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OFFICE OF POLICY DEVELOPMENT STAFFING MEMORANDUM

DATE: 5/6/82 ACTION/CONCURRENCE/COMMENT DUE BY: FYI

SUBJECT: Daily Assignment Update

	ACTION	FYI		ACTION	FYI
HARPER	<input type="checkbox"/>	<input checked="" type="checkbox"/>	SMITH	<input type="checkbox"/>	<input type="checkbox"/>
PORTER	<input type="checkbox"/>	<input checked="" type="checkbox"/>	✓ UHLMANN	<input type="checkbox"/>	<input checked="" type="checkbox"/>
BANDOW	<input type="checkbox"/>	<input type="checkbox"/>	ADMINISTRATION	<input type="checkbox"/>	<input checked="" type="checkbox"/>
BAUER	<input type="checkbox"/>	<input checked="" type="checkbox"/>	DRUG POLICY		
BOGGS	<input type="checkbox"/>	<input checked="" type="checkbox"/>	TURNER	<input type="checkbox"/>	<input type="checkbox"/>
BRADLEY	<input type="checkbox"/>	<input checked="" type="checkbox"/>	D. LEONARD	<input type="checkbox"/>	<input type="checkbox"/>
CARLESON	<input type="checkbox"/>	<input checked="" type="checkbox"/>	OFFICE OF POLICY INFORMATION		
FAIRBANKS	<input type="checkbox"/>	<input checked="" type="checkbox"/>	GRAY	<input type="checkbox"/>	<input checked="" type="checkbox"/>
FRANKUM	<input type="checkbox"/>	<input type="checkbox"/>	HOPKINS	<input type="checkbox"/>	<input checked="" type="checkbox"/>
HEMEL	<input type="checkbox"/>	<input type="checkbox"/>	OTHER		
KASS/GUNN	<input type="checkbox"/>	<input checked="" type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
B. LEONARD	<input type="checkbox"/>	<input checked="" type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
MALOLEY	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>

REMARKS:

OPD and OPI Staff:

Please find attached your portion of today's tracking sheet. As you are aware, I send these only to alert you to the information that we have on file as due from your office.

I hope the sheet proves to be of help. Let Betty Ayers and/or me know if you have any questions.

E. Rock
E. ROCK

EDWIN L. HARPER
ASSISTANT TO THE PRESIDENT
FOR POLICY DEVELOPMENT
(X6515)

ID: 067660PD RECEIVED: 820330

HARPER, EDWIN L., MR. THE WHITE HOUSE
8:00 AM MEETINGS
INDIAN CLAIMS LEGISLATION - DEPARTMENT OF
JUSTICE COMMENT ON THE BILL, CABINET COUNCIL
ON LEGAL POLICY AGENDA ITEM.
---DUE--- FROM-----
MICHAEL UHLMANN

✓ Indian Land Claims

ID: 067680PD RECEIVED: 820331

SINGER, HENRY A., DR. HUMAN RESOURCES INSTITUTE INC.
RESPONSE TO HUMAN RESOURCES INSTITUTE INC.
LETTER
PLEASE ANALYZE AND DRAFT A RESPONSE -
INTERESTING IDEA
---DUE--- FROM-----
820407 MICHAEL UHLMANN

Reply letter

ID: 067774PD RECEIVED: 820405

HARPER, EDWIN L., MR. THE WHITE HOUSE
BECENTENNIAL OF THE BILL OF RIGHTS AND
CONSTITUTION PLANNING
---DUE--- FROM-----
820416 MICHAEL UHLMANN

update → talk to Bob Goldwyn

ID: 067851PD RECEIVED: 820407

HARPER, EDWIN L., MR. THE WHITE HOUSE
PROPOSED JUSTICE REPORTS ON CONSTITUTIONAL
AMENDMENTS TO BAN ABORTION
SEE COMMENTS ON ATTACHED SHEET
---DUE--- FROM-----
820413 MICHAEL UHLMANN

✓ Abortion

ID: 067882PD RECEIVED: 820408

HARPER, EDWIN L., MR. THE WHITE HOUSE
TRIS LEGISLATIVE STATUS UPDATE
---DUE--- FROM-----
820416 MICHAEL UHLMANN

✓ TRIS

D: 067953PD RECEIVED: 820412

ARPER, EDWIN L., MR. THE WHITE HOUSE
RESPONSE TO JAY MOORHEAD REGARDING VERITY
STATEMENT

THIS REQUEST WAS SENT OUT MAR 22 82
THIS IS A REMINDER

---DUE--- FROM-----
MICHAEL UHLMANN

D: 067954PD RECEIVED: 820412

ARPER, EDWIN L., MR. THE WHITE HOUSE
COORDINATION OF CIVIL RIGHTS ENFORCEMENT
THIS WAS ORIGINALLY SEN OUT MAR 23 82
THIS IS A REMINDER

---DUE--- FROM-----
820425 MICHAEL UHLMANN

D: 067958PD RECEIVED: 820412

ARPER, EDWIN L., MR. THE WHITE HOUSE
TESTIMONY ON TAX EXEMPT SCHOOLS
THIS REQUEST WAS SENT OUT MAR 23 82
THIS IS A REMINDER

---DUE--- FROM-----
820426 MICHAEL UHLMANN

D: 067963PD RECEIVED: 820412

ARPER, EDWIN L., MR. THE WHITE HOUSE
KEITH KAHLE LETTER REGARDING POSTAL SERVICE
MIKE UHLMANN:
COULD YOU PLEASE ANSWER THIS UNDER YOUR
SIGNATURE? - THANKS - EMILY ROCK

---DUE--- FROM-----
820426 MICHAEL UHLMANN

D: 067994PD RECEIVED: 820414

ARPER, EDWIN L., MR. THE WHITE HOUSE
CIVIL RIGHTS ACT OF 1964
MIKE - ALSO GET COMMENTS FROM MEL BRADLEY
ON THIS

---DUE--- FROM-----
820419 MICHAEL UHLMANN

ID: 068010PD RECEIVED: 820415

HARPER, EDWIN L., MR. THE WHITE HOUSE
ADMINISTRATION'S POSITION ON THE PRESERVATION
OF STATE RIGHT TO WORK STATUTES

---DUE--- FROM-----
820419 MICHAEL UHLMANN

ID: 068027PD RECEIVED: 820322

HARPER, EDWIN L., MR. THE WHITE HOUSE
EEO POLICY

---DUE--- FROM-----
820427 MICHAEL UHLMANN

ID: 071733PD RECEIVED: 820421

HARPER, EDWIN L., MR. THE WHITE HOUSE
CRIMINAL CODE / BILL GRIBBON REMARKS
MIKE UHLMANN - ELH WOULD LIKE YOUR COMMENTS
ON THE ATTACHED - THANKS - DOC ROCK

---DUE--- FROM-----
820427 MICHAEL UHLMANN

ID: 071743PD RECEIVED: 820423

HARPER, EDWIN L., MR. THE WHITE HOUSE
LETTER FROM CHESTER FINN
LETTER FROM CHESTER FINN

---DUE--- FROM-----
820430 MICHAEL UHLMANN

ID: 071749PD RECEIVED: 820423

HARPER, EDWIN L., MR. THE WHITE HOUSE
LAW OF THE SEA FORM LETTER RESPONSE
MIKE - PLEASE DRAFT A FORM LETTER RESPONSE
TO ANSWER THE ATTACHED AND OTHERS LIKE THEM
WE WILL BE GLAD TO PUT IT ON OUR WORD
PROCESSOR AND ANSWER THEM FROM HERE AFTER WE
GET A DRAFT FROM YOU - THANKS - DOC ROCK

---DUE--- FROM-----
820430 MICHAEL UHLMANN

ID: 071785PD

RECEIVED: 820426

HARPER, EDWIN L., MR. THE WHITE HOUSE
SECTION BY SECTION SUMMARY OF COMPROMISE
AMENDMENT
PLEASE PROVIDE COMMENTS ON THE ATTACHED
---DUE--- FROM-----
820430 MICHAEL UHLMANN

?

ID: 071797PD

RECEIVED: 820426

HARPER, EDWIN L., MR. THE WHITE HOUSE
SENATOR JACKSON LETTER REGARDING A-76
MIKE - PLEASE DRAFT A RESPONSE FOR ELH'S
SIGNATURE - THANKS - E. ROCK
---DUE--- FROM-----
820505 MICHAEL UHLMANN

?

ID: 071802PD

RECEIVED: 820427

HARPER, EDWIN L., MR. THE WHITE HOUSE
ADMINISTRATION POSITIONS ON BILLS PROPOSING
AMENDMENTS OF THE BANK SECRECY ACT
---DUE--- FROM-----
820505 ROGER PORTER
820505 MICHAEL UHLMANN

✓

talk to Justice
Treasury -
Bob
Powis
Bank Secrecy Act

ID: 071843PD

RECEIVED: 820429

HARPER, EDWIN L., MR. THE WHITE HOUSE
FOLLOW UP ON TELECOMMUNICATIONS MEETING WITH
MICHIGAN PSC CHAIRMAN
---DUE--- FROM-----
820505 MICHAEL UHLMANN

ID: 071857PD

RECEIVED: 820429

HARPER, EDWIN L., MR. THE WHITE HOUSE
CONSTITUTIONAL AMENDMENT REGARDING SCHOOL
PRAYER - NEEDED CHANGES
STATUS? THESE LOOK LIKE REASONABLE POINTS
TO ME
---DUE--- FROM-----
820503 MICHAEL UHLMANN

D: 071878PD RECEIVED: 820503

BARPER, EDWIN L., MR. THE WHITE HOUSE
REVIEW OF ISSUES OF SPECIAL INTEREST TO
MINORITIES

---DUE--- FROM-----
820504 MELVIN BRADLEY
820504 ROBERT CARLESON
820504 MICHAEL UHLMANN
820504 OFFICE OF MANAGEMENT AND BUDGET
820504 CRAIG L. FULLER
820504 OFFICE OF MANAGEMENT AND BUDGET

D: 071896PD RECEIVED: 820503

BARPER, EDWIN L., MR. THE WHITE HOUSE
WORKING GROUP REGARDING TUITION TAX CREDIT
BILL

MIKE UHLMANN - PLEASE CREATE AND CONVENE A
WORKING GROUP TO RESOLVE THE TUITION TAX
CREDIT BILL PROBLEM RAISED BY LANGUAGE IN
THE BILL THAT APPEARS TO SOME TO ALLOW TOO
MUCH GOVERNMENT INTERFERENCE IN RELIGIOUS
SCHOOLS - I WOULD RECOMMEND THAT THE GROUP
CONSIST OF B. BAUER, M. BRADLEY, M. HOROWITZ
AND M. BLACKWELL - PLEASE SUBMIT THE WORKING
GROUP'S RECOMMENDATION TO ME BY MAY 12

---DUE--- FROM-----
MICHAEL UHLMANN

D: 071915PD RECEIVED: 820504

BARPER, EDWIN L., MR. THE WHITE HOUSE
CIVIL RIGHTS DISCRIMINATION: THE FACTS

---DUE--- FROM-----
820505 MICHAEL UHLMANN

D: 071928PD RECEIVED: 820505

BARPER, EDWIN L., MR. THE WHITE HOUSE
CALIFORNIA AND GUN REGISTRATION

---DUE--- FROM-----
820510 MICHAEL UHLMANN

Wednesday
May 12

REPORT DATE: 06 MAY 1982
OCTJSPPD ACTION OFFICE MICHAEL UHLMANN

PAGE 46

ID: 071935PD

RECEIVED: 820505

HARPER, EDWIN L., MR. THE WHITE HOUSE
CIVIL RIGHTS ACTIVITY QUANTIFICATION

---DUE---
820510
820510

FROM-----
MICHAEL UHLMANN
OFFICE OF MANAGEMENT AND BUDGET

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

May 11, 1982

FOR: EDWIN HARPER
FROM: MICHAEL UHLMANN
SUBJECT: TRIS Indemnification Legislation
Options and Recommendation

The Administration must soon reach a position on TRIS Indemnification Legislation (S.823/H.R. 4011). These bills provide for Federal indemnification of businesses which have sustained losses as a result of CPSC's 1977 order banning TRIS-treated sleepwear pursuant to the Federal Hazardous Substances Act (FHSA).

Legislative Status

S.823, sponsored by Senator Strom Thurmond, passed the Senate in June 1981. It has been referred to the House Judiciary Committee's Subcommittee on Administrative Law and Governmental Relations. On March 18, 1982, Ken Duberstein reported that the bill will be voted out of Committee "probably sooner rather than later" and that it "looks like this is going to be on a relatively fast track".

Some Pertinent Background Facts

In 1971, when the Commerce Department proposed a stringent flammability standard, the industry objected on the grounds that the chemicals needed to meet the standard had not been adequately tested. When Commerce adopted the strict standard, the industry nevertheless proceeded to market sleepwear treated with these chemicals. In 1976, EDF precipitated a public debate over the safety of TRIS. Sales of TRIS products suffered. Some companies stopped making TRIS-treated fabrics and sleepwear; others continued. In 1977, the CPSC banned TRIS-treated sleepwear and invoked that statute's buy-back provisions. The apparel industry estimates that it lost about \$50 million as a result of the ban.

In the sleepwear business, a few large textile mills supply treated, uncut cloth to about 110 garment manufacturers who cut and sew the cloth into sleepwear. The TRIS was added by the fiber or fabric companies and was already in the cloth before it was received by the garment manufacturers.

The CPSC's TRIS ban has been applied in such a way that most of the financial loss has fallen on the garment manufacturers. The latter companies have been required to repurchase sleepwear from retailers but have not been allowed to sell the sleepwear back to the textile companies which produced the TRIS-treated cloth. A CPSC order which would have permitted the garment manufacturers to do so was frustrated by court action. Rather than appeal this decision or pursue common law remedies against their suppliers, the garment manufacturers have looked principally to the Federal government for indemnification.

The 110 garment manufacturers affected by the ban are mostly small businesses. Taken together they employ 25,000 - 30,000.

The Proposed Legislation

The bill covers all manufacturers, distributors and retailers of sleepwear, fabric, fiber, or yarn. It authorizes each of these companies to file separate lawsuits in the Court of Claims seeking full indemnification for their losses. The bill seems to assume government liability and empowers the Court "to consider" various factors, such as the claimant's good faith, and to determine the appropriate level of compensation for each claimant.

There are substantial problems with the bill:

- o It sets a bad precedent by creating any Government liability in this case. (The Government is not guilty of any legal wrongdoing, and indemnification for industry losses in the absence of wrongdoing is inappropriate. Economic losses from adverse governmental decisions -- and economic gains from favorable decisions -- are part of the risk of doing business.)
- o Even if some Government liability were appropriate, the bill sets a bad precedent by providing for full indemnification by the Government. (Industry has a duty to develop safe products to meet federal performance standards. The fact that the Government's standard is ill-conceived should not totally relieve industry of its responsibilities. If industry chooses to market a product with uncertain safety characteristics, it must bear some of the risk. Full indemnification would weaken industry incentive to develop safe products to meet Federal performance standards.)

- The bill ignores the fact that much of the ban's perceived "injustice" has resulted from the garment manufacturers' own failure to mitigate damages by pursuing their remedies against their suppliers.
- The bill does not take into account that much of the industry's losses were caused by pre-ban public resistance to TRIS products and not by the ban itself. The Government should not pay for losses which result from consumer preference.
- The bill sets no clear-cut criteria to govern the claimant's right to recover or the proper level of recovery. It merely directs the Court to "consider" a number of factors in determining an award.
- The bill contemplates an extremely costly and cumbersome indemnification procedure, requiring litigation of over a hundred separate lawsuits in the Court of Claims. This is wasteful.

Prospects

Similar legislation passed both the Senate and House during the 95th Congress, but was pocket vetoed by President Carter.

S.823, having already passed the Senate handily, can be expected, in the absence of Administration action, to pass the House by a comfortable margin.

Ken Duberstein reports that Rep. Campbell has signalled a willingness to consider amendments.

OPTIONS

Option 1: Oppose Any Indemnification Legislation

Oppose concept of indemnification where Government has committed no legal wrong. Be prepared to veto S.823. Use veto as an opportunity to make two points:

- Bad regulations cost society billions of dollars. But taxpayer cannot be asked to pay for losses caused by bad regulations.
- The solution to bad regulations is to elect people who will stop them. The President is doing something about it. Congress should help him.

Pros

- i. If bill stopped or veto sustained:
 - bad precedent avoided;
 - over \$50 million saved.
- ii. Avoids Administration complicity in setting bad precedent.
- iii. Provides opportunity to remind people that bad regulations are costly and that the President is attacking this problem at its roots.
- iv. Projects President as protecting taxpayer.
- v. Projects President as trying to hold the line on spending.

Cons

- i. Congress may circumvent by attaching to non-vetoable vehicle.
- ii. Forecloses opportunity to ameliorate legislation; if veto overridden, U.S. must pay \$50 million plus and bad precedent set.
- iii. Item may be too small to score any points effectively.
- iv. Administration may be portrayed as being "unfair" to the little guy.
- v. Offends Sen. Thurmond and other Congressional backers, as well as affected segments of textile industry.
- vi. Creates strong possibility of veto override -- which is never good, even on small item.

Option 2: Support S.823 If Amended to Provide for Partial Indemnification and to Set Clear-cut Standards for Recovery

Seek a "middle ground" within the framework of the existing bill. Propose some or all of the following amendments and support the legislation if a sufficient number are adopted:

Amendment A: Recovery against U.S. limited to 50% of proven losses. (This preserves principle that industry is not relieved of its own responsibilities simply because the Government does not act intelligently. Also takes into account that much of the loss results from consumer preference and failure to mitigate damages.)

Amendment B: Bar any recovery for companies that continued to market TRIS-treated goods after they knew, or should have known, that such products might be hazardous.

Amendment C: Bar recovery for any inventories that were produced after a specified date (by which the company should have known that TRIS might be banned as hazardous).

Amendment D: Convert the "factors" which the bill invites the Court to "consider" into clear-cut standards which a claimant must prove before it is entitled to any recovery.

Amendment E: Make it clear that the U.S. will not assume liability for personal injury actions brought against companies for using TRIS (e.g. lawsuit by parents of child who has developed cancer). (Ala "Agent Orange").

Pros

Cons

- | | |
|---|---|
| i. Reduces total U.S. payments. | i. Still sets bad precedent. |
| ii. Precedent is a little less pernicious since industry must still bear costs. | ii. Still requires costly litigation (maybe even more costly because of strict criteria). |
| iii. Rigorous standards may deter claimants or defeat many claims. | iii. May be difficult to sell in the House. |

Option 3: Support Relief But Only if Accomplished Through a Streamlined Administrative Proceeding

Accept that some extraordinary relief is appropriate in this case. Insist, however, that such relief not be predicated on the notion that the U.S. was "at fault" or that the industry has a "legal claim" against the Government. Stress that Congressional (rather than judicial) relief is needed because FHSA's buy-back provisions and various court actions have prevented the equitable allocation of losses. Insist that any relief be accomplished in the most efficient manner possible.

Specifically, urge the House Judiciary Committee to adopt the following approach:

- o Congress appropriates a set sum (e.g. \$25-30 million) to be distributed among affected companies by the Secretary of Commerce according to statutory guidelines.

- Guidelines would be similar to those in S.823 but would be designed principally to redress misallocation of losses caused by buy-back provisions of FHSA.
- Companies wishing to participate must file claims with Secretary within short time period and must release U.S. from all legal claims arising from TRIS ban. Secretary (or designee) gathers information through informal, streamlined procedures but may permit adversary-type hearings on limited issues in a particular case.
- Secretary issues order apportioning appropriated sums among claimants, with bulk going to "innocent" small garment manufacturers rather than large textile mills that actually applied TRIS.
- Secretary's order is either non-reviewable or is subject only to limited review for "arbitrariness".

Pros

- i. Sets exact magnitude of U.S. payments.
- ii. Avoids complex and costly litigation for all parties.
- iii. Aid is more likely to be distributed equitably (to those who deserve it rather than those who can litigate more effectively).
- iv. Aid will be distributed much more quickly.
- v. Precedent is not as bad. Concept of U.S. "fault" and "legal claim" attenuated. Purely legislative rather than judicial precedent. May be viewed as Congress remedying defect in FHSA buy-back provision.

Cons

- i. Still sets bad precedent.
- ii. May be difficult to sell to House because so different from Senate-passed approach.
- iii. Looks more like pork-barrel and, hence, inconsistent with budgetary restraint.
- iv. Looks more like preferential "bail out".

Option 4: Support Pure "Day in Court" Bill

Insist that there should be no U.S. liability without legal fault. Urge the House Committee to adopt legislation that would not create a new cause of action on behalf of the industry (as the proposed bill does) but would simply authorize the Court of Claims to determine whether a legal wrong was committed by the Government in this case under existing legal principles. If the Court finds that the Government acted wrongfully, it may award damages.

Pros

- i. The Court would probably find no wrongdoing and, hence, no bad precedent would be set and no money paid out.

Cons

- i. Exceedingly doubtful this approach would be acceptable in Congress.
- ii. Creates the possibility that the Court would view the legislation as inviting it to "discover" a cause of action under the circumstances of the case. Such an "innovative" judicial ruling would set the worst possible precedent.

RECOMMENDATION

I would recommend that we explore something akin to Option 3. There is precedent for such administrative proceedings, particularly in the context of Federal assistance programs.

I suggest that before locking in on this position, however, informal soundings be taken with Campbell and Thurmond to see whether an approach of this sort would be feasible.

THE WHITE HOUSE
WASHINGTON

6/25

TO: MICHAEL UHLMANN
FROM: WENDELL GUNN

Please review and comment. I would like you to prepare the Options section, including pros and cons.

THE WHITE HOUSE
WASHINGTON

6/25

TO: BILL BARR
FROM: WENDELL GUNN

Please review and comment. I would like you to prepare the Options section, including pros and cons.

MEMORANDUM FOR THE PRESIDENT

FROM: MALCOLM BALDRIGE, CHAIRMAN PRO TEMPORE
CABINET COUNCIL ON COMMERCE AND TRADE

ISSUE: Should the Administration support legislation to indemnify manufacturers of TRIS-treated sleepwear for losses that resulted from changes in Federal regulations?

ACTION FORCING EVENT

S. 823, sponsored by Senator Strom Thurmond, passed the Senate in 1981. Its House counterpart, H.R. 4011, has been referred to the House Judiciary Committee's Subcommittee on Administrative Law and Government Relations. It appears that the bill will soon be voted out of committee and maybe on a relatively fast track.

These bills provide federal indemnification for businesses which sustained losses as a result of the 1977 federal ban of TRIS-treated sleepwear. The bill authorize each of the affected companies to file separate lawsuits in the Court of Claims seeking full indemnification for their losses.

DISCUSSION

In 1971, when the Commerce Department proposed stringent flammability standards for sleepwear, the industry objected because the chemical needed to meet the standards, called TRIS, had not been adequately tested for other possibly harmful effects. However, the Department of Commerce adopted the strick standards anyway and the industry proceeded to market sleepwear treated with TRIS. In 1976, (EDF) precipitated a public debate over the safety of TRIS and sales of TRIS-treated products suffered. Some companies stopped production; others continued. In 1977, the Consumer Product Safety Commission (CPSC) banned TRIS-treated sleepwear pursuant to the Federal Hazardous Substances Act (FHSA) and invoked the statute's buy-back provisions. The apparel industry estimates that it lost about \$50 million as a result of the ban.

Most of the financial loss has fallen on the garment manufactures who were required by the statute to repurchase sleepwear from retailers but were not allowed to sell the sleepwear back to the companies which produced the TRIS-treated cloth. A CPSC order which would have permitted this recourse was frustrated by court action. Rather than appeal this decision, the garment manufacturers are looking to the federal government for indemnification.

The 110 affected companies are mostly small businesses which, taken together, employ 25,000 to 30,000 workers.

Legislation similar to S. 823 passed both the House and Senate during the 95th Congress, but was pocket-vetoed by President Carter. S. 823 passed the Senate handily and can be expected, in the absence of Administration opposition, to pass the House by a comfortable margin. Representative Campbell, however, has signaled a willingness to consider amendments.

OPTIONS

1. Oppose any indemnification legislation and be prepared to veto.
2. Support the legislation if amended to set clear-cut standards for recovery and to provide for partial indemnification.
3. Support relief but only if accomplished through a streamlined administrative proceeding.

DECISION STATUS

While there was general empathy on the part of Council members for the plight of companies caught in the middle of this dual government action, there was serious concerns, as discussed in the above analysis of options. The Council was unable to reach a consensus, as a bare majority (5 of 9) was opposed to indemnification.

In support of partial indemnification were the Departments of Agriculture, Labor and The U.S. Trade Representative. Favoring full recourse was the Department of Energy. A general statement of the rationale is embodied in the following position of the Department of Energy:

The Commerce Department in 1971 pushed industry into the production of TRIS-treated fabric. The small garment manufacturers who bought TRIS-treated material from the textile producers had no choice. When in 1977 CPSC banned TRIS-treated sleepwear, these companies were required to repurchase the material from the retailers but were not able to resell to the textile companies who produced the cloth. In other words, as a result of their own, were forced to absorb a loss for something for which they were not responsible. Consequently, the Department believes that the Federal Government is liable and should be required to indemnify these businesses for those losses caused by the actions of the Federal government.

Opposed to indemnification, i.e., choosing Option 1, were The Council of Economic Advisers, the Departments of Treasury, Justice, Commerce and The Office of Management and Budget. A general statement of the rationale is as follows:

Whenever a government changes a policy, there are parties who win and parties who lose. In carrying out its duties, the government must set regulations based upon information available to it at the time and such decisions will not always appear in retrospect to have been wise. But the government's lack of wisdom does not necessarily equate to wrongdoing.

In any case, at least two potentially serious precedents are involved in indemnification. The first is the establishment of governmental liability by congressional action. The second is compensation by the government to parties disadvantaged by government policy decisions. The implications of either -- and certainly both -- are enormous and unacceptable.

THE WHITE HOUSE
WASHINGTON

July 2, 1982

TO: WENDELL GUNN

FROM: BILL BARR

Attached is the Options section, as requested by you on 6/25. You will note that it is taken from my original TRIS memo.

OPTIONS

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- i. Reduces total U.S. payments.
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- o Guidelines would be similar to those in S.823 but would be designed principally to redress misallocation of losses caused by buy-back provisions of FHSA.
- o Companies wishing to participate must file claims with Secretary within short time period and must release U.S. from all legal claims arising from TRIS ban. Secretary (or designee) gathers information through informal, stream-lined procedures but may permit adversary-type hearings on limited issues in a particular case.
- o Secretary issues order apportioning appropriated sums among claimants, with bulk going to "innocent" small garment manufacturers rather than large textile mills that actually applied TRIS.
- o Secretary's order is either non-reviewable or is subject only to limited review for "arbitrariness".

Pros

Cons

- | | |
|---|---|
| i. Sets exact magnitude of U.S. payments | i. Still sets bad precedent. |
| ii. Avoids complex and costly litigation for all parties. | ii. May be difficult to sell to House because so different from Senate-passed approach. |
| iii. Aid is more likely to be distributed equitably (to those who deserve it rather than those who can litigate more effectively). | iii. Looks more like pork-barrel and, hence, inconsistent with budgetary restraint. |
| iv. Aid will be distributed much more quickly. | iv. Looks more like preferential "bail out". |
| v. Precedent is not as bad. Concept of U.S. "fault" and "legal claim" attenuated. Purely legislative rather than judicial precedent. May be viewed as Congress remedying defect in FHSA buy-back provision. | |