to the court of appeals for the circuit in which the district court is located; other cases, if it is determined that they cannot be decided at the next ensuing term, are affirmed by an order that has the same effect as affirmance by an equally divided Court. The former procedure was used in United States v. Alcoa, 322 U.S. 716 (1944); the latter in Prichard v. United States, 339 U.S. 974 (1950) and Sloan v. Nixon, 419 U.S. 958 (1974). Your article, however, raises interesting concerns, and I have taken the liberty of forwarding it to the Department of Justice, Office of Legal Policy and Office of Legal Counsel, for whatever review these offices consider appropriate.

As a point of fact, in further response to your letter, I would point out that former Justice Arthur Goldberg, unlike Justice Potter Stewart, resigned from the Court; he did not retire.

Thank you again for sharing your interesting article with us.

Sincerely,

Fred F. Fielding
Counsel to the President

Mr. Jay L. Spiegel
110 W. 39 Street, #1315
Baltimore, Maryland 21210

FFF:JGR:aea 11/16/83

bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 16, 1983

MEMORANDUM FOR JONATHAN C. ROSE
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

THEODORE B. OLSON
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Suggestion that Retired Supreme Court Justices be Eligible to Fill Vacant Seats on the Supreme Court (Article From Baltimore's "Daily Record"

The attached letter from and article by Jay L. Spiegel, together with a copy of my reply, are submitted for whatever review, if any, you consider appropriate.

Attachments
FFF:JGR:aea 11/16/83
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 16, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Draft Presidential Radio Talk: Department of the Interior

Richard Darman has asked that comments on the above-referenced draft remarks be sent directly to Ben Elliott by 4:00 p.m. today. The remarks, drafted by the President, praise what former Secretary Watt did during his tenure at the Department of the Interior. I assume the decision to deliver such remarks was made in response to efforts by some in the Senate to link Mr. Clark's confirmation to consideration of a resolution critical of Watt's policies (see attached news accounts).

On page 3, lines 7-8, the remarks refer to the sale of a strip of federal land two miles long and two feet wide and state "that must have erased some problems private landowners had with clouded title to their property." If the Government did own such a strip of land it would not "cloud" the title of others -- their title would not cover it at all. I would simply delete "clouded title to."

The last sentence of the second full paragraph on page 3 states: "Not one acre of park or wilderness land was leased for oil drilling or mining, contrary to what you may have read or heard." I was concerned that this was true only because Congress blocked Watt's efforts. According to Hank Habicht of Justice's Lands Division, however, Watt did not propose leasing of any park or wilderness land, as technically defined. He did announce a willingness to process lease applications covering the Bob Marshall wilderness area, which prompted a preemptive legislative veto by Representative Udall's committee, and litigation that was eventually settled. Watt reserved the question of whether he would actually issue leases on wilderness land, however, so the sentence is not only technically correct but also fair in its import. Habicht recommends keeping it in and I concur.

Attachment

THE WHITE HOUSE

WASHINGTON

November 16, 1983

MEMORANDUM FOR BEN ELLIOTT
DEPUTY ASSISTANT TO THE PRESIDENT
DIRECTOR, PRESIDENTIAL SPEECHWRITING OFFICE

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Draft Presidential Radio Talk:
Department of the Interior

Counsel's Office has reviewed the above-referenced draft remarks. On page 3, line 8, we recommend deleting "clouded title to." If the Government did own a strip of land two miles long and two feet wide, the strip would doubtless interfere with the property of others but would not technically "cloud" their title -- their title would not cover it at all.

In the first line of the second full paragraph on page 4, we assume "studies" was meant to be "strides."

FFF:JGR:aea 11/16/83
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 16, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Proposed DOJ Response to Questions Concerning H.R. 3625, a Bill to Amend the Inspector General Act of 1978

Jim Murr of OMB has asked for comments by close of business today on the attached proposed responses prepared by the Department of Justice to questions submitted by the House Government Operations Committee concerning H.R. 3625. This bill would, among other things, amend the Inspector General Act of 1978 to extend its coverage to include the Department of Justice. The Department has consistently opposed the bill, most recently in testimony delivered by Associate Attorney General Lowell Jensen on October 26, 1983 (copy of testimony and my memorandum concerning it attached).

The questions from the Committee ask precisely in what manner extension of the IG Act to Justice would interfere with prosecutorial discretion, and what reservations the Department has concerning the reporting requirements of the Act. The Department's response is a lengthy discussion of the application of prosecutorial discretion throughout the U.S. Attorneys Offices and at the Department, as well as the established procedures for approval of undercover operations. The central point that is made is that an IG at Justice would be in a position to override or at least intrude upon the exercise of this discretion. With respect to the reporting requirements of the Inspector General Act, the Department's response notes that application of this requirement to the Justice Department could compromise sensitive ongoing investigations, confidential sources, classified information, and litigation material.

I have reviewed the Department's proposed responses to the questions submitted by the Committee, and have no objection to them. They are consistent with prior Department of Justice testimony on the Inspector General Act and H.R. 3625.

Attachment

THE WHITE HOUSE

WASHINGTON

November 16, 1983

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

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Proposed DOJ Response to Questions Concerning H.R. 3625, a Bill to Amend the Inspector General Act of 1978

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

FFF:JGR:aea 11/16/83
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 17, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Statement of John C. Keeney
Re: Computer Crime -- H.R. 1092
on November 18, 1983

We have been provided with a copy of the above-referenced testimony, which Deputy Assistant Attorney General Keeney proposes to deliver before the House Judiciary Subcommittee on Civil and Constitutional Rights on November 18. The testimony notes that the Department is still reviewing the question of computer fraud, and that it hopes to submit proposals in the near future. Accordingly, Keeney takes no position on proposals currently pending before the Subcommittee. He does note that computer fraud fits uncomfortably into existing criminal provisions, with gaps caused by requirements such as the need for transmissions to cross state lines to be covered by federal law or the need to consider theft of information the theft of a tangible asset with fixed value.

Keeney defers to Commerce on a proposal to fund a grant program to develop new methods of protecting computers, and to Treasury on a proposal to give tax credits to those who purchase computers. He does object to a plan to create an interagency advisory committee on the subject as an overly formal and cumbersome approach.

I have no objections.

Attachment

THE WHITE HOUSE

WASHINGTON

November 17, 1983

MEMORANDUM FOR GREGORY JONES
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Statement of John C. Keeney
Re: Computer Crime -- H.R. 1092
on November 18, 1983

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

FFF:JGR:aea 11/17/83
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 17, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Draft Proclamation/National Decade of Disabled Persons (1983-1992)

Dodie Livingston has asked for comments on the above-referenced draft proclamation by close of business Friday, November 18. This proclamation does not satisfy our usual criteria, since it neither has been requested by joint resolution nor is it customary. The United Nations, however, has designated 1983-1992 as the U.N. Decade of Disabled Persons, and Congress has passed a concurrent resolution asking the President to implement the U.N. resolution. In August, Livingston raised the question of issuing a proclamation on this subject with the Senior Staff, and obtained approval to proceed.

The proclamation, drafted by HHS and approved by OMB, notes the progress made during the 1981 International Year and 1982 National Year of Disabled Persons, and urges continuation of this progress during the designated Decade of Disabled Persons. The emphasis is on opportunities for independent living by the disabled.

I have no legal objections.

Attachment

THE WHITE HOUSE

WASHINGTON

November 17, 1983

MEMORANDUM FOR DODIE LIVINGSTON
SPECIAL ASSISTANT TO THE PRESIDENT
DIRECTOR, SPECIAL PRESIDENTIAL MESSAGES

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Draft Proclamation/National Decade of Disabled Persons (1983-1992)

Counsel's Office has reviewed the above-referenced draft proclamation, and finds no objection to it from a legal perspective. In paragraph four, line two, "which" should be "that" or, better still, "which are" may be deleted altogether.

FFF:JGR:aea 11/17/83
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 16, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: D.C. Chadha Correspondence

David Clarke, Chairman of the D.C. Council, and Wilhelmina Rolark, Chairperson of the Council's Committee on the Judiciary, have written you in response to the draft letter from Robert McConnell on H.R. 3932, the D.C. Chadha bill. As you know, OMB provided the Council with a copy of the draft for comment. The letter itself was sent out early this morning, with the changes we discussed yesterday.

The letter contends that our position entails "disastrous consequences" for Home Rule, and would impede the ability of the Council to enact appropriate criminal laws to protect the citizens of the District. The letter reviews actions of the Council with respect to criminal law, in an effort to mount an argument that our fears of laxness are unjustified. The letter also notes that Congress, unlike the Council, is likely to ignore local District criminal law problems.

Briefly, the answers: Our proposal does not have "disastrous consequences" for Home Rule. This bill is not, in the first place, a Home Rule bill at all but a bill to correct constitutional problems pointed out by Chadha. We support giving the Council plenary authority in every area except criminal law. Such an approach continues a distinction in current law permitting easier Congressional review of Council actions in the criminal law area.

As to what the Council has done in the criminal area, there is some good and some bad. Our U.S. Attorneys Office, however, which deals with these issues on a day-to-day basis, advised us that zany ideas have been blocked only because of the threat of Congressional veto. The U.S. Attorneys Office was horrified at the prospect of the Council legislating in this area without the check of effective Congressional control.

Finally, the Council can still act in this area. The fear that Congress will have to become intimately involved in the minutiae of local law is unfounded. All that the Council need do is obtain approval of its actions, which should be forthcoming for reasonable proposals.

I do not think you should send a substantive reply to Clark and Rolark. The letter they're concerned about was from McConnell; their reply should be directed to him. This approach will help keep the dispute between the District and Justice, rather than the District and the White House, to the extent that is possible in light of OMB's "leaks" to District officials. A brief reply noting you have referred the letter to Justice for consideration and response is attached. I have copied Horowitz to let him know we think the matter should be kept over at Justice.

Attachment

THE WHITE HOUSE

WASHINGTON

November 16, 1983

MEMORANDUM FOR ROBERT A. MCCONNELL
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGISLATIVE AFFAIRS

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: D.C. Chadha Correspondence

The attached letter from the D.C. Council Chairman and the Chairperson of the Council Judiciary Committee, together with a copy of my reply, is referred to you for your consideration and direct reply. I think it best to keep the debate on this matter, to the extent possible, between District officials and the Justice Department rather than District officials and the White House.

cc: Michael Horowitz
Counsel to the Director
Office of Management and Budget

FFF:JGR:aea 11/16/83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 16, 1983

Dear Mr. Clarke and Ms. Rolark:

Thank you for your letter of November 15, concerning a draft of a letter to Senator William V. Roth, Jr. from Assistant Attorney General Robert A. McConnell. That draft letter discussed H.R. 3932, a bill to amend the District of Columbia Self-Government and Governmental Reorganization Act to correct certain constitutional infirmities in the wake of the Supreme Court's recent decision in Immigration and Naturalization Service v. Chadha, 103 S.Ct. 2764 (1983). A letter from Assistant Attorney General McConnell concerning H.R. 3932 has now been sent, although with several changes from the draft you reviewed.

I have referred your letter to Assistant Attorney General McConnell for his consideration and direct reply. The Department of Justice is most directly involved in these issues and accordingly is in the best position to respond to your expressed concerns. Thank you for sharing those concerns with us.

Sincerely,

Fred F. Fielding
Counsel to the President

Mr. David A. Clarke
Ms. Wilhelmina J. Rolark
Council of the District of
Columbia
Washington, D.C. 20004

FFF:JGR:aea 11/16/83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 17, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Mayor's Response to the Administration Position on H.R. 3932

Mayor Barry has written the President to object to the McConnell letter on H.R. 3932, the D.C. Chadha bill. The mayor attempts to refute the contention that criminal law is accorded special treatment under existing law through highly selective quotation from the legislative history of the Home Rule Act. At no point does he address the basic fact that under existing law Council acts in the criminal area are subject to a one-house veto while all other acts are subject to a two-house veto, the clearest evidence of the "special treatment" referred to in the McConnell letter.

The mayor's letter also maintains that the McConnell letter "relied heavily" on a court decision, Palmore v. United States, 411 U.S. 389 (1973), and criticizes that supposed reliance. In fact, the decision was cited once, in passing, in the course of establishing that the District court system is a federal court system with judges appointed by the President. The mayor's letter does not otherwise respond to the substance of the McConnell letter, although it concludes by criticizing the Administration's delay in presenting its position and maintaining that members of the Administration "misled" Mayor Barry and his staff.

As I mentioned this morning, I think it best to redirect the District's objections to the Justice Department, not only to minimize the fallout but also because Justice (through the U.S. Attorneys Office) originated the position and stands to lose the most if it does not prevail. A referral memorandum and acknowledgment letter is attached. If you agree, I will let OMB know that this is how we are handling the mayor's letter.

Attachment

THE WHITE HOUSE

WASHINGTON

November 17, 1983

MEMORANDUM FOR ROBERT A. MCCONNELL
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGISLATIVE AFFAIRS

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Mayor's Response to the Administration Position on H.R. 3932

The attached letter from the Mayor, together with a copy of my reply, is referred to you for your consideration and direct reply. As I noted with respect to the similar letter from the D.C. Council, I think it best to keep this matter at the Justice Department to the extent possible.

Attachment
FFF:JGR:aea 11/17/83
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 17, 1983

Dear Mayor Barry:

Thank you for your letter of November 15 to the President, concerning the Administration's position on H.R. 3932. That position was announced in a letter from Assistant Attorney General Robert A. McConnell.

I have referred your letter to Assistant Attorney General McConnell for consideraton and direct reply. The Department of Justice is most directly involved in these issues and accordingly is in the best position to respond to your expressed concerns.

Thank you for sharing these concerns with us.

Sincerely,

Fred F. Fielding
Counsel to the President

The Honorable Marion Barry
Mayor of the
District of Columbia
Washington, D.C. 20004

FFF:JGR:aea 11/17/83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 17, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: A Legislative Proposal "To Provide for Comprehensive Reforms in Compensation of Attorneys, Pursuant to Federal Statute in Civil and Criminal Proceedings Against U.S. and Against State and Local Governments"

Assistant Attorney General McConnell has sent you a copy of a package he sent to OMB Director Stockman for clearance. The package contains Justice's proposed "Legal Fees Reform Act," a section-by-section analysis, and a draft letter to the Speaker. Our office has reviewed the substance of this proposal before and noted no legal objection to it (copies of pertinent memoranda attached). The bill would:

- limit award of attorneys fees against the United States or state and local governments to truly "prevailing" parties, and then only for time devoted to issues on which the party prevailed
- set a ceiling on such attorneys fees of $75 per hour
- permit courts to reduce or deny attorneys fees for a variety of reasons (unreasonable prolonging of litigation, fees unreasonably exceed monetary recovery, fees exceed hourly salary of the attorney, etc.)
- reduce the amount of attorneys fees by 25% of any monetary award (on the theory that litigation costs should be at least partially paid from damages obtained)
- double the rate of compensation for attorneys for indigent defendants under the Criminal Justice Act
- establish uniform procedures for applying for attorneys fees from governments
- clarify and limit the circumstances under which attorneys fees may be awarded when a case is settled or becomes moot due to a policy change

The letter to the Speaker explicitly links support for increased fees for Criminal Justice Act attorneys with the limitations on fee awards against governments in other cases. The letter reviews the abuses that have developed in this area, and justifies the $75 cap as (1) the same rate as set in the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1) and (3), and (2) more commensurate with compensation paid government attorneys. The latter comparison is considered appropriate since fees are shifted to governments in these cases on the theory that the prevailing plaintiff was acting as a "private attorney general." If this theory is correct, he should be compensated roughly the same as attorneys who work for the real Attorney General, i.e., government lawyers.

I have reviewed the proposed bill, section-by-section analysis, and Speaker letter, and have no objection to them. They are not significantly different from those we approved in September. OMB has not yet formally requested our views, but I wanted to alert you to McConnell's transmittal in case you received any inquiries about it.

Attachment

THE WHITE HOUSE

WASHINGTON

November 17, 1983

Dear Mr. Marrash:

This is in response to your letter of October 22, 1983 to White House Chief of Staff James A. Baker III. In that letter and accompanying materials you requested assistance in obtaining citizenship through naturalization for yourself and various members of your family.

Please be advised that the White House does not become involved in the consideration or resolution of such matters. We have, however, referred your correspondence to the Immigration and Naturalization Service (INS) for whatever review or action that agency considers appropriate. You should direct any further correspondence to the appropriate INS office.

Sincerely,

Fred F. Fielding
Counsel to the President

Mr. William B. Marrash
c/o Azzam
15 Lucielle Drive
Easton, CT 06612

FFF:JGR:aea 11/17/83
bcc: FFFielding/JGRoberts/Subj/Chron