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WITHDRAWAL SHEET

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2

DOC NO	Doc Type	Document Description	No of Pages	Doc Date	Restrictions
1	LETTER	RICHARD MCGRATH TO EMILY ROCK RE: INCIDENT	2	7/2/1982	B6

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]
B-3 Release would violate a Federal statute [(b)(3) of the FOIA]
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]
B-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 19, 1982

FOR: EMILY ROCK

FROM: MICHAEL M. UHLMANN

SUBJECT: Right-Gard Corporation/N.L.R.B.

Reference Number: 085246

There is, unfortunately, nothing we can do to assist Mr. McGrath. The N.L.R.B. is an independent agency over whose investigatory and adjudicatory activities we have no authority whatsoever. He should consult with his counsel on whether to take an appeal to federal court on the administrative law judge's opinion. Beyond that, his counsel might want to consider the advisability of bringing a criminal complaint against one or more of the participants, who seem to have used violence or the threat of it during a federal proceeding -- in which case, the appropriate office to talk to would be the U.S. Attorney's office.

DOCUMENT NO. 085246 PD

OFFICE OF POLICY DEVELOPMENT

STAFFING MEMORANDUM

DATE: 7/16/82 ACTION/CONCURRENCE/COMMENT DUE BY: open

SUBJECT: Right-Gard Corporation letter re NLRB

	ACTION	FYI		ACTION	FYI
HARPER	☐	☐	DRUG POLICY	☐	☐
PORTER	☐	☐	TURNER	☐	☐
BARR	☐	☐	D. LEONARD	☐	☐
BAUER	☐	☐	OFFICE OF POLICY INFORMATION		
BOGGS	☐	☐	GRAY	☐	☐
BRADLEY	☐	☐	HOPKINS	☐	☐
CARLESON	☐	☐	PROPERTY REVIEW BOARD	☐	☐
DENEND	☐	☐	OTHER	☐	☐
FAIRBANKS	☐	☐		☐	☐
FERRARA	☐	☐		☐	☐
GUNN	☐	☐		☐	☐
B. LEONARD	☐	☐		☐	☐
MALOLEY	☐	☐		☐	☐
MONTOYA	☐	☐		☐	☐
SMITH	☐	☐		☐	☐
✓ UHLMANN	X	☐		☐	☐
ADMINISTRATION	☐	☐		☐	☐

Remarks:

Mike Uhlmann:

Is there anything to do with this? This character called in and I told him that there probably wasn't anything I could do but would be glad to look at his papers.

Any validity to his charges? Any solution?

Thanks. E. Rock

Please return this tracking sheet with your response.

Edwin L. Harper
Assistant to the President
for Policy Development
(x6515)

WITHDRAWAL SHEET
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MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 19, 1982

FOR: EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN

SUBJECT: Short-Term Fixes on Womens' Issue

I. EQUAL PAY FOR EQUAL WORK

As discussed in my previous memos, the pay disparity between men and women generally does not reflect sex discrimination. To the extent it does, there are already two federal statutes which mandate equal pay for equal work. These laws have been effective, and there is really little at the federal level that can be done in this area that will give any more protection.

There are two areas, however, where some room for maneuver may exist:

1. Pensions. Women's retirement benefits could be raised up to men's level. A CCLP working group is examining this and will be ready to report in a week.

2. Other amendments. Present law contains exemptions for pay differences based on seniority systems, productivity, merit. Also there are some exemptions for seasonal workers and certain workers in some sectors of agriculture, retailing, health care, etc. The EEO working group could study whether any modifications can be made to these provisions to broaden and strengthen the existing statutory mandate. (However, the political costs of any amendments would likely outweigh gains.)

II. OTHER POTENTIAL INITIATIVES

1. Military pensions. This week Rep. Schroeder is introducing legislation that would give divorced wives of military men an interest in their husband's pensions. We could support this move if DOD concurs.

2. Further tax cut for the working poor. (See my memo of June 11, 1982, "Overview of Women's Issues".)

3. Day care. Increase tax incentives provided in 1981 Tax Act to businesses to establish corporate day care centers.

4. Enforcement of child support. Explore possibility of federal measure or multi-state compact to facilitate enforcing child support decrees. Any initiative should avoid creating federal domestic relations law.

5. Jobs for "displaced homemakers". Develop program to encourage private sector to hire and train unskilled middle-aged women driven into labor market, usually by breakup of family.

THE WHITE HOUSE

WASHINGTON

July 21, 1982

MEMORANDUM FOR ROGER PORTER

FROM: MICHAEL M. UHLMANN

SUBJECT: Balanced Budget Amendment

1. I am informed that Hatch and Domenici have agreed to the following change in the last sentence of Section 1:

> "...the Congress and the President shall, pursuant to legislation or through exercise of their powers under the first and second articles, insure...."

Domenici seems to think that the new language removes an implication in the earlier text that the Amendment increases presidential power vis-a-vis Congress. If that is in fact his intention, the new language doesn't do the trick. It is at best a mere redundancy, and at worst a needless confusion. Standing alone, it doesn't trouble me.

I am troubled, however, by the way it might be read in conjunction with the following new section, which Hatch and Domenici have also agreed to:

> "The Congress shall implement and enforce this article by appropriate legislation."

If you read the change in Section 1 as merely incorporating the present status of forces under Article I and Article II, this new section creates new confusion -- because it seems to say that there can be no enforcement without implementing legislation. In short, whereas revised Section I says the President retains his Article II powers intact, the new Section suggests that the exercise of his Article II powers in a controversy arising under this Amendment may be conditioned by implementing legislation.

2. The new section which sought to preclude judicial review has apparently been dropped.

3. Whether one reads the new language as either (a) confusing but harmless or (b) confusing but potentially mischievous, there doesn't see to be very much we can do about it at this point. Hatch and Domenici have cut their deal. We could, I suppose, try to arrange a floor colloquy in which the possibility of a mischievous interpretation is removed, but unless closely scripted that could turn out worse than what we now have.

4. Do you suppose James Madison ever went through anything like this?

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 21, 1982

FOR: ROGER PORTER

FROM: MICHAEL M. UHLMANN

SUBJECT: Flexitime Signing Ceremony Proposal
Reference Number 085331

I understand that OPL strongly recommends against a signing ceremony for the Flexitime Bill (S. 2240). I agree.

1. It is not the right vehicle. The Bill actually cuts back on the previous program and was opposed by the federal women's groups.

2. There are better vehicles coming along on which to hold a signing ceremony.

   -- Women's Equality Day (August 26)

   -- Working Mothers' Day (September 5)

3. On the Flexitime Bill, I would recommend simply issuing the attached statement, perhaps with an additional paragraph making the following points:

   -- more women with families are entering the workforce and this makes things hard for them and their families.

   -- this Administration supports initiatives like Flexitime which helps the families.

   -- this Administration has done other things to help the families of working women, e.g., increased child care credit, tax incentives for corporate child care programs.

   -- we call on private sector to follow our lead.

Wendy Borcherdt, OPL, is drafting a paragraph along these lines for inclusion in the statement. The language should be ready and cleared by OPD by mid-day tomorrow (July 22).

Administration of the Bankruptcy System Faces Collapse

The Bankruptcy Reform Act of 1978 created a U.S. bankruptcy court in each judicial district as an adjunct to each district court. Bankruptcy judges were to be appointed for 14-year terms, subject to removal by the local judicial council, and paid salaries subject to adjustment by Congress. The Act also expanded the jurisdiction of these bankruptcy courts, allowing them to exercise broad jurisdiction over civil cases related to the bankruptcy proceedings.

On June 28 the Supreme Court held this grant of expansive jurisdiction to the bankruptcy courts unconstitutional. The Court ruled that, to exercise such jurisdiction, judges must be appointed under the terms of Article III of the Constitution -- that is, they must have guarantees of life tenure and undiminished salary.

Because the Court could not sever the defective parts of the jurisdictional grant from those that are lawful, it struck down in its entirety all jurisdiction which had been granted bankruptcy judges under the Bankruptcy Reform Act.

This ruling will apply only prospectively and will not take effect until October 4, 1982, in order to allow Congress to remedy the defect without impairing the interim administration of the bankruptcy laws.

If Congress fails to cure the defects in the Act by October 4, there would be uncertainty as to whether a bankruptcy system exists and, if so, what it is. Legal rights as to billions of dollars would be in doubt.

There are signs of a potential impasse in the Congress. Senators Dole and Thurmond reportedly would like to use the opportunity to make substantive changes in the bankruptcy laws and would like to keep bankruptcy judges as non-Article III judges serving as subordinate adjuncts to the district court. They would address the jurisdictional problem by restricting the jurisdiction of the bankruptcy judges. This would give the Administration a basis for appointing dozens of new federal district judges. In the House, on the other hand, Rep. Rodino would like to avoid substantive changes to the bankruptcy laws and appears to favor elevating bankruptcy judges to Article III status. This would mean lifetime appointments for about 250 bankruptcy judges. Many of the existing referees would have to be "grandfathered" into these appointments to keep the system working.

> The Department of Justice is reviewing the options on an expedited basis and is expected to have a proposal ready in two weeks. The Administration must be prepared to exercise strong leadership so that Congress will meet the October 4 deadline. Only 40 legislative days remain in the House before that deadline expires.

Judge Torpedoes Major Deregulation Initiative

On July 22 a federal district court judge preliminarily enjoined implementation of new Department of Labor regulations under the Davis-Bacon Act. The new regulations halted by the judge are among the most important of the Administration's deregulation initiatives and would have resulted in estimated cost savings of $600 million annually.

The Davis-Bacon Act, enacted in 1931, requires payment of "prevailing wages" to workers on federally funded construction contracts. Formulas used under previous regulations to compute "prevailing wages" resulted in wages in excess of real market rates. The new regulations, approved by the Vice President's task force and promulgated in May, changed the method for determining prevailing wages to render more realistic rates, allowed greater use of lower-paid "helpers" on construction projects, and reduced paperwork requirements on contractors.

In May the AFL-CIO challenged the new regulations in the U.S. District Court of the District of Columbia. In a 17-page opinion, the district judge ruled that the AFL-CIO would most likely prevail on the merits, and he enjoined implementation of the new regulation pending completion of the suit. In effect, the judge ruled that when regulations have been in effect for a long time, they become like statutes themselves, and the Executive Branch cannot change them through the regulatory process but must resort to legislation.

> This ruling sets a pernicious precedent for your entire deregulation effort. The Justice Department and Labor Department are trying to clear the way for an expedited appeal.

Office of Policy Development
July 26, 1982

Imminent Senate Action on Abortion

Senator Jesse Helms and others have persistently maneuvered and petitioned over the last 18 months to win an opportunity for the Senate to vote on an abortion bill. Everything now points toward that desire being fulfilled. Senator Baker has agreed to recognize Senator Jepsen when the Debt Limit Extension bill is debated for the purpose of allowing the Senator to offer an amendment dealing with abortion. This is likely to take place in the next two weeks.

The abortion amendment is most likely to be Senator Helms' "Human Life Bill". (Senator Hatfield does not want his bill considered as an amendment, and it isn't possible for the Hatch Constitutional Amendment to be offered to legislation that requires only a majority vote for passage.) It is possible that, in order to gain cloture, Senator Helms will modify his bill to bring it more in line with Senator Hatfield's measure.

At the time of cloture vote, it is expected that the right-to-life movement will close ranks behind the amendment, whatever form it takes, and unite in urging passage of it - since all of them want a major vote this year.

When the abortion amendment is offered, there will no doubt be an effort to filibuster, probably led by Senators Packwood and Weicker. Thus, "pro-choice" advocates will be in the rather uncomfortable position of delaying Congressional consideration of a major piece of legislation that has to be passed.

Pressure is mounting within the right-to-life movement for you to become actively involved in an effort to obtain a favorable cloture vote.

Office of Policy Development
July 26, 1982

THE WHITE HOUSE

WASHINGTON

July 27, 1982

Dear Father Coughlin:

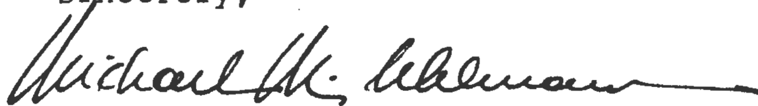
Ed Meese has asked me to answer your letter concerning S.1698, a bill introduced by Senator Denton that would give priority to immigrants who are children of American soldiers.

This Administration agrees that relief should be provided the children of American servicemen who wish to immigrate to the United States. Administration witnesses have testified in support of Senator Denton's proposals, and we have worked closely with the Senator on this issue.

In addition, the Administration has itself offered amendments to the overall immigration reform bill now pending in the Congress along the same general lines as Senator Denton's bill.

Your leadership on this important matter is to be commended. I hope you will continue to provide your thoughts on the policies of this Administration in the months and years ahead.

Sincerely,



Michael M. Uhlmann
Special Assistant to
the President

Bernard J. Coughlin, S.J.
President
Gonzaga University
Spokane, Washington 99258

THE WHITE HOUSE
WASHINGTON

TO: Mike Uhlmann

FROM: T. KENNETH CRIBB, JR. TKC
Assistant Counsellor
to the President

The attached was received by Edwin Meese III and requires special handling by your office and staff for response.

Please handle as appropriate and forward a copy of your response, with the incoming to - Neil Hammerstrom, Rm. ~~420~~ 442, EOB, Ext. 7940.

Thank you.

Gonzaga University / SPOKANE, WASHINGTON 99258 (509) 328-4220

Office of the President

June 7, 1982

Dear Mr. Meese:

I urge the Administration's support for Senate Bill #1698, the Denton Bill. It is sponsored by 34 senators, and hearings are scheduled in Senator Simpson's committee on Monday, June 14.

The bill simply gives priority to immigrants who are sons and daughters of our G.I. soldiers. Amerasians are literally without a country. The bill finally recognizes U.S. responsibility and helps to correct a long-standing injustice. At Gonzaga University we have 16 Amerasian students.

The advantages of the bill are these:

1. It allows abandoned sons and daughters of Americans to immigrate to the U.S. if they wish.
2. President Reagan's support shows his compassion.
3. There is no cost to taxpayers.
4. It assists the private sector, working with these Amerasians, to exercise charity.
5. The bill corrects an injustice of 40 years' standing, to which previous administrations have given little attention.

I am sending this same letter to William Clark and Michael Deaver. President Reagan's support at the Senate committee hearings on June 14 would assure the bill's passage. Please help.

Very sincerely,

Bernard J. Coughlin, S.J.
President

Mr. Edwin Meese
Presidential Press Secretary
The White House
Washington, D.C. 20500

cc: James S. Munn
Father Theodore Hesburgh

File ① Chron ② Book

THE WHITE HOUSE

WASHINGTON

July 30, 1982

MEMORANDUM FOR EDWIN L. HARPER
DAVID GERGEN

FROM: MICHAEL M. UHLMANN

SUBJECT: Anti-Pornography Language for President's Knights of Columbus Speech

DOJ has signed off on the following language:

> The moral and social environment of our nation continues to be polluted by the filth of pornography. Those who produce and disseminate pornography have brazenly escalated their efforts nationwide, profiteering from the degradation of women and the unspeakable exploitation of children. The Attorney General and I agree that we must respond to this assault and redouble our effort by vigorously enforcing federal anti-pornography laws. I call upon state and local law enforcement officials to join with us in a sustained effort to rid our nation of this blight.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 4, 1982

FOR: EDWIN L. HARPER

FROM: WILLIAM P. BARR WPB

SUBJECT: Legal Fee Cap Bill
Ref. 085427

1. We worked closely with Horowitz on this proposed legislation that would place comprehensive limitations on awards of attorneys' fees against the U.S. and State and local governments under various fee-shifting statutes. We think it is an excellent piece of work.

2. In our view, Horowitz is correct in rejecting the two suggestions made by DOJ. The $53.16 fee cap should be retained and not raised to $75.00. The requirement for a real fee relationship between attorney and client as a precondition for fee awards should also be retained.

3. Horowitz has informed me of the following further developments:

(a) There may be a positive story about this proposal coming up in next issue of Human Events.

(b) NFIB and the Chamber are now on board.

(c) Jim Baker has said he likes the bill.

4. Action: Ed Meese should call a meeting to devise a strategy. The meeting should include Ed Meese, you, Bob Thompson, and Horowitz.

DOCUMENT NO. 085427 PD

OFFICE OF POLICY DEVELOPMENT

STAFFING MEMORANDUM

DATE: 7/29/82 ACTION/CONCURRENCE/COMMENT DUE BY: 8/2/82

SUBJECT: Legal Fee Cap Bill

	ACTION	FYI		ACTION	FYI
HARPER	☐	☐	DRUG POLICY	☐	☐
PORTER	☐	☐	TURNER	☐	☐
BARR	☐	☐	D. LEONARD	☐	☐
BAUER	☐	☐	OFFICE OF POLICY INFORMATION		
BOGGS	☐	☐	GRAY	☐	☐
BRADLEY	☐	☐	HOPKINS	☐	☐
CARLESON	☐	☐	PROPERTY REVIEW BOARD	☐	☐
DENEND	☐	☐	OTHER	☐	☐
FAIRBANKS	☐	☐		☐	☐
FERRARA	☐	☐	______	☐	☐
GUNN	☐	☐	______	☐	☐
B. LEONARD	☐	☐	______	☐	☐
MALOLEY	☐	☐	______	☐	☐
MONTOYA	☐	☐	______	☐	☐
SMITH	☐	☐	______	☐	☐
✓ UHLMANN	X	☐	______	☐	☐
ADMINISTRATION	☐	☐	______	☐	☐

Remarks:

Please check with Mike Horowitz to see if OPD needs to do anything on this.

Please return this tracking sheet with your response.

Edwin L. Harper
Assistant to the President
for Policy Development
(x6515)

THE WHITE HOUSE
WASHINGTON

Date/# 7/27

TO: R. Porter
D. Boggs
R. Carleson
D. Kass
M. Uhlmann

FROM: Edwin L. Harper

ACTION: ☒ FYI: ☐

Comment:

Background:

Draft response for:

For your handling:

File:

Set up meeting:
With:

REMARKS: P/s check with Mike H to see if OPD needs to do anything on this.

Due Date:

Action Completed:

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

JUL 23 1982

MEMORANDUM

JUL 22 1982

TO: David A. Stockman
Edwin Harper

FROM: Michael J. Horowitz MH

SUBJECT: Legal Fee Cap Bill

Attached is the speaker letter (Tab A), the bill (Tab B) and a section-by-section analysis (Tab C) regarding our legal fee cap initiative. It follows along the lines described in our FY '83 major themes book (Tab D), and has been sharpened and supplemented following extensive efforts by an interagency working group and meetings with business community representatives and the National Association of Attorneys General. The bill establishes comprehensive limitations on awards of attorney's fees against the United States and State and local governments under various federal fee-shifting statutes. In its main features, the bill does the following:

- For statutes other than the Equal Access to Justice Act "the Act", limits the awards of fees to the lower of:

  (1) the hourly rates payable to the highest paid government attorneys, plus benefits and a 50% overhead allowance (for awards against the federal government the calculated maximum fee will be $53.16); or

  (2) the actual cost of attorney's fees incurred by or on behalf of the party.

- For statutes other than the Act, limits the amount of fees awarded against the government where a money award is part of the final judgment, by permitting payment only of that portion of an otherwise allowable fee which exceeds 25% of the money judgment.

- Requires that a party must prevail in the lawsuit before fees may be awarded, and that fees may be awarded only for work preformed on issues upon which the party prevails and only if the issues were necessary to the resolution of the controversy. (Recent D.C. Circuit decisions have interpreted the Clean Air Act and other environmental statutes, to allow attorney fee awards to non-prevailing parties if they "substantially contribute to the goals [the law in question]".)

- Provides that awards are to be made to clients and not attorneys, and requires that the client certify that the fees are owed to the attorney, were determined on an arms length basis and will be paid to the extent not covered by the fee award. (This is a critical provision, designed to assure that fee awards are for the benefit of clients only, in order to make them whole after they have obligated themselves to pay for lawyers to defend themselves against overreaching government action. It is designed in part to bar fee awards to entrepreneurial attorneys who now engage in contingency litigation against the government on ideological, public policy grounds.)

- Disallows fee awards to organizations that employ staff attorneys, except when an attorney was hired for the express purpose of handling the specific case.

- Bars attorney's fee awards to intervenors in agency proceedings except where specifically authorized by statute and limits any such awards to the fee caps established by the bill.

- Prevents double dipping by legal services organizations who receive government funds for providing legal services.

- Requires that the fee award bear a reasonable relation to the result achieved in the controversy.

A draft proposed bill was circulated to all cabinet departments, VA, EPA, SBA, SEC, OPM, FTC, and GSA. Fourteen agencies provided comments which were supportive of the bill. SBA stated that it highly favored curbing unreasonable awards of attorney's fees against the government, but that the Chief Counsel for Advocacy objected to certain modifications of the Act. (Some of the objections were based on the Chief Counsel's misinterpretations of the bill's provisions)*.

---

* Agency comments

Justice........................strongly supports
Treasury.......................strongly supports
Transportation.................strongly supports
Interior.......................strongly supports
Defense........................supports
State..........................concurs
Labor..........................strongly supports
HHS............................supports some sections (misunderstood focus of other sections)
HUD............................concurs
DOE............................technical comments only
USDA...........................supports and defers to Justice
OPM............................strongly supports
VA.............................supports
SEC............................oral technical comments only
SBA............................favored policy; Chief Counsel for Advocacy did not favor certain aspects of the draft bill

The comments were of significant benefit in clarifying the bill, and making necessary technical amendments. A working group of attorneys from Justice, Treasury, Interior, and Transportation has assisted us in refining further drafts and resolving all legal and technical issues.

Justice strongly supports the bill, but raised two policy considerations. First, Justice believes that the fee cap of $53.16 is too low and may risk "credibility" problems. Justice suggests that the bill conform to the $75.00 fee cap contained in the Equal Access to Justice Act. Secondly, Justice questions the need for the requirement of section 5(a)(2) of the bill that the party seeking the award certify that he owes a legitimate fee, which will be paid to the extent uncompensated by a statutory fee award.

With respect to Justice's first concern, I believe that our $53.16 fee cap is logical and entirely supportable. Unlike the arbitrarily selected $75.00 fee cap in the Act, the $53.16 fee cap is based on the highest salary payable to government attorneys, plus benefits (pursuant to OMB Circular A-76), plus a fifty-percent overhead add-on. Since many of the fee-shifting statutes which will be amended by the bill are premised on the theory that individuals and public interest groups who sue the government for public benefit purposes are acting as so called "private attorneys general", it is entirely appropriate that attorney's fees awarded to them be consistent with the salary of the "public attorneys general" of the Federal, State and local governments.

With respect to the requirement for a real fee relationship between attorney and client as a predicate for fee awards, I believe that the provision is absolutely necessary to reduce subsidies to "public interest" lawyers of the right and left who advocate their ideologies at public expense, in effect on a contingency basis. This position is in sync with our initiative to depoliticize the grant process.

What remains are decisions and actions regarding the introduction and support of the bill. As these matters go, prospects are good for a remarkable coalition in active

support. State and local governments have been strained under the provisions of 42 USC §1988, which award attorney's fees in broadly defined "civil rights" actions. A bill addressed specifically to their concerns has been introduced by Hatch and is going nowhere, largely because the focus of the bill is on cutting back on "civil rights" activities. In this regard, the National Association of Attorneys General recently passed a resolution supporting our initiative "in principle." The business community is deeply concerned about such matters as intervenor reimbursement, public financing of "public interest" litigation, etc. and is committed to active support of the initiative. The small business community -- which has not as yet cleared on the specifics of our bill -- has been concerned about the use of the Equal Access to Justice Act as a financing mechanism for the "public interest" bar; it properly believes the Act may not be renewed after it sunsets in FY 85 unless it is narrowed to its "core" purpose of providing attorney's fees to small businesses that are subjected to overreaching action by federal agencies. The conservative community has been deeply concerned about federal financing of political advocacy; the fee cap initiative deals directly with its concerns. There has been considerable interest on the Hill about the proposal, particularly since the recent D.C. Circuit decisions allowing fee awards to "public interest" groups in environmental cases even when the government prevails in litigation. Both the business and conservative communities are confident of their ability to line up high-level and broad support and sponsorship, in Congress and elsewhere.

The magnitude of federal fee awards is difficult to determine in part because many such awards are paid out of the judgment fund, a permanent indefinite appropriation, and are not broken down as between legal fees and money judgments. Perhaps the best index of the size of the fee award industry is the federal fee award treatises that are now beginning to appear -- the big ones have been published within the last year. In addition, there is a bi-monthly Harcourt Brace report service, "Federal Attorney Fee Awards Reporter." (Tab E).

A recent mailing campaign by a local law firm to public interest firms confirms our view of the scope of the problem. The mailing (Tab F) touts the firm's expertise in obtaining high awards of attorney's fees against the government, and offers their services either to counsel "public interest" groups on attorney fee recovery tactics or to

handle the fee award litigations on behalf of the groups. It is so striking and offensive that I propose to attach it to the Speaker letter. Also attached is a formal announcement of the recent opening of a law firm entitled "Trial Lawyers for Public Justice, P.C.", (Tab G) which noted that it was

> "especially indebted to Joan Claybrook for her help in raising funds and organizing the firm, and to Ralph Nader for inspiration and guidance; their involvement has been vital to the founding of the firm."

The firm expects to stay in business largely through fee awards.

The bill will of course be opposed, and vigorously, by the "public interest" crowd which is now highly active in lining up opposition. An ABA committee has already proposed a resolution against our initiative and civil rights and public interest groups are asserting that the initiative will undercut the purposes for which attorney's fees provisions were enacted -- assurance of adequate legal representation for the poor and for public issues which would otherwise not be litigated.

Our counter to this opposition and the cornerstone of the coalition that we can put together is that taxpayers should not be required to subsidize attorneys or ideological advocacy. A literal industry of public interest law firms has developed as a result of the legal fee awards with such groups regarding attorney's fees as a permanent financing mechanism. The point here is not adequate representation of the poor; rather it is public oversubsidization of middle class lawyers.

One index of the bill's prospects is the exceedingly favorable press thus far received on our initiative. The attached recent pieces have appeared in the National Journal, Regulation Magazine (Nino Scalia) and the Times, WS Journal and Louis Rukeyser's column (see Tab H).

Hatch has indicated that, if pressed, he will hold hearings on the bill before the end of September. The groups with whom we have spoken believe that hearings in this session providing a strong showing of fee award "horror stories" and active and diverse support for the bill will be an important first step toward passage in the next Congress.

We need to move quickly. I believe we need to show West Wing support for the proposal, and need to devise a strategy for sponsorship, hearings and coordination. (I have discussed the matter with Bob Thompson and Bob Kabel, who are interested and who are enthusiastic, and awaiting basic guidance decisions.)

One of you, or perhaps Ed Meese, can call a brief meeting, with someone from Ken Duberstein's office present, for the initiative to be set on course.

cc: Ken Cribb
Bob Kabel
Alan Holmer

A BILL

To provide for the limitation on legal fees awarded against the United States, States and local governments.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That this Act may be cited as "The Limitation on Legal Fees Awards Act of 1982."

Sec. 2. Notwithstanding any other provision of law, no award of attorney's fees or other expenses may be made against the United States, or any agency or any official of the United States acting in his or her official capacity or under section 722 of the Revised Statutes (42 U.S.C. 1988) in any litigation or administrative proceeding unless the party seeking the award clearly and substantially prevailed on the merits of the controversy. If a party has clearly and substantially prevailed on the merits of the controversy, any such award may be made only for work performed on activities or issues upon which the party prevails against the United States, a State or municipal government or an agency or official of the United States, State or municipal government, and only if such activities and issues were necessary to the disposition of the controversy.

Sec. 3.(a) Notwithstanding any other provision of law, no award of attorney's fees made against the United States or any agency or any official of the United States acting in his or her official capacity, or under section 722 of the Revised Statutes (42 U.S.C. 1988) in any litigation or administrative proceeding shall exceed the lower of

(1) an hourly rate which is the sum of (A) the highest hourly pay rate plus benefits payable to Government attorneys in the Civil Service (said rate to be annually determined at the beginning of each Fiscal Year by the Director of the Office of Personnel Management), or for awards under section 722 of the Revised Statutes (42 U.S.C. 1988) the highest hourly rate plus benefits payable to State or municipal attorneys of the State or municipality involved in the litigation, plus (B) reasonable overhead expenses provided that such expenses do not exceed 50% of the total of the calculated hourly rate plus benefits calculated under paragraph (A) above; or

(2) the actual, direct cost of attorney's fees incurred by or on behalf of the party.

(b) (1) Where awards of attorney's fees are made pursuant to subsection (a)(1) above, no hourly rates for awards of fees for paralegals or law clerks shall exceed one-third of the hourly rate awarded for attorney's fees.

(2) Where awards of attorney's fees are made pursuant to subsection (a)(2) above, costs for paralegals and law clerks shall be included in the actual direct costs incurred by or on behalf of the party.

(c) This Section shall not apply to fees awarded under section 504(a)(1) of Title 5 of the United States Code or Sections 2412(d)(1)(A) and (d)(3) of Title 28 of the United States Code.

Sec. 4.(a) Notwithstanding any other provision of law, in any litigation or administrative proceeding in which an award of money is part of the final judgment or final agency order, no attorney's fees against the United States or an agency or an official of the United States acting in his or her official capacity or under section 722 of the Revised Statutes (42 U.S.C. 1988) shall be payable except to the extent that the attorney's fees (computed in accordance with Section 3 of this Act) exceed 25% of such money award as part of the judgment or final agency order. Only the portion of attorney's fees which exceed 25% of such money award shall be payable under this section. In no event shall the fee awarded exceed the fee established pursuant to Section 3 of this Act.

(b) This Section shall not apply to fees awarded under section 504(a)(1) of Title 5 of the United States Code, Sections 2412(d)(1)(A) and (d)(3) of Title 28 of the United States Code, or in cases where government "bad faith" is proven under section 2412(b) of Title 28 of the United States Code.

Sec. 5. Notwithstanding any other provision of law--

(a) A party who is seeking an award of attorney's fees or other expenses against the United States or any agency or any official of the United States acting in his or her official

capacity or under section 722 of the Revised Statutes (42 U.S.C. 1988) shall, within thirty days of either a decision on the merits by the court or the entry by an administrative officer of an agency of a final disposition of an administrative proceeding, submit to the court or agency an application for such award. Such application shall include a statement that sets forth and establishes to the satisfaction of the Court or the administrative officer the following:

(1) a description of the basis of the award sought indicating that it is proper under applicable law, and the amount sought. Where the party and the attorney have entered into a written fee agreement, the application shall include a copy of the fee agreement. The application shall also include (A) an itemized statement under oath from the attorney representing or appearing in behalf of the party, setting forth and establishing the actual hours expended per day by each attorney, and the specific tasks performed during that time in behalf of the party; and (B) such information as the court or administrative officer may require in order to determine the actual, direct cost of attorney's fees and other expenses incurred by or on behalf of the party;

(2) where the attorney's fees or other expenses sought have not been paid or assumed, a statement under oath by the party establishing that the attorney's fees or other expenses sought are owed to the attorney, were determined on an arm's length basis and will be paid by the party to the extent not covered by the fee award;

(3) where the attorney's fees or other expenses have been previously paid or assumed and the party seeks reimbursement of such attorney's fees or other expenses, a statement under oath by the party establishing that the attorney's fees or other expenses would not have been incurred but for the participation by the party in the litigation or administrative proceeding for which the award is sought; and

(4) such other information as may be required by law or the court or the administrative officer.

(b) A party who seeks an award of attorney's fees or costs against the United States or any agency or any official of the United States acting in his or her official capacity or under section 722 of the Revised Statutes (42 U.S.C. 1988) shall, within one year after the action was initiated and annually thereafter, provide to the United States, federal, State, municipal agency or federal, State, municipal official, and to the court or administrative officer of an agency, a report which shall include such information required by subsection (a) of this Section as is available or assertainable.

(c) No award of attorney's fees, or other costs, may be made against the United States or any agency or any official of the United States acting in his or her official capacity or under section 722 of the Revised Statutes (42 U.S.C. 1988) unless the party seeking the award has complied with the provisions of this Section.

(d) A party who seeks an award of attorney's fees or costs against the United States or any agency or any official of the United States acting in his or her official capacity or under section 722 of the Revised Statutes (42 U.S.C. 1988) shall have the burden of proof with respect to establishing entitlement and the amount of any award of attorney's fees and other expenses, and with respect to meeting the other requirements of this section.

(e) A Court or administrative officer may in its discretion hear and determine any right to payment of attorney's fees or other expenses against the United States or any agency or any official of the United States acting in his or her official capacity or under Section 722 of the Revised Statutes (42 U.S.C. 1988) following a decision on the merits by the Court or the entry by the administrative officer of an agency of a final disposition of an administrative proceeding, or may delay such hearing and determination until completion of all appeals and entry of a final judgment. In no event shall a court or administrative office hear or determine such a right

prior to entry of a decision on the merits by the court or entry of a final disposition of an administrative proceeding by an administrative officer. Payment of attorney's fees or other expenses awarded against the United States, or any agency or any official of the United States acting in his or her official capacity or under Section 722 of the Revised Statutes (42 U.S.C. 1988) shall be stayed until completion of all appeals and entry of a final judgment.

(f) A party that has employed salaried staff attorneys prior to the onset of the specific case shall not be eligible for fee awards except upon a showing that the staff attorney had been retained in express anticipation of the specific case and that staff employee levels would have been lower but for the anticipated need to deal with the specific litigation or administrative proceeding. The provisions of this subsection apply to prepaid legal services, including dues paying structures which provide for the use of attorneys in return for dues.

Sec. 6. Notwithstanding any other provision of law, no award of attorney's fees may be made against the United States or any agency or any official of the United States acting in his or her official capacity or under section 722 of the Revised Statutes (42 U.S.C. 1988) unless the fee awarded bears a reasonable relation to the result achieved in the proceeding; nor may such an award be made where the Court or administrative officer of an agency determines that special circumstances make such an award unjust. In no event shall the fee awarded exceed the fee established pursuant to Section 3 of this Act.

Sec. 7. Notwithstanding any other provision of law, no award of attorney's fees or other expenses against the United States or any agency or any official of the United States acting in his or her official capacity or under section 722 of the Revised Statutes (42 U.S.C. 1988) shall be made in any litigation or administrative proceeding to any corporation, association or organization or their grantees, or to a party represented by any such corporation, association or organization or their grantees, whose primary purpose is to provide legal services and whose legal services in the litigation or administrative proceeding were funded in whole or in part by a grant or appropriation by the United States, State or municipality for the purpose of legal services. (For the purposes of this section, the term "grantees" includes recipients of grants, contracts or other agreements, and the term "grant" includes a grant, contract or other agreement.)

Sec. 8. In awarding attorney's fees and other expenses under any provision of law against the United States or any agency or any official of the United States acting in his or her official capacity or under section 722 of the Revised Statutes (42 U.S.C. 1988) the court or administrative officer of an agency shall reduce the amount that otherwise would be awarded under the provisions of this Act or deny an award, in whole or in part in the discretion of the court or administrative

officer, if the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the controversy.

Sec. 9. Notwithstanding any other provision of law, no award of attorney's fees or other expenses in any litigation or administrative proceeding concerning the payment of attorney's fees or other expenses shall be made against the United States or any agency or any official of the United States acting in his or her official capacity or under section 722 of the Revised Statutes (42 U.S.C. 1988) unless the court or administrative officer of an agency finds that the United States, State or municipality was unreasonable in the position it took in court or before the agency concerning such payment of attorney's fees or other expenses. The party seeking such attorney's fees or other expenses shall have the burden of proof with respect to whether such position was unreasonable.

Sec. 10. Notwithstanding any other provision of law, no award of attorney's fees or other expenses may be made against the United States, or any agency or any official of the United States acting in his or her official capacity or under section 722 of the Revised Statutes (42 U.S.C. 1988)

(a) as compensation for that part of litigation or an administrative proceeding subsequent to a declined offer of settlement when such offer was as substantially favorable to

the prevailing party as the relief ultimately awarded by the Court or administrative officer, unless the Court, or administrative officer finds that the prevailing party had substantial justification for declining the offer and continuing the litigation; or

(b) where a Court or an administrative officer finds the claims to be moot due to a change in government policy and that the pendency of the litigation or administrative proceeding was not a material factor for such change.

Sec. 11. In any litigation or adjudication against the United States, or any agency or any official of the United States acting in his or her official capacity or under sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes (42 U.S.C. 1981, 1982, 1983, 1985 and 1986), if the Court or administrative officer of an agency finds that the plaintiff's claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate or pursue the adjudication after it clearly became so, even though there was no subjective bad faith, attorney's fees and other expenses should be awarded to the prevailing defendant at the amount established pursuant to Section 3 of this Act. (For the purpose of this Section the term "adjudication" means an adjudication under Section 554 of Title 5 of the United States Code, and the term "adjudicative officer" means the deciding official, without regard to whether the offical is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adjudication.)

Sec. 12. Except as expressly authorized by law, no award of attorney's fees or other expenses may be made by an agency to any party who intervenes or participates in an agency proceeding. Notwithstanding any other provision by law, no such award shall exceed the amount authorized pursuant to Section 3 of this Act.

Sec. 13. Notwithstanding any other provision of law, no award of attorney's fees or other expenses may be made against the United States, or any agency or any official of the United States acting in his or her official capacity or under section 722 of the Revised Statutes (42 U.S.C. 1988) to any intervenor in any litigation, adjudication or licensing unless the intervenor seeking the award clearly and substantially prevailed on the merits of the controversy. If an intervenor has clearly and substantially prevailed on the merits of the controversy, any such award may be made only pursuant to the rates established by section 3 of this Act, and only for work performed on issues which are significantly new and different from those previously pending in the litigation, adjudication or licensing, and only if the invervenor prevails against the United States, a State or municipal government or an agency or official of the United States, State or municipal government on such significantly new and different issues, and such activities and issues were necessary to the disposition of the controversy. Except for Section 2 of this Act, an intervenor in any litigation, adjudication or licensing shall be considered a party for the purposes of this Act.

Sec. 14. In addition to the other provisions of this Act, section 722 of the Revised Statutes (42 U.S.C. 1988) is further amended by adding the following:

"Where a party has prevailed on a pendent claim or Federal statutory claim not covered under section 722 (42 U.S.C. 1988) but which is joined under the Federal Rules of Civil Procedure to a claim that is under such section, a Court may only award attorney's fees if it finds that the claim covered under section 722 of the Revised Statutes (42 U.S.C. 1988) has sufficient merit to have justified a reasonable person to have brought such claim as a separate suit."

Sec. 15. The Comptroller General of the United States shall submit annually on April 1 of each year a report to the President and the Congress on the amount of attorney's fees and other expenses awarded against the United States, or ive agencies and officials of the United States acting in their official capacities awarded in litigation and administrative proceedings during the preceding fiscal year. The reports ant shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress and the President in evaluating the scope and impact of such awards. Copies of the reports shall be provided to the Attorney General of the United States, the Director of the Administrative Office of the United States Courts, the Chairman of the Administrative Conference of the United States and the Director of the Office of Management and Budget. The Courts and each agency shall provide the Comptroller General with such information as is necessary for him to comply with the requirements of this

Section. Each agency shall record every award of attorney's fees and other expenses made against the agency, an agency official acting in his or her official capacity, or in the event of an award against the United States, by the agency on behalf of which the litigation or administrative proceeding was brought or defended.

Sec. 16. (a) The provisions of this Act shall apply to any award of attorney's fees and other expenses made subsequent to the enactment of this Act including, except as provided in subsection (b) of this section, actions commenced and fees and expenses incurred prior to such enactment.

(b) The annual reports required by Section 5(b) of this Act shall be required only subsequent to enactment of this Act.

Sec. 17. The provisions of this Act establish minimum criteria and requirements for the award of attorney's fees or other expenses against the United States, or an agency or any official of the United States acting in his or her official capacity or under Section 722 of the Revised Statutes (42 U.S.C. 1988). The provisions of other statutes which establish additional criteria or requirements beyond those established in this Act limiting entitlement to such awards of attorney's fees or other expenses, or otherwise limiting such awards, shall apply in addition to the provisions of this Act to the extent that such additional statutory provisions are not inconsistent with this Act.

Sec. 18. Nothing in this Act shall be interpreted to create any right to an award of attorney's fees or other expenses.

Sec. 19. Definitions - For the purposes of this Act --
(A) "other expenses" includes the reasonable expense of expert witnesses and the reasonable cost of any study, analysis engineering report, test, or project which is found by the agency or court to be necessary for the preparation of the party's case.

(B) "party" means a party, as defined in section 551(3) of this title, which is an individual, partnership, corporation, association, unincorporated business, estate or public or private organization other than an agency.

(C) "Administrative proceeding" means any agency proceeding, as defined in subsection 12 of section 551 of Title 5 of the United States Code, in which a party may under statute or regulation be awarded attorney's fees or other expenses.

(D) "Administrative officer" means the official or person who by statute or regulation has the authority to decide the substantive issues being considered in the administrative proceeding. Where the official within an agency who pursuant to statute or regulation has authority to decide matters pertaining to the award of attorney's fees or other expenses is not the official or person who by statute or regulation has the authority to decide the substantive issues being considered in the administrative proceeding, the head of the agency shall establish regulations to prescribe the official[s] or person[s] who shall be designed "administrative officer[s]" for the purposes of, and consistent with, this Act.

(E) "decision on the merits" means a decision by the Court on all of the substantive issues raised in the litigation.

"(F) Except as otherwise provided in this section, the definitions provided in section 551 of Title 5 of the United States Code apply to this Act.