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DOC NO	Doc Type	Document Description	No of Pages	Doc Date	Restrictions	
1	MEMO	ROBERTS TO FIELDING RE DOUGLAS KOWAL LETTER	1	5/24/1984	B6	781
2	MEMO	FIELDING TO CAROL DINKINS RE DOUGLAS KOWAL LETTER (PARITAL) [RELEASED IN PART 02/03/06 - MJD]	1	5/24/1984	B6	783

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-4 Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
B-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
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]
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WITHDRAWAL SHEET

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COOK
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DOC NO	Doc Type	Document Description	No of Pages	Doc Date	Restrictions	
1	MEMO	ROBERTS TO FIELDING RE DOUGLAS KOWAL LETTER (PARTIAL)	1	5/24/1984	B6	781
2	MEMO	FIELDING TO CAROL DINKINS RE DOUGLAS KOWAL LETTER	1	5/24/1984	B6	783

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

May 22, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Enrolled Resolution S.J. Res. 252 -- Missing Children Day

Richard Darman has asked for comments by noon today on the above-referenced enrolled resolution. The resolution, which passed both Houses by voice vote, designates May 25, 1984 as "Missing Children Day." That day will be the fifth anniversary of the disappearance of Etan Patz in New York City. The resolution states that the search for missing children is "frequently a low-priority investigation in many law enforcement agencies" and that "efforts between Federal and local law enforcement agencies in child abduction cases are usually uncoordinated, haphazard, and ineffective." OMB, HHS, and Justice recommend approval.

You will recall that our office has resisted the issuance of a Missing Children Day proclamation because such a proclamation was neither traditional nor requested by Congress. Despite our objections such a proclamation was signed on May 15, designating May 25 as Missing Children Day. Now Congress, by passing S.J. Res. 252, has retroactively removed the basis for our objection. Fortunately the proclamation as signed by the President is presciently responsive to the resolution, announcing the establishment of the National Center for Missing and Exploited Children at the Department of Justice and urging that missing children cases be given a higher priority by all law enforcement agencies.

The memorandum for the President from OMB Assistant Director for Legislative Reference James M. Frey states that a proclamation will be forwarded for the President's consideration. I do not think it necessary or appropriate for the President to issue a second proclamation; he has already done what S.J. Res. 252 authorizes and requests him to do. It is unfortunate that there was not better coordination between the Special Messages Office and Legislative Affairs, so that the proclamation could have been held until after receipt of the resolution. (Of course, the problem would

not have arisen had our advice been heeded and the proclamation not issued in the absence of a Congressional request.) The attached memorandum for Darman recommends that a second Missing Children Day proclamation not be issued. At least with proclamations, once is enough.

Attachment

THE WHITE HOUSE

WASHINGTON

May 22, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Enrolled Resolution S.J. Res. 252
-- Missing Children Day

Counsel's Office has reviewed the above-referenced enrolled resolution, and finds no objection to it from a legal perspective. I would note, however, that the President issued a proclamation designating May 25 as Missing Children Day on May 15. Since the President has already done what this enrolled resolution authorizes and requests him to do, there is no need to prepare a second proclamation. It would, of course, have been preferable not to issue the proclamation until after receipt of the resolution.

FFF:JGR:aea 5/22/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 22, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Proposed Presidential Letter to Fortune 1000 Members on Behalf of Minority Financial Institutions

Richard Darman has asked for comments by May 23 on the latest (I dare not say last) version of a letter from the President to Fortune 1000 CEO's concerning private sector support for minority business enterprises. This is the fourth draft that has been circulated for comment. You will recall that the letter reviews the Administration's initiatives to promote minority business enterprises, and calls upon the private sector to join in the effort. This version changes "targeting government procurements" to "encouraging government procurements" in the third paragraph, and changes "a national commitment to encourage private firms to expand their business activities with minority enterprises" to "a national commitment to encourage private firms to expand their opportunities for minority enterprises" in the fifth paragraph. I have no objection to these changes, or to the letter itself.

Attachment

THE WHITE HOUSE

WASHINGTON

May 22, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Proposed Presidential Letter to Fortune 1000 Members on Behalf of Minority Financial Institutions

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

FFF:JGR:aea 5/22/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 23, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Your Question on the Attached

You asked why it was acceptable for the President's letter on minority business enterprises to speak of "encouraging government procurements" in the first sentence of the third paragraph. That sentence describes the initiatives announced on December 17, 1982, and use of the word "encourage" seems to be an accurate description of what was announced at that time. The December 17 statement (attached) announced "a commitment to increase the level of general procurement from minority-owned enterprises" and "this Administration's objective of increasing the share of total procurement supplied by minority businesses." If we are committed to increasing the level of minority procurements I think it is fair to say that we are encouraging them.

I do not think "encourage" connotes anything in the nature of a numerical set-aside or quota. You can "encourage" minority procurements by broader advertising, actively soliciting bids from qualified minority firms, and so forth. To speak of encouraging minority admissions to a school does not suggest quotas or even a lessening of admission standards; I think the same is true of encouraging minority procurements.

THE WHITE HOUSE

WASHINGTON

May 23, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Appointment of Enrico Mihich to the National Cancer Advisory Board

I have reviewed the Personal Data Statement submitted by Dr. Enrico Mihich in connection with his prospective appointment to the National Cancer Advisory Board. By memorandum dated April 17, 1984 (attached), you reviewed the complex requirements for appointments to this Board for John Herrington. In particular, you noted that the Administration was confronted with a dilemma, in that we could not satisfy the statutory requirement that at least five of the Board members be knowledgeable in environmental carcinogenesis without violating the additional requirement that no more than 12 of the Board members be scientists or physicians. See 42 U.S.C. § 286b(a)(1). We decided to avoid the dilemma (to the extent possible) by considering one of the sitting members, Tim Lee Carter, M.D., a lay member and not a "scientist or physician," since his practice had been inactive for 16 years and he had been appointed as and always considered a lay member.

The April 17 memorandum cleared for appointment David Korn, Louise C. Strong, Gertrude Elion, Helene Brown, and Roswell Boutwell, on the explicit conditions that Herrington's office confirm that Strong, Elion, Korn, and Boutwell were knowledgeable in environmental carcinogenesis (a determination we are unqualified to make), and that whomever is appointed to replace Irving Selikoff also is determined to be knowledgeable in environmental carcinogenesis. Dr. Mihich is the individual who is to replace Irving Selikoff. He is the director of the Grace Cancer Drug Center and seems well qualified for the Board, although again I have no way of ascertaining if he is considered knowledgeable in environmental carcinogenesis. As with the other appointees to the Board, and indeed as with almost anyone active in this area, Mihich has several affiliations with National Cancer Institute supported entities. I have talked with Mihich and he is well aware of the need to recuse himself from any discussions affecting grants or organizations with which he is affiliated.

The attached memorandum from Herrington reiterates our earlier advice that Mihich must be determined to be knowledgeable in environmental carcinogenesis.

Attachment

THE WHITE HOUSE

WASHINGTON

May 23, 1984

MEMORANDUM FOR JOHN S. HERRINGTON
ASSISTANT TO THE PRESIDENT
FOR PRESIDENTIAL PERSONNEL

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Appointment of Enrico Mihich to the National Cancer Advisory Board

Counsel's Office has reviewed the Personal Data Statement submitted by Dr. Enrico Mihich in connection with his prospective appointment to the National Cancer Advisory Board. I reviewed the requirements for appointees to this Board in my memorandum for you of April 17, 1984 (copy attached). Dr. Mihich is replacing Irving J. Selikoff on the Board, and in my memorandum I advised you that whomever was chosen to replace Dr. Selikoff must be "knowledgeable in environmental carcinogenesis." See 42 U.S.C. § 286b(a)(1). Our office is of course not qualified to determine who is or is not "knowledgeable in environmental carcinogenesis." Assuming that your office confirms that Dr. Mihich meets this requirement, we have no objection to proceeding with his appointment.

FFF:JGR:aea 5/23/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 24, 1984

MEMORANDUM FOR MICHAEL E. BARODY
DEPUTY ASSISTANT TO THE PRESIDENT
DIRECTOR, PUBLIC AFFAIRS

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: White House Digest Entitled
"Sandinista Violations of Human Rights"

Counsel's Office has reviewed the above-referenced draft White House Digest. The assertions that specific murders were arranged by the FSLN Directorate and the Chief and Deputy Chief of State Security, appearing on page 2, must be adequately verified, and, as with the draft as a whole, must be reviewed and approved by the National Security Council.

The first sentence of the seventh paragraph on page nine suggests a causal relationship between the liberation of Grenada and the relaxing of press censorship in Nicaragua, but the nature of that causal relationship is neither apparent nor explained. If there is such a causal relationship it should be explained; if not, the sentence should be rewritten so that one is not implied.

cc: Robert Kimmitt
National Security Council

FFF:JGR:aea 5/24/84
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 24, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: White House Digest Entitled "Sandinista Violations of Human Rights"

Attached is the draft White House Digest on "Sandinista Violations of Human Rights" that we discussed at this morning's staff meeting. The most prominent assertions are on page 2, where it is alleged that the FSLN Directorate arranged for two individuals to be shot "while attempting to escape" from prison and that the Chief and Deputy Chief of State Security decided to kill a leading private citizen. The attached draft memorandum for Baroody notes that the accuracy of these assertions must be adequately verified and that the assertions, as well as the entire draft, must be cleared by the National Security Council. As we discussed this morning, Bob Kimmitt is copied on the memorandum.

Paragraph 7 on page 9 presents a less serious problem. The first sentence of the paragraph states: "Since the rescue mission in Grenada and the fall of the Marxist-Leninist regime there, censorship [in Nicaragua] has been relaxed somewhat, but is still severe." The causal connection between the liberation of Grenada and press censorship in Nicaragua is neither apparent nor explained. I recommend noting that this is confusing in our memorandum to Baroody.

Attachment

THE WHITE HOUSE

WASHINGTON

May 24, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Letter to James Baker and the President From Douglas Kowal [redacted] b6

Barbara Hayward of Mr. Baker's office has referred to us a letter from Douglas Kowal. Mr. Kowal hand delivered the letter -- along with an identical one to the President -- Tuesday night. [redacted] b6

We should refer this immediately to Main Justice. [redacted] b6

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

Attachment

THE WHITE HOUSE

WASHINGTON

May 24, 1984

MEMORANDUM FOR CAROL E. DINKINS
DEPUTY ATTORNEY GENERAL
U.S. DEPARTMENT OF JUSTICE

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Letter to James Baker and the President
From Douglas Kowal [redacted] B6

The attached letter from Mr. Douglas Kowal to the President and Chief of Staff James A. Baker, III, is referred to you for whatever action you consider appropriate. [redacted] B6 He hand delivered the instant letter to the White House at 7:45 p.m. on May 22; it was referred to our office today. [redacted] B6 Consistent with our established approach to such matters, we have not responded directly to [redacted] but are instead referring the correspondence to you. B6

cc: Barbara Hayward
Office of James A. Baker, III

FFF:JGR:aea 5/24/84
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 24, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Requests Help From James Baker Regarding a Meeting with Secretary Clark and Ray Arnett to Discuss Inequities of Easements

Congressman Arlan Stangeland (R-Minn.) delivered to the White House a letter a constituent, Mrs. Jerome Schoenborn, had written to Chief of Staff Baker. Mrs. Schoenborn is having difficulties with the U.S. Fish and Wildlife Service concerning a waterfowl easement the Government has on her property. It appears that the easement prohibits the landowner from draining specified wetland areas, and the Fish and Wildlife Service maintains that the landowner has dug ditches for drainage in violation of the easement. In her letter Mrs. Schoenborn disputes the Service's contentions and the validity of the easement itself, and requests a meeting with Secretary Clark and Assistant Secretary for Fish and Wildlife and Parks, G. Ray Arnett. Along with her letter Mrs. Schoenborn includes correspondence from the Minnesota U.S. Attorney's office, threatening the commencement of a civil action to enforce the easement.

Fish and Wildlife has apparently referred the matter to the Department of Justice. I suggest that we do the same and so advise the landowner. We should not set up a meeting to discuss a matter that currently is or is about to be the subject of litigation. A memorandum for your signature for Deputy Attorney General Dinkins is attached, as are notes advising Congressman Stangeland and Mr. Baker's staff of our disposition.

Attachment

THE WHITE HOUSE

WASHINGTON

May 24, 1984

Dear Congressman Stangeland:

You recently referred to the White House a letter from a constituent, Mrs. Jerome Schoenborn, to Chief of Staff James A. Baker, III. In her letter Mrs. Schoenborn requested a meeting with Secretary of the Interior William Clark and Assistant Secretary for Fish and Wildlife and Parks G. Ray Arnett, to discuss a pending dispute with the Government concerning her property. Attached for your information is a copy of my response on behalf of Mr. Baker to Mrs. Schoenborn, advising her that it would be inappropriate for the White House to intervene in the dispute in the manner she requested.

If we may be of any further assistance, please do not hesitate to contact us.

Sincerely,

Fred F. Fielding
Counsel to the President

The Honorable Arlan Stangeland
United States House of Representatives
Washington, D.C. 20515

FFF:JGR:aea 5/24/84
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 24, 1984

MEMORANDUM FOR CAROL E. DINKINS
DEPUTY ATTORNEY GENERAL
U.S. DEPARTMENT OF JUSTICE

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Requests Help From James Baker Regarding a Meeting with Secretary Clark and Ray Arnett to Discuss Inequities of Easements

The attached correspondence from Mrs. Jerome Schoenborn, together with a copy of my reply, is referred to the Department of Justice for whatever action you consider appropriate.

Many thanks.

Attachments

FFF:JGR;aea 5/24/84
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 24, 1984

MEMORANDUM FOR KATHERINE CAMALIER
STAFF ASSISTANT TO JAMES A. BAKER, III

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Requests Help From James Baker Regarding a Meeting with Secretary Clark and Ray Arnett to Discuss Inequities of Easements

Attached for your information are copies of my replies to Mrs. Jerome Schoenborn and Congressman Arlan Stangeland, concerning the letter from Mrs. Schoenborn to Mr. Baker that you referred to this office on May 18, 1984. I have also attached a copy of my memorandum for the Deputy Attorney General, referring Mrs. Schoenborn's correspondence to the Department of Justice.

Attachments

FFF:JGR:aea 5/24/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 24, 1984

Dear Mrs. Schoenborn:

Your letter to White House Chief of Staff James A. Baker, III has been referred to this office for consideration and response. In that letter you requested a meeting with Secretary of the Interior William Clark and Assistant Secretary for Fish and Wildlife and Parks G. Ray Arnett, to discuss a pending dispute between you and the United States Fish and Wildlife Service.

The White House adheres to a policy of not intervening in the handling of particular cases by the Department of Justice. The purpose of this policy is to preserve public confidence in the impartial administration of our laws. Since this matter has been referred to the United States Attorney's office for the District of Minnesota, I must advise you that it would be inappropriate for Mr. Baker or any other member of the White House staff to intervene in the manner you requested. I have, however, referred your letter to the Department of Justice, for whatever action that Department considers appropriate.

Thank you for sharing your concerns with us. I trust you will understand the reasons for our response.

Sincerely,

Fred F. Fielding
Counsel to the President

Mrs. Jerome Schoenborn
Route 2 Box 302
Waubun, Minnesota 56589

FFF:JGR:aea 5/24/84

bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 29, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Administration Position Paper Regarding Freezing Textile and Apparel Imports

Richard Darman has asked for comments by close of business today on the above-referenced proposed Administration position paper and accompanying talking points and letters to Congressmen (for Ambassador Brock's signature). Although the domestic textile industry is recovering from the severe recession it experienced in 1982, imports are also rising, up 28 percent in 1983 and 48 percent in the first quarter of this year. You will recall that the Administration took controversial action in December of last year to dampen the increase in textile imports. The domestic industry is not satisfied with that action and continues to call for comprehensive ("global") quotas set at 1983 import levels. A meeting of the Textile Trade Policy Group (TTPG) took place on May 10 to develop an Administration response to such proposals. The instant draft position paper reflects the agreement of all TTPG participants to reject global quotas.

From our perspective it is significant that the draft position paper concludes that there is no domestic legal authority to impose such global quotas. I have no objection to rejecting quotas on policy grounds, but care must be taken to avoid using supposed legal limitations as an excuse for inaction. Circumstances may change and the President may want to exercise authority that was previously denied in an effort to justify what was in essence a policy, not legal, decision. In this instance, however, my review of the pertinent legal authorities compels me to conclude that the analysis in the position paper is generally sound and that the legal authority to impose quotas of the sort sought by the textile industry does not in fact exist. Assistant Attorney General Paul McGrath, who sits on the TTPG, agrees with this conclusion.

The position paper reviews six separate statutory provisions that might justify global textile quotas. It concludes that authority does not exist under 7 U.S.C. § 624, which authorizes action to prevent interference with price support programs, because there is no evidence of such interference, and because quotas, by inviting retaliation against our cotton exports, may themselves harm the price support program. The

position paper rejects possible authority for global quotas under 19 U.S.C. § 2251, the principal International Trade Commission provision, on the ground that the statute is directed to particular articles and not broad categories of imports. The position paper notes that the detailed requirements of the balance of payments provision, 19 U.S.C. § 2132, are not met in this instance, and rejects possible action under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701, on the ground that "[i]t has never been considered that the desire to protect a particular U.S. industry would justify use of this authority." The position paper contends that there is no authority under 7 U.S.C. § 1854 to impose global quotas, since that statutory provision only authorizes the President to implement bilateral agreements, and such quotas would be inconsistent with those agreements. (You will recall that 7 U.S.C. § 1854 is the statutory provision that figured in the December textile initiatives. We concluded at that time that the actions taken in December -- short of global quotas -- were themselves at the very fringe of authority under 7 U.S.C. § 1854. Based on our exhaustive review of 7 U.S.C. § 1854 at that time, it is clear that global quotas under that statute would be indefensible.) Finally, the position paper notes that global quotas cannot be justified on national security grounds, the predicate for any action under 19 U.S.C. § 1862.

I recommend two changes in the paper's discussion of domestic legal authority. In the discussion of section 201 of the Trade Act of 1974, 19 U.S.C. § 2251, the paper states that action under that statute is justified if increased imports are "the most important cause of serious injury or threat of serious injury to domestic producers." In fact, the operative statutory phrase is "substantial cause," not "most important cause." "Substantial cause" is defined as "a cause which is important and not less than any other cause," 19 U.S.C. § 2251(b)(4), but this is not the same as "most important cause," and I see no reason to depart from the precise statutory language.

In the discussion of possible authority under IEEPA, the paper recites the requirement that the action must be in response to an "unusual and extraordinary threat" to the U.S. economy, and states that "[i]t has never been considered that the desire to protect a particular U.S. industry would justify use of this authority." I am reluctant to so categorically limit Presidential authority under such a critical statute as IEEPA. One could easily postulate a case, perhaps involving an industry closely linked to national defense, in which action "to protect a particular U.S. industry" might be necessary under IEEPA. I would

change the offending sentence to "It cannot be contended that extraordinary emergency action is justified under IEEPA to protect the U.S. textile industry."

I have no other objections to the position paper. Nor do I have any objections to the draft talking points or letters to Congressmen (for Brock's signature), which are both derivative of the position paper. A memorandum for Darman is attached for your review and signature.

Attachment

THE WHITE HOUSE

WASHINGTON

May 29, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Administration Position Paper Regarding Freezing Textile and Apparel Imports

Counsel's Office has reviewed the above-referenced draft position paper, and the accompanying draft talking points and letters to Congressmen. On page 3, line 19, "most important cause" should be changed to "substantial cause," the term used in the statute. See 19 U.S.C. § 2251. It is true that "substantial cause" is defined as "a cause which is important and not less than any other cause," 19 U.S.C. § 2251(b)(4), but this is not the same as "most important cause." If it is considered necessary to indicate how significant a cause the increased imports must be, the statutory definition of "substantial cause" should be quoted.

The last sentence of the second full paragraph on page 4 should be changed. We should not categorically restrict the President's authority under so critical a statute as the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701. It is not difficult to imagine situations in which a President may find it necessary to take action under IEEPA "to protect a particular U.S. industry." We recommend substituting "It cannot be contended that extraordinary emergency action is justified under IEEPA to protect the U.S. textile industry," or something similar.

FFF:JGR:aea 5/29/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 29, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Legality of Nominations for the Unexpired Remainder of a Term and the Next Subsequent Full Term

John Herrington has asked for an opinion on the legality of the practice of submitting nominations to the Senate for the unexpired remainder of a term and next subsequent full term. Senators Cranston and Metzenbaum have objected to a floor vote on the eleven pending nominations to the Board of Directors of the Legal Services Corporation, on the ground that six of the nominations are for the remainder of terms expiring on July 13, 1984, and for the full terms commencing on that date and expiring on July 13, 1987. Senator Baker has requested Senate Legislative Counsel to prepare an opinion on the issue, and Herrington has asked our office to do so as well. According to Herrington, Baker will bring the nominations to the floor after these opinions are completed.

Pursuant to 42 U.S.C. § 2996c(b), "[a]ny member appointed [to the Board of Directors of the Legal Services Corporation] to fill a vacancy occurring prior to the expiration of the term for which such member's predecessor was appointed shall be appointed for the remainder of such term." This provision, which has counterparts throughout the U.S. Code, is designed to preserve "staggering" in the expiration of terms of service. On March 19, 1984, the President submitted nominations for the Board of Directors of the Legal Services Corporation, separately listing six individuals for the remainder of terms expiring on July 13, 1984, and the same individuals of the full three-year terms beginning on that day (Tab A).

The legality of this practice was specifically addressed and approved by the Office of Legal Counsel in 1960 (Tab B). The question addressed in the OLC opinion was precisely the one before us, viz., "whether the President may without legal objection submit a nomination, for confirmation by the Senate, of the appointment of an individual to a vacancy for an unexpired term of office and at the same time to the vacancy for the full term which immediately follows." The opinion noted that there could be no objection to the

nomination for an unexpired remainder of a term, so the issue was simply whether the President could submit a nomination for an office that will not become vacant until a future date (in this case, July 13, 1984). The opinion concluded that the President possessed such power, provided that the full term began during his own period of office. The President regularly submits nominations for the reappointment of incumbents prior to the expiration of their terms, the opinion noted, and:

> Consistently with the foregoing it must be concluded that a nomination may be made at the same time for an unexpired term and a full term of office to follow upon each other. The fact that the nominee is an individual not theretofore appointed, rather than an incumbent in office, may be an element for the consideration of the Congress, but it cannot be said to affect the application of the principle which has become established; i.e., that in the absence of a specific law to forbid it, the President may make appointments to offices which will become vacant within the time when he has the power to fill them.

The President's power to submit nominations for prospective vacancies was also thoroughly reviewed by the Department of Justice in the course of the ill-fated nominations of Justice Fortas to succeed Earl Warren as Chief Justice and of Homer Thornberry to succeed Fortas. Warren resigned effective upon the qualification of a successor, and President Johnson nominated Fortas to be Chief Justice and Thornberry to succeed Fortas. Senator Ervin objected that neither vacancy yet existed, since Warren still held office, as did Fortas. A lengthy Justice Department memorandum submitted for the record at the Judiciary Committee confirmation hearings concluded that "it is well established that the President has power to nominate, and the Senate power to confirm, in anticipation of a vacancy." The memorandum reviewed many of the instances from the earliest days of the Republic when this occurred, and noted that the practice avoided continual gaps in the holding of important offices. According to the memorandum, "[t]here is nothing inconsistent with the Constitution in the practice of anticipatory nomination and confirmation.... To the contrary, this practice is sanctioned by the Constitution and the experience under it throughout our history." Hearings Before the Senate Committee on the Judiciary on the Nominations of Abe Fortas and Homer Thornberry, 90th Cong., 2d Sess. 365, 381 (1968).

The question of the President's power to nominate an individual for an unexpired remainder of a term and a subsequent

full term was prominently presented at the beginning of this Administration, with the nomination of John Shad to the Securities and Exchange Administration. You will recall that Shad was nominated on April 1, 1981, for the remainder of a term expiring on June 5, 1982, and the full term running from June 5, 1981 to June 5, 1986. Shad agreed to resign the term expiring June 5, 1982, on June 5, 1981, and succeed into the full five-year term commencing that day. On April 8, the Senate confirmed Shad both for the unexpired remainder and the full term opening up on June 5, 1981.

The Shad case presented an unusual wrinkle, in that Shad resigned his unexpired remainder term before it expired to succeed into the next full term vacancy on the SEC, rather than the full term succeeding his unexpired remainder term. This procedure was considered advisable in light of the length of the unexpired remainder term, some 15 months. The Shad case, however, clearly demonstrates Senate consideration and acceptance of the practice in question.

Indeed, it has been fairly common over the course of several Administrations for nominations to be submitted and approved for the unexpired remainder of a term and the next subsequent full term. A random sampling of 23 such instances compiled by the Executive Clerk's office (Tab C) indicates that the practice dates at least from 1930. The average length of the unexpired remainder term in the sampling (excluding the unusual Shad case) is about three months. The unexpired remainder term in the instant case was just under four months at the time of nomination, and is now only six weeks.

In sum, logic, documented past practice accepted by the Senate, and prior opinions by the Department of Justice all establish beyond doubt that it is proper for the President to submit nominations for the unexpired remainder of a term and the next subsequent full term. The only legal limitation is that the subsequent full term must commence during the President's tenure in office (and, although the question has not come up, perhaps during the same Congress), and as a policy matter it seems best to avoid the practice when the unexpired remainder term is longer than a few months. None of these potential problems are present in this case. The Senate is, of course, completely free to confirm a nominee for the unexpired remainder term and not the subsequent full term, although I am aware of no instance in which it has done so.

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

Attachment

THE WHITE HOUSE

WASHINGTON

May 29, 1984

MEMORANDUM FOR JOHN S. HERRINGTON
ASSISTANT TO THE PRESIDENT
FOR PRESIDENTIAL PERSONNEL

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Legality of Nominations for the Unexpired Remainder of a Term and the Next Subsequent Full Term

You have asked for an opinion on the legality of the practice of submitting nominations for the unexpired remainder of a term and the next subsequent full term. On March 19, 1984, the President nominated six individuals to be members of the Board of Directors of the Legal Services Corporation, for the remainder of terms expiring July 13, 1984, and for full three-year terms expiring July 13, 1987. You have advised this office that Senators Cranston and Metzenbaum have objected to this procedure as improper.

There is no doubt that the President may submit nominations for the unexpired remainder of a term and the next subsequent full term, so long as the full term commences during the President's term of office. The Justice Department Office of Legal Counsel considered this precise question in 1960, and concluded that "a nomination may be made at the same time for an unexpired term and a full term of office to follow upon each other." There is no question concerning the President's authority to submit a nomination for the unexpired term, so the legal issue is simply whether the President may submit a nomination prior to the commencement of the full term. It has generally been accepted that the President possesses such power. The only instance in which it was seriously questioned was in 1968, when Chief Justice Earl Warren announced his resignation, effective on the confirmation of a successor, and President Johnson nominated Justice Fortas to be Chief Justice and Judge Thornberry to succeed Justice Fortas. The Department of Justice submitted a 30-page memorandum for the record of the hearings on these nominations, establishing that the President may submit nominations in anticipation of a vacancy. As the memorandum noted, a contrary conclusion would result in continual gaps in the holding of important offices. The Justice Department memorandum concluded that the practice of submitting nominations before a vacancy actually exists "is sanctioned by the

Constitution and the experience under it throughout our history." Hearings Before the Senate Committee on the Judiciary on the Nominations of Abe Fortas and Homer Thornberry, 90th Cong., 2d Sess. 365, 381 (1968).

As noted, the practice of submitting a nomination for the unexpired remainder of a term and the subsequent full term is nothing more than a combination of the clear authority to submit a nomination for the unexpired remainder of a term and the equally unobjectionable authority to submit a nomination -- in these cases, of the same individual -- for the anticipated vacancy that will occur upon the expiration of that remainder. The practice of simultaneously nominating an individual for the unexpired remainder of a term and the succeeding full term has been fairly common over the years through different administrations, as evidenced by the attached compilation of examples. In sum, logic, documented past practice dating from at least 1930, prior Justice Department opinions, and Senate acceptance all establish beyond any doubt that the President may nominate an individual for the unexpired remainder of a term and the succeeding full term. In this case, there is no doubt that the nominations for the Board of Directors of the Legal Services Corporation submitted by the President on March 19, 1984, were proper.

Attachment

FFF:JGR:aea 5/29/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 29, 1984

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS

SUBJECT: Civil Aeronautics Board Decisions in Denham Aircraft Services; Airmark Corporation; New Gateways to Brazil Case

This memorandum is addressed to Mr. Hauser because of the involvement of Eastern Air Lines, Inc., in one of the subject decisions.

Richard Darman's office has asked for comments by close of business 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 June 18, 30, and July 6 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, the proposed letter from the President to the CAB Chairman prepared by OMB includes the standard sentence designed to preserve availability of judicial review.

In the Denham case, the CAB, over the dissent of Chairman McKinnon, overruled the decision of the Administrative Law Judge that Denham was not managerially and economically fit to engage in foreign charter service. In the Airmark case the Board issued a foreign charter certificate to that carrier. Finally, in the Brazilian route case, the Board suspended American's authority over certain Brazilian

routes, activated Capitol's back-up authority, and rejected applications for such authority from Arrow and Eastern. OMB describes these orders as "routine, noncontroversial matters."

A memorandum for Darman is attached for your review and signature. The memorandum notes that Mr. Fielding did not participate in the review of this matter.

Attachment

THE WHITE HOUSE

WASHINGTON

May 29, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: RICHARD A. HAUSER
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: Civil Aeronautics Board Decisions in Denham Aircraft Services; Airmark Corporation; New Gateways to Brazil Case

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.

Mr. Fielding did not participate in the review of this matter.

RAH:JGR:aea 5/29/84
cc: RAHauser/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 29, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: S. 422 -- Controlled Substance Registrant Protection Act of 1984

Richard Darman has asked for comments on the above-referenced enrolled bill by 3:00 p.m. today. This bill, which passed both Houses by voice vote, would make it a Federal crime to rob or burglarize a registrant (typically a pharmacist) under the Controlled Substances Act, 21 U.S.C. § 822, and would also make it a separate Federal offense to assault with a dangerous weapon or kill a person while robbing or burglarizing such a registrant, or to conspire to do so. Prosecution for the robbery and burglary elements is only permitted if (1) the value of the controlled substance is a least $500, (2) the defendant travelled in interstate commerce or used a facility in interstate commerce in committing the offense, or (3) a person was killed or seriously injured during the offense. A covered robbery or burglary carries a penalty of up to 20 years and/or a fine of up to $25,000; assault with a dangerous weapon in the course of a covered offense increases the maximum term to 25 years and the fine to $35,000; if death results the defendant faces life and a maximum fine of $50,000. A conspiracy conviction carries a penalty of up to ten years and/or a fine of up to $25,000. OMB recommends approval; Justice has no objection; HHS defers; Treasury has no comment.

The lukewarm endorsement of this bill reflected in the agency comments derives from the belief that robbery and burglary offenses should be the province of State and local rather than Federal law enforcement. As you may be aware, several State and local law enforcement officials have objected to the bill on the ground that it is an intrusive expansion of Federal jurisdiction. I can appreciate these concerns. On the other hand, the registrants are subject to a greater risk of burglary and robbery precisely because of the Federal regulations and control over their activities, and the limitations in the bill make it clear that run-of-the-mill pharmacy robberies are not automatically to become Federal cases. The Federal authorities can exercise prosecutorial discretion and defer to their State and local counterparts in all but the most serious cases, or those with broader ramifications beyond the robbery, and in light of

the large number of more significant Federal cases in the drug area, I suspect Federal prosecutors will generally be quite willing to do so.

Justice has apparently not submitted a signing statement, outlining the limited Federal prosecutorial role they anticipate under this statute. Such a statement could alleviate the concerns of some State and local officials, but could also antagonize the bill's sponsors and be perceived as Administration timidity in embracing another tool in the war on drugs. On balance, it probably makes sense simply to sign the bill without issuing a statement.

I have reviewed the memorandum for the President prepared by OMB Assistant Director for Legislative Reference James M. Frey, and the bill itself, and have no objections.

Attachment

THE WHITE HOUSE

WASHINGTON

May 29, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: S. 422 -- Controlled Substance Registrant Protection Act of 1984

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

FFF:JGR:aea 5/29/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 30, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Enrolled Bill H.R. 5287 -- Developing Institution Challenge Grant and Other Education Program Amendments

Richard Darman has asked for comments on the above-referenced enrolled bill by close of business Monday, June 4. This bill would correct a problem that has developed in the grant program for developing educational institutions, including historically black colleges. A law passed last year established a new grant program for such schools and provided for the termination of the previously-awarded grants to the same schools at the end of this year. The bill would avoid this abrupt termination and permit a smoother transition between the old and new grant programs, without increasing the total committed funds. The bill would also increase the authorization level for the Education Department Inspector General, to the level requested by the Administration; reauthorize a fellowship program for poor students and teachers to participate in the "Close Up" program; authorize grants for law school clinical programs and law-related educational programs at the elementary and secondary school levels; slightly expand the definition of migrant children for purposes of the established migrant education program; and authorize a grant to two historically black colleges in Philadelphia, Lincoln University and Cheyney State College.

Education recommends approval, contending that the black colleges and Inspector General aspects of the bill outweigh the other objectionable but largely insignificant provisions. OMB concurs. I have reviewed the memorandum for the President prepared by OMB Assistant Director for Legislative Reference James M. Frey, and the bill itself, and have no objections.

Attachment

THE WHITE HOUSE

WASHINGTON

May 30, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Enrolled Bill H.R. 5287 -- Developing Institution Challenge Grant and Other Education Program Amendments

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

FFF:JGR:aea 5/30/84
cc: FFFielding/JGRoberts/Subj/Chron