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THE WHITE HOUSE

WASHINGTON

September 25, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Canada-U.S. Free Trade Agreement

Prime Minister Mulroney of Canada is to call the President tomorrow to indicate his interest in negotiating a free trade agreement. Mr. Regan asked Mr. McFarlane to determine what legal bases had to be touched in terms of Congressional notification, consultation, etc. before such negotiations could commence. McFarlane asked Ambassador Yeutter to look into the question. Yeutter has now sent a memorandum to McFarlane, attaching a legal analysis from USTR General Counsel Holmer. Chew has asked for your views.

The pertinent provisions of the Trade Act of 1974, as amended by the Trade and Tariff Act of 1984, are exceedingly complicated (as witnessed by the statutory citations below). The 1984 Act granted the President specific authority to conduct negotiations for free trade agreements, including agreements on tariff barriers, and provided that the implementing legislation for such agreements would be considered on a "fast track" basis by Congress, if the President went through various notification and consultation hoops. The "fast track" basis is highly desirable -- the agreements are considered by Congress within 60 days, and are not subject to amendment. The President can always negotiate as he sees fit, reach an agreement, and submit implementing legislation, but, as a practical matter, the Administration is willing to go through the hoops to obtain "fast track."

The authority for the President to enter into a trade agreement providing for the reduction or elimination of duties (a free trade agreement) is found at 19 U.S.C. § 2112(b)(4). The other country must request such an agreement, 19 U.S.C. § 2112(b)(4)(A)(i). The President must notify Congress 90 days before entering into such an agreement, and publish the notification in the Federal Register. 19 U.S.C. § 2112(e)(1). In addition -- and this requirement was added in 1984, along with the grant of specific authority -- the President must, at least 60 days before giving the 90 days notice, notify the Senate Finance Committee and the House Ways and Means Committee of any

negotiations concerning such an agreement, and "consult with such committees regarding the negotiation of such agreement." 19 U.S.C. § 2112(b)(4)(A)(ii)(I), (II).

If the President fails to meet these requirements, he loses "fast track," 19 U.S.C. § 2112(b)(4)(B)(ii)(I). "Fast track" is also lost if either the Senate Finance Committee or the House Ways and Means Committee disapproves of the negotiation during the 60-day period referred to above, 19 U.S.C. § 2112(b)(4)(B)(ii)(II). This is not an unconstitutional legislative veto, since it goes to Congress's ordering of its own calendar; OLC approved the provision in the bill when it was being considered by Congress.

In his list of required consultations, Holmer omits the requirement in 19 U.S.C. § 2112(c) that the President consult with the Senate Finance Committee and the House Ways and Means Committee before entering into any agreement. This requirement was in the 1974 Act, and may now be considered redundant of or superseded by the more elaborate 60-day notice and consultation provision with respect to the same committees added in 1984, and appearing at 19 U.S.C. § 2112(b)(4)(A)(ii). Both provisions are still on the books, however, and the new one refers to consultations regarding negotiations, while the old one refers to consultations regarding an agreement. In the interest of completeness, I would note the Section 2112(c) requirement in the memorandum for Chew.

In addition to the foregoing, there is an omnibus provision, 19 U.S.C. § 2211(b)(1), that requires the USTR to keep "official advisers" -- members of Congress designated by the Speaker of the House and the President pro tempore of the Senate -- "currently informed" on the status of U.S. trade negotiations.

As a legal matter, then, there is no need to notify Congress or the pertinent committees immediately about Mulroney's request, or to begin consultations with the committees. That need only happen at least 60 days before giving the 90 day notice. As a practical and political matter, however, those most active on these issues in Congress would be surprised if negotiations proceeded too far along with the Canadians without notifying Congress. As Holmer's memorandum points out, the legislative history suggested the committees would have an early opportunity to disapprove negotiations. According to Alex Platt of NSC, the proposal is for Yeutter to sound out the committees informally about Mulroney's call. If the reaction is clearly negative, the matter will be dropped. If the reaction is positive, the required

written notice to the committees will be given, and negotiations will commence. Negotiations would not commence during the period of informal consultation. This plan more than complies with the statute.

Attachment

THE WHITE HOUSE

WASHINGTON

September 25, 1985

MEMORANDUM FOR DAVID L. CHEW
STAFF SECRETARY

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Canada-U.S. Free Trade Agreement

You have asked for our views on the requirements for notification of and consultation with Congress prior to the negotiation and conclusion of a free trade agreement with Canada. I understand Prime Minister Mulroney is expected to telephone the President concerning such an agreement tomorrow. I have reviewed the attached memoranda from Ambassador Yeutter and USTR General Counsel Alan Holmer on this subject, and have no legal objection to those memoranda.

I would begin by pointing out that, as a constitutional matter, the President is free to negotiate with other countries without restriction, and submit any necessary implementing legislation to Congress for action. To obtain the desired "fast track" treatment under 19 U.S.C. § 2191, however, the various notification, consultation, and approval requirements must be satisfied. The President must notify Congress 90 days before entering into a free trade agreement, and publish this notification in the Federal Register, 19 U.S.C. § 2112(e)(1), and, at least 60 days before giving that notice, must provide the Senate Finance Committee and House Ways and Means Committee written notice of negotiation of such an agreement, and consult with those committees on the negotiations. 19 U.S.C. § 2112(b)(4)(A)(ii). In addition, a general provision, 19 U.S.C. § 2211(b)(1), requires USTR to keep certain members of Congress "currently informed" on trade negotiations.

In the interest of completeness, I should point out that there is another consultation requirement, not noted in the USTR memoranda, contained in 19 U.S.C. § 2112(c). That provision requires that the President consult with the Senate Finance Committee and the House Ways and Means Committee, and other affected committees, prior to entering into any agreement. This requirement was in the Trade Act of 1974, and may be considered to be redundant of or superseded by the more elaborate requirement with respect to these committees added by the Trade and Tariff Act of 1984. Both provisions are still on the books, however, and

19 U.S.C. § 2112(c) refers to the agreement itself, while 19 U.S.C. § 2112(b)(4)(A) refers to the negotiations. Prudence would dictate consulting with the pertinent committees a second time pursuant to 19 U.S.C. § 2112(c), on the agreement, after the consultations required by 19 U.S.C. § 2112(b)(4)(A), on the negotiations.

Strictly speaking, then, there is no legal requirement to advise Congress or the pertinent committees immediately upon Prime Minister Mulroney's call. Notification and consultation is legally required under 19 U.S.C. § 2112 no earlier than 150 days before entering into an agreement, and under 19 U.S.C. § 2211 at some vague point before negotiations progress too far.

Since either the Senate Finance Committee or the House Ways and Means Committee can block fast track treatment, however, 19 U.S.C. § 2112(b)(4)(B)(ii)(II), I agree that prudence may dictate promptly advising Congress of Mulroney's interest.

I understand that the proposal is for Ambassador Yeutter to consult informally with committee members and other members of Congress about Mulroney's interest before commencing negotiations. Formal written notification of the committees would take place if the reaction is favorable, again before commencing negotiations. This is beyond the strict requirements of the law, but I certainly have no objection to the proposed course of action.

Attachment
FFF:JGR:aea 9/25/85
cc: FFFielding
JGRoberts
Subj
Chron

THE WHITE HOUSE

WASHINGTON

September 26, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Executive Order Entitled "Prohibition of the Importation of the South African Krugerrand"

David Chew has asked for comments as soon as possible (not 4:30 p.m. as indicated on the cover memorandum) on the proposed Executive Order prohibiting importation of South African Krugerrands into the United States. The original version of this order circulated this morning was inadequate in that it did not contain any determination that the national emergency declared in Executive Order 12532 was continuing. The revised version responds to objections on that score raised by me and the Department of Justice. I have reviewed the draft Executive Order and have no objections to it.

I have also reviewed the accompanying report to Congress required by 50 U.S.C. § 1703(b). This report is sufficient under 50 U.S.C. § 1703(b), particularly since it references the previous Executive Order and previous report to Congress. Under 50 U.S.C. § 1641(b), however, the President is required to send to Congress a copy of any Executive Order he issues taking emergency action. This requirement is in addition to the reporting requirement of 50 U.S.C. § 1703(b). I would, accordingly, change the last clause of the last sentence in the second paragraph to read as follows: "I have issued an Executive Order, a copy of which is attached, exercising my statutory authority to prohibit such imports effective October 11, 1985." This ensures satisfaction of 50 U.S.C. § 1641(b), and a record that the requirement was satisfied.

Attachment

THE WHITE HOUSE

WASHINGTON

September 26, 1985

MEMORANDUM FOR DAVID L. CHEW
STAFF SECRETARY

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Executive Order Entitled "Prohibition of the Importation of the South African Krugerrand"

Counsel's Office has reviewed the above-referenced proposed Executive Order and the accompanying report to Congress. I have no legal objection to the Executive Order. With respect to the report to Congress, I would change the last clause in the last sentence in the second paragraph to read as follows: "I have issued an Executive Order, a copy of which is attached, exercising my statutory authority to prohibit such imports effective October 11, 1985." A copy of the Executive Order should then be attached to the report. This will ensure compliance with, and create a record of compliance with, the requirements of 50 U.S.C. § 1641(b). That provision requires the President promptly to provide Congress with copies of any emergency Executive Orders he may issue. This requirement is in addition to the reporting requirement of 50 U.S.C. § 1703(b).

I also note that "certian" in line 4 should be "certain."

FFF:JGR:aea 9/26/85
cc: FFFielding
JGRoberts
Subj
Chron

THE WHITE HOUSE

WASHINGTON

September 30, 1985

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS

SUBJECT: Barbados-United States Tax Treaty

I understand that Mr. Fielding has asked you to return a telephone call on this subject. Attached for your background is my memorandum of December 13, 1983, for Mr. Fielding, concerning this firm's first approach to this office on this subject, and the response Mr. Fielding signed. At that time the U.S. Government had terminated a tax treaty with Barbados (and 22 other Caribbean countries) as a prelude to negotiating new ones. The new treaty has now been concluded and is awaiting ratification; there has already been a hearing before the Senate Foreign Relations Committee.

Zagaris's concern is that some on the Hill are contending ratification should await passage of the new tax bill, while Zagaris's client, the Barbados Government, wants prompt ratification. According to Treasury, the Administration is also clearly committed to prompt ratification, and is opposed to any delay pending the tax bill. Apparently the Foreign Relations Committee is waiting for letters from Rostenkowski's committee (House Ways and Means) and Packwood's committee (Senate Finance) before voting out the treaty.

You can tell Zagaris that the Administration fully agrees with his position: we want prompt ratification, and do not think ratification should be held up for the tax bill.

THE WHITE HOUSE

WASHINGTON

September 26, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Justice Report on S.J. Res. 162, Proposed Amendment to the Constitution Authorizing the President to Disapprove or Reduce an Item of Appropriations

OMB has asked for our views on a proposed Justice report on S.J. Res. 162, a proposed constitutional amendment to give the President a line-item veto for appropriations. The amendment would authorize the President to reduce or disapprove particular items in appropriations bills. Any reduction or disapproval may be overridden as usual, by two-thirds vote of both Houses, except that only a majority vote of both Houses would be required to restore an item to its original amount.

The proposed report contains the usual boilerplate to the effect that the Executive has no direct role in proposing amendments, and goes on to note Administration support for a line item veto. The report objects that S.J. Res. 162 only applies to appropriations bills, and would permit reinstatement of original amounts by majority vote (rather than two-thirds).

I have reviewed the proposed report and have no objections. As you know, the President is on record as supporting a bill that would, in effect, grant temporary line item veto authority, by enrolling each item as a separate bill. He has also, however, consistently called for a permanent constitutional amendment. Since this report concerns only the latter, I see no need to discuss his support for the bill granting temporary authority.

Attachment

THE WHITE HOUSE

WASHINGTON

September 26, 1985

MEMORANDUM FOR GREGORY JONES
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Justice Report on S.J. Res. 162, Proposed Amendment to the Constitution Authorizing the President to Disapprove or Reduce an Item of Appropriations

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

FFF:JGR:aea 9/26/85
cc: FFFielding
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THE WHITE HOUSE

WASHINGTON

September 26, 1985

MEMORANDUM FOR ROBERT H. TUTTLE
DEPUTY ASSISTANT TO THE PRESIDENT
DIRECTOR, PRESIDENTIAL PERSONNEL

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Vacancy on Panel of Arbitrators of the International Centre for Settlement of Investment Disputes

A vacancy has arisen in the United States delegation to the Panel of Arbitrators of the International Centre for Settlement of Investment Disputes (ICSID).

The ICSID was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, to which the United States is a party. The Convention provides that the United States may appoint four individuals to the Centre's Panel of Arbitrators, and 22 U.S.C. § 1650 provides that the President may make those appointments.

The only qualifications for appointment appear in Article 14(1) of the Convention:

> Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

Persons appointed to the Panel receive no compensation from the Government, but are compensated by the parties to any case they arbitrate.

Past appointees have generally been very distinguished attorneys or legal scholars. Since parties must consent to submit cases to the Centre, the quality of the arbitrators is very important. This will be President Reagan's first appointment to the Panel of Arbitrators.

On March 28, 1985, the Legal Adviser at State and the Acting General Counsel at Treasury made a joint recommendation of four candidates. At this point, I have requested the new incumbents for recommendations. Upon receipt I will forward the same to you with my comments.

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cc: FFFielding
JGRoberts
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Chron

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THE WHITE HOUSE

WASHINGTON

September 27, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Appointment of Diane Wolf and Pascal Regan to the Commission of Fine Arts

By memorandum dated July 31 for Bob Tuttle, you cleared six prospective appointees for the Commission of Fine Arts. You noted, however, the statutory requirement that the appointees be "well-qualified judges of the fine arts," 40 U.S.C. § 104, [redacted] The attached memorandum to Borchard tells her she may go forward if she is satisfied.

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Attachment

THE WHITE HOUSE

WASHINGTON

September 27, 1985

MEMORANDUM FOR SUSAN BORCHARD
ASSOCIATE DIRECTOR
PRESIDENTIAL PERSONNEL

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Appointment of Diane Wolf and Pascal Regan to the Commission of Fine Arts

Thank you for your memorandum of September 23, detailing the reasons you believe Diane Wolf and Pascal Regan may be considered "well-qualified judges of the fine arts." My memorandum of July 31 cleared these two and the other prospective appointees to the Commission of Fine Arts; my additional comments were simply intended to alert you to possible criticism of the appointments. If you are satisfied, you may proceed with the appointments.

FFF:JGR:aea 9/27/85
cc: FFFielding
JGRoberts
Subj
Chron

THE WHITE HOUSE

WASHINGTON

September 27, 1985

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS

SUBJECT: Scheduling Request for Presentation of the Interim Report from the President's Commission on Organized Crime by Chairman Irving R. Kaufman

Fred Ryan has asked for our recommendation by close of business today on a request from Chairman Irving Kaufman of the President's Commission on Organized Crime for a meeting with the President during the week of October 21, to present another interim report of the Commission. Such a meeting took place October 25, 1984, and Kaufman will doubtless expect another ceremony when presenting the Commission's final report in March 1986.

I see no reason for the President to receive Kaufman and the Commissioners three separate times. A memorandum to Ryan expressing this view is attached for your signature.

Attachment

THE WHITE HOUSE

WASHINGTON

September 27, 1985

MEMORANDUM FOR FREDERICK J. RYAN, JR.
DEPUTY ASSISTANT TO THE PRESIDENT
DIRECTOR, PRESIDENTIAL SCHEDULING

FROM: RICHARD A. HAUSER
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: Scheduling Request for Presentation of the Interim Report from the President's Commission on Organized Crime by Chairman Irving R. Kaufman

You have asked for our views on a request from Chairman Irving Kaufman of the President's Commission on Organized Crime for a meeting with the President during the week of October 21, to present another interim report of the Commission. While this office would have no objection to such a meeting with the President, we also do not consider it necessary. Chairman Kaufman was granted a meeting with the President to present an earlier interim report of the Commission on October 25, 1984. He will doubtless request a meeting to present the final report of the Commission in March 1986. I see no reason to grant this request for a grand total of three ceremonial presentations, when many Presidential commissions have none at all.

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cc: FFFielding
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JGRoberts
Subj
Chron

THE WHITE HOUSE

WASHINGTON

September 30, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Testimony on S. 1305, the Computer Pornography and Child Exploitation Act of 1985

OMB has asked for comments by noon today on testimony Lawrence Lippe of the Criminal Division is scheduled to deliver tomorrow on the Computer Pornography and Child Exploitation Act of 1985. That bill would add computer pornography to the obscene mail statute, and make it a crime to use computers to store or transmit information about minors for the purpose of facilitating sexual conduct with minors or the visual depiction of such conduct.

The draft testimony supports adding computer transmitted material to the obscene mail statute. Lippe asserts that it is constitutional to prohibit even informational speech if the speech is closely connected to specific criminal activity. He therefore suggests changing the wording of the bill to ban transmission of information about minors in connection with a specific act, plan, or scheme involving sexual abuse or sexual conduct with minors in violation of law. (As a practical matter this could make prosecution under the bill very difficult, since the prosecution would apparently be required to prove an underlying violation of law before prosecuting the computer transmission.) Lippe concludes his testimony with some technical restructuring suggestions.

I have no objections.

Attachment

THE WHITE HOUSE

WASHINGTON

September 30, 1985

MEMORANDUM FOR GREGORY JONES
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Testimony on S. 1305, the Computer Pornography and Child Exploitation Act of 1985

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

FFF:JGR:aea 9/30/85
cc: FFFielding
JGRoberts
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Chron

THE WHITE HOUSE

WASHINGTON

September 30, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: David O. Stewart

Attached are David O. Stewart's most recent articles for the ABA Journal. They all report on recent developments in the Supreme Court, and are basically objective and informational. The only bias I have discerned is a tendency to elevate the importance of Justice Powell, his old boss. I have clipped a few brief passages that discuss the Administration.

Also attached is Stewart's Martindale-Hubbel entry.

Attachments