WHORM Subject File Code: FE002
(Federal Government: Declaration of Independence and the Constitution)
Case File Number(s): 458000-489999
Box Number: 2

Dg

469471

ID # _____ CU

FE002

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) ___/___/___

Name of Correspondent: Alan Raul

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: Fifth Amendment

ROUTE TO:		ACTION		DISPOSITION	
Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
cuhall	ORIGINATOR	87/01/08		C	87/01/08
Referral Note:					
cuat 27	D/A	87/01/08		C	87/01/08
Referral Note:					
cuwall	S	87/01/08		C	87/01/08
Referral Note:		Jan 8 87 PJW memo to Donald Regan			
		___/___/___			___/___/___
Referral Note:					
		___/___/___			___/___/___
Referral Note:					

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

RECORDS MANAGEMENT ONLY

CLASSIFICATION SECTION

No. of Additional Correspondents:_____ Media: 0 Individual Codes: __.____ __.____ __.____

Prime Subject Code: FE 002.__ Secondary Subject Codes: IT 003.__ __ __.___

__ __.___ __ __.___

__ __.___ __ __.___

PRESIDENTIAL REPLY

Code	Date	Comment	Form
C __ __	_____	Time: _____	P-_____
DSP	_____	Time: _____	Media: _____

SIGNATURE CODES:

CPn - Presidential Correspondence
- n - 0 - Unknown
- n - 1 - Ronald Wilson Reagan
- n - 2 - Ronald Reagan
- n - 3 - Ron
- n - 4 - Dutch
- n - 5 - Ron Reagan
- n - 6 - Ronald
- n - 7 - Ronnie

CLn - First Lady's Correspondence
- n - 0 - Unknown
- n - 1 - Nancy Reagan
- n - 2 - Nancy
- n - 3 - Mrs. Ronald Reagan

CBn - Presidential & First Lady's Correspondence
- n - 1 - Ronald Reagan - Nancy Reagan
- n - 2 - Ron - Nancy

MEDIA CODES:
- B - Box/package
- C - Copy
- D - Official document
- G - Message
- H - Handcarried
- L - Letter
- M - Mailgram
- O - Memo
- P - Photo
- R - Report
- S - Sealed
- T - Telegram
- V - Telephone
- X - Miscellaneous
- Y - Study

THE WHITE HOUSE

WASHINGTON

January 8, 1987

MEMORANDUM FOR DONALD T. REGAN
CHIEF OF STAFF
TO THE PRESIDENT

FROM: PETER J. WALLISON
COUNSEL TO THE PRESIDENT

ORIGINAL SIGNED BY PJW

SUBJECT: Fifth Amendment

We have looked into the question of whether an individual who is the subject of possible criminal liability waives his right against self-incrimination under the Fifth Amendment by making a voluntary public statement.

Case law addressing the issue of Fifth Amendment waivers is nebulous and there is no definitive answer regarding these particular circumstances. Nonetheless, after consulting with the Department of Justice, I believe that the better view is that no waiver occurs when an individual's decision to disclose information is voluntary, rather than the product of government compulsion. The waiver problem is greatest where an individual responds to questions under oath pursuant to a subpoena. Information filed on a tax return, however, is also considered "compelled" and could be deemed to constitute a waiver of the Fifth Amendment.

A public statement or press release can be distinguished from the examples where individuals are forced to disclose potentially adverse information. Courts have held that voluntary disclosures do not waive the privilege. Naturally, if the public statements were induced by an element of coercion, prosecutors would have a somewhat stronger case arguing that a waiver had occurred.

Defense attorneys will, of course, advise their clients conservatively and recommend against any public statements that could conceivably waive or circumscribe protection under the Fifth Amendment. Moreover, even if the voluntary public statements did not waive any rights, they would still be "admissions against interest" which prosecutors could use in court.

409471 cu

THE WHITE HOUSE
WASHINGTON

8 Jan 87

Peter,

I consulted with Doug Kmiec at OLC on the waiver issue. They are still researching but are fairly confident about the advice embodied in the attached memo.

Alan.

477826

4

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

8684
FE002
JL003
F-G006-12

ACTION

December 10, 1986

MEMORANDUM FOR RODNEY B. MCDANIEL

FROM; PAUL W. HANLEY

SUBJECT: Qs and As on Witnesses Pleading the Fifth Amendment

Attached at Tab I for your signature is a memo to the Executive Secretaries of State, DoD, CIA and USIA forwarding the Qs and As at Tab A.

RECOMMENDATION

That you sign the memo at Tab I.

Approve _____ Disapprove _____

Attachments

Tab I Memo
Tab A Qs and As

cc: Larry Speakes
Davie Chew

NSC# 8608684

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

MEMORANDUM FOR MR. NICHOLAS PLATT
Executive Secretary
Department of State

COLONEL JAMES F. LEMON
Executive Secretary
Department of Defense

MR. JOHN H. RIXSE
Executive Secretary
Central Intelligence Agency

MR. LARRY A. TAYLOR
Chief Executive Secretariat
U.S. Information Agency

SUBJECT: Qs and As on Witnesses Pleading the Fifth Amendment

Attached at Tab A for your information and use are the subject Qs and As. They have been cleared by the NSC.

Rodney B. McDaniel
Executive Secretary

Attachment

Tab A Qs and As

Q: Since the President has told the American people and the Congress that he wants to get to the bottom of the Iranscam affair, why are past and present NSC employees refusing to testify? Isn't this either a direct violation of the President's instructions or perhaps a coverup so that in effect the story doesn't come out even though the President says he wants it out?

A: The President has made it clear that he wants the story on the Iran affair to be fully disclosed. Mistakes have been made, and actions were taken without the President's knowledge. He has asked present and former officers of the executive branch to make themselves available to Congress. But, no one is being asked, nor should be asked, to waive their Constitutional rights. Certain important witnesses who have exercised their rights not to testify have noted on the record their desire and intention to tell all the facts in due course. Our intent is to get to the bottom of this as quickly as possible, but in a manner consistent with the law - the President's actions since the day he learned of the diversion of funds have been aimed at that end.

TIME STAMP

NATIONAL SECURITY COUNCIL
EXECUTIVE SECRETARIAT STAFFING DOCUMENT

8684 DEC 8 P6:11 URGENT

SYSTEM LOG NUMBER: 8684

ACTION OFFICER: HANLEY DUE: 0830, 12/10

- ☐ Prepare Memo For President
- ☒ Prepare Memo For Poindexter / Keel
- ☐ Prepare Memo _____ to _____
- ☐ Prepare Memo McDaniel to Chew
- ☐ Prepare Memo McDaniel to Dolan

CONCURRENCES/COMMENTS* *PHONE** to action officer at ext. 6536

	FYI		FYI		FYI
☐	☐ Brooks	☐	☐ Lavin	☐	☐ Ross
☐	☐ Burghardt	☐	☐ Lenczowski	☒	☐ Sable
☐	☐ Burns	☐	☐ Levine	☐	☐ Sachs
☐	☐ Cannistraro	☐	☐ Linhard	☐	☐ Saunders
☐	☐ Childress	☐	☐ Mahley	☐	☐ Sestanovich
☐	☐ Cobb	☐	☐ Major	☐	☐ Small
☐	☐ Danzansky	☐	☐ Mandel	☐	☐ Sommer
☐	☐ deGraffenreid	☐	☐ Matlock	☐	☐ Soos
☐	☐ Dobriansky	☐	☐ May	☐	☐ Stark
☐	☐ Donley	☐	☐ Mingle	☐	☐ Steiner
☐	☐ Douglass	☐	☐ Morton	☐	☐ St Martin
☐	☐ Farrar	☐	☐ Murdock	☐	☐ Tahir-Kheli
☐	☐ Grimes	☐	☐ North	☐	☐ Teicher
☐	☐ Hanley	☐	☐ Perry	☒	☐ Thompson
☐	☐ Kelly	☐	☐ Platt	☐	☐ Tillman
☐	☐ Kissell	☐	☐ Pugliaresi	☐	☐ _____
☐	☐ Kraemer	☐	☐ Raymond	☐	☐ _____
☐	☐ Laux	☐	☐ Reger	☐	☐ _____

INFORMATION
- ☐ McDaniel
- ☒ Rodman
- ☐ Poindexter (advance)
- ☒ Pearson
- ☐ Cockell
- ☐ Keel (advance)
- ☒ Secretariat
- ☐ _____
- ☐ _____

COMMENTS

URGENT

Return to Secretariat

National Security Council
The White House

System # _____
Package # 8684
DOCLOG _____ A/O _____

	SEQUENCE TO	HAS SEEN	DISPOSITION
Bob Pearson	1	P	
Rodney McDaniel			
Rodman/Cockell			
Al Keel			
Paul Thompson			
Florence Gantt			
John Poindexter			
Rodney McDaniel			
NSC Secretariat	2		staff
Situation Room			

I = Information	A = Action	R = Retain	D = Dispatch	N = No further Action

cc: VP Regan Buchanan Other _____

COMMENTS Should be seen by: _____
(Date/Time)

Action: PWH
Concur RKS
PBT

Please clear by 0830 12/10

National Security Council
The White House

System # I

Package # 8684

DOCLOG _____ A/O _____

	SEQUENCE TO	HAS SEEN	DISPOSITION
Bob Pearson	1	P	
Rodney McDaniel			
Rodman/Cockell			
Al Keel			
Paul Thompson			
Florence Gantt			
John Poindexter			
Rodney McDaniel			
NSC Secretariat	2	H.L.W. 12/15	N
Situation Room			

I = Information	A = Action	R = Retain	D = Dispatch	N = No further Action

cc: VP Regan Buchanan Other _____

COMMENTS Should be seen by: _____
(Date/Time)

NSC/S PROFILE UNCLASSIFIED ID 8608684

RECEIVED 09 DEC 86 19

TO POINDEXTER FROM HANLEY DOCDATE 09 DEC 86

KEYWORDS: CONGRESSIONAL IRAN

Q+A

SUBJECT: Q+A RE TESTIMONY TO CONGRESSIONAL IRAN INVESTIGATION

ACTION: PREPARE MEMO FOR POINDEXTER DUE: 10 DEC 86 STATUS S FILES WH

FOR ACTION	FOR CONCURRENCE		FOR INFO
HANLEY	SABLE	THOMPSON	RODMAN
			PEARSON

COMMENTS

REF# LOG NSCIFID (IB ~~IB~~ AK)

ACTION OFFICER (S)	ASSIGNED	ACTION REQUIRED	DUE	COPIES TO
C	12/15	No Further Action Req'd		Pwm Chan

DISPATCH _____ W/ATTCH FILE WH (C) AK

THE WHITE HOUSE

WASHINGTON

January 8, 1987

MEMORANDUM FOR DONALD T. REGAN
CHIEF OF STAFF
TO THE PRESIDENT

FROM: PETER J. WALLISON
COUNSEL TO THE PRESIDENT

SUBJECT: Fifth Amendment

We have looked into the question of whether an individual who is the subject of possible criminal liability waives his right against self-incrimination under the Fifth Amendment by making a voluntary public statement.

Case law addressing the issue of Fifth Amendment waivers is nebulous and there is no definitive answer regarding these particular circumstances. Nonetheless, after consulting with the Department of Justice, I believe that the better view is that no waiver occurs when an individual's decision to disclose information is voluntary, rather than the product of government compulsion. The waiver problem is greatest where an individual responds to questions under oath pursuant to a subpoena. Information filed on a tax return, however, is also considered "compelled" and could be deemed to constitute a waiver of the Fifth Amendment.

A public statement or press release can be distinguished from the examples where individuals are forced to disclose potentially adverse information. Courts have held that voluntary disclosures do not waive the privilege. Naturally, if the public statements were induced by an element of coercion, prosecutors would have a somewhat stronger case arguing that a waiver had occurred.

Defense attorneys will, of course, advise their clients conservatively and recommend against any public statements that could conceivably waive or circumscribe protection under the Fifth Amendment. Moreover, even if the voluntary public statements did not waive any rights, they would still be "admissions against interest" which prosecutors could use in court.

THE WHITE HOUSE
WASHINGTON

TO: Tom / Peter

FROM: DONALD T. REGAN
CHIEF OF STAFF

Send a copy of
this to Paul Laxalt
if no objections

DTR

✓ done —
see attached

a

1/23 5:00pm

THE WHITE HOUSE
WASHINGTON

1-23-87

TO: The Honorable Paul Laxalt

HOUSE

GTON

FROM: **THOMAS C. DAWSON**
Office of the Chief of Staff

Mr. Regan asked me to send you a copy of this - per your conversation with him.

DENT

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ifth Amendment
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regarding these particular circumstances. Nonetheless, after consulting with the Department of Justice, I believe that the better view is that no waiver occurs when an individual's decision to disclose information is voluntary, rather than the product of government compulsion. The waiver problem is greatest where an individual responds to questions under oath pursuant to a subpoena. Information filed on a tax return, however, is also considered "compelled" and could be deemed to constitute a waiver of the Fifth Amendment.

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THE WALL STREET JOURNAL

March 11, 1987

A Safe and Effective Constitutional Convention

By Martin Anderson

Again and again during the first six years of his presidency, Ronald Reagan has pleaded the urgency and importance of a balanced-budget amendment to the Constitution. In campaign statements, in his acceptance speeches at the Republican national conventions, in five of six State of the Union messages, in two national radio addresses, in the Economic Report of the President and in both inaugural addresses he has clearly made the passage of a balanced-budget amendment one of his top policy priorities.

But so far it has been a toothless tiger. The reasoning and rhetoric have been powerful and sleek, but his administration has not produced a specific program for him to take to the American people, a program that has sharp, cutting teeth. The main reason is that few people in the administration think that a balanced-budget amendment is as important and desirable as President Reagan does and the vast majority of the American people say they do. Time is running out on President Reagan and he can no longer afford to wait for his staff to produce the balanced-budget policy options he has every right to expect. He is going to have to demand them.

I propose a two-week constitutional convention in Philadelphia this fall for the express and sole purpose of drafting a brief amendment to the Constitution mandating a balanced federal budget.

But wouldn't this be dangerous? Think of the mischief that might be done if thousands of people got together in one room and started carving up the Constitution with their pens and pencils. Some noted conservatives and liberals have recently joined in a cry of alarm. Phyllis Schlafly, the head of the Eagle Forum; Gerald Gunther, professor at the Stanford Law School; and Howard Phillips, chairman of the Conservative Caucus, have issued agitated warnings that the constitutional skies may fall. Are their fears justified?

No, not at all. The specter of a "runaway" convention is a disingenuous argument put forth usually by those who are adamantly opposed to the idea of balancing the budget in the first place. There are some valid reasons why one could oppose balancing the budget—concerns over having enough money to spend on national defense and on social-welfare programs, and concerns about having to raise taxes. These should be argued out in the open, not masked behind silly and dishonest arguments about the "dangers" of a constitutional convention.

To begin with, a convention would not be a gathering of thousands. The entire Constitution (some 8,500 words) was drafted by fewer than 100 people. The proper size of a modern convention would be about 100 people, similar in scope to the platform-writing committees of the major political parties.

Let each state send two delegates to the convention. This could be done by statewide election. Or, in a system that would be easier and faster, the governors could appoint two delegates, with the stipulation that there must be one man and one woman and one Democrat and one Republican in each state delegation. The intense publicity focused on the selection process by the media would go a long way toward ensuring that only responsible, outstanding citizens are chosen, citizens committed to limiting their amendment-drafting efforts to the topic of a balanced budget.

Few people seem to realize that Congress can, at any time, propose amendments to the Constitution, the same power a convention would have. One could argue that there is considerably more danger of Congress proposing dangerous, irrelevant amendments than of a small, carefully chosen set of constitutional delegates with a clear mandate doing so. The truth is that neither body, by itself, is going to do anything that would threaten one hair of the Constitution's head.

The zero danger of a "runaway" constitutional convention is doubly confirmed by the fact that neither Congress nor a convention has the power to change the Constitution. Both can only propose that something be changed. Then that proposed amendment must be submitted to the states for their approval. And three-fourths of the states—38 of them—must ratify the amendment before it becomes part of the Constitution. The Founding Fathers created a political gantlet for any amendment to run that is so thorough and tough that only the most important, sensible amendments can ever make it.

Ridding the U.S. of a $175 billion deficit all at once could be counterproductive. It would weaken America's national defenses, ravage its social-welfare programs, and raise tax rates to ruinous levels. But reducing the deficit gradually, say $35 billion a year, is a different matter. That could be done without causing economic damage. In fact, just the opposite would occur. A sure, believable path toward wiping out the deficit would be of great benefit to the economy. That is why any balanced-budget amendment must include a specific deficit phase-out period. Five years would seem to be just about right.

This is the way Gramm-Rudman-Hollings was supposed to work, but what can be easily done by legislation can be easily undone. Just recently, Sen. Paul Simon ruefully admitted that as far as meeting the deficit targets of Gramm-Rudman-Hollings goes, "There is almost no hope, and everybody knows it." Legislation to phase out the deficit was a brilliant idea, but it needs the steel spine of a constitutional amendment to make it happen.

The convention itself should last only two weeks, since all the delegates have to do is draft one or two paragraphs on the balanced budget. And Philadelphia would be the proper setting for symbolic reasons. An excellent version of the amendment to start with is the one that more than two-thirds of the Senate and a majority of the House voted for in 1982. If the delegates don't like that one, Milton Friedman has also drafted a couple of paragraphs. All they have to do is a little editing.

So let's get on with it. President Reagan should take his case directly to the American people. The issue is of such fundamental and lasting importance to the future of the U.S. that it deserves at least a full half-hour television address on prime time.

In his speech to the nation the president should urge Congress to propose a balanced-budget amendment within 30 days. If Congress fails to do this, as it is likely to, the president should declare that he will then personally lead a national campaign to call a balanced-budget constitutional convention, using all the powers of his office to persuade at least two more states to pass the necessary resolutions.

President Reagan's goal should be a balanced-budget amendment firmly embedded in the Constitution before he leaves office in 1989.

Mr. Anderson is a senior fellow at Stanford's Hoover Institution. He was assistant to the president for policy development, 1981-82.

Best, Jim Martin Anderson

DG

ID # 486046 CU
FE002

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

BOR

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 87/10/15

Name of Correspondent: William Ball

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: Letter from Lincoln C. Oliphant to Senator William Armstrong Regarding the Constitutionality of the President's Ordering Sexually Explicit Materials Out of Federal Stores

ROUTE TO: Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Completion Code	Completion Date YY/MM/DD
	ACTION		**DISPOSITION**		
Cuholl	ORIGINATOR CJ	87/04/15		C	87/05/01 WS
	Referral Note:				WS
Cmat 28	D/A CJ	87/04/16	CJ	C	87/05/01
	Referral Note:	Apr. 29 87 RMK memo to Arthur Culvahouse			
Culvo	S	87/04/29		C	87/05/01
	Referral Note:	May 1 87 ABC note to Bob Kruger			WS
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				

ACTION CODES:
A - Appropriate Action
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D - Draft Response
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5/81

RECORDS MANAGEMENT ONLY

CLASSIFICATION SECTION

No. of Additional Correspondents:_____ Media: 0 Individual Codes: ___.____ ___.____ ___.____

Prime Subject Code: FE 002-__ Secondary Subject Codes: PR 011-__ __ ____-__
PH ____-__ __ ____-__
__ ____-__ __ ____-__

PRESIDENTIAL REPLY

Code	Date	Comment	Form
C __ __	_____	Time: _____	P- _____
DSP	_____	Time: _____	Media: _____

SIGNATURE CODES:

CPn - Presidential Correspondence
- n - **0** - Unknown
- n - **1** - Ronald Wilson Reagan
- n - **2** - Ronald Reagan
- n - **3** - Ron
- n - **4** - Dutch
- n - **5** - Ron Reagan
- n - **6** - Ronald
- n - **7** - Ronnie

CLn - First Lady's Correspondence
- n - **0** - Unknown
- n - **1** - Nancy Reagan
- n - **2** - Nancy
- n - **3** - Mrs. Ronald Reagan

CBn - Presidential & First Lady's Correspondence
- n - **1** - Ronald Reagan - Nancy Reagan
- n - **2** - Ron.- Nancy

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- **M** - Mailgram
- **O** - Memo
- **P** - Photo
- **R** - Report
- **S** - Sealed
- **T** - Telegram
- **V** - Telephone
- **X** - Miscellaneous
- **Y** - Study

THE WHITE HOUSE

WASHINGTON

April 29, 1987

MEMORANDUM FOR ARTHUR B. CULVAHOUSE, JR.

FROM: ROBERT M. KRUGER RMK

SUBJECT: Proposal for an Executive Order Banning Sexually Explicit Materials from Federal Stores

I have advised John Tuck that our preliminary review of the materials provided by Will Ball indicates that (1) Senator Armstrong's proposal to have the President issue an executive order banning sexually explicit materials from Federal stores raises substantial constitutional questions and (2) the memorandum to Senator Armstrong from the Legislative Counsel of the Senate Republican Policy Committee does not adequately address the constitutional issues. As you know, OMB has already taken the position that such an order would be constitutionally invalid. (Jack Carley reports that he received informal confirmation of this view from OLC.)

Jack Carley has already provided John with talking points for Senator Baker's use in discussing this issue with Senator Armstrong. John has added to these talking points a statement that OLC has been formally tasked to review this issue. Pursuant to our discussions of this matter, I suggested that it may be preferable for Senator Baker not to raise the issue of a formal OLC analysis, unless Senator Armstrong requests such a review.

I agree. Please advise Tuck. It would be politically embarrassing and not necessary

Copy sent to PMK 5/1/87

4-13-87

THE WHITE HOUSE
WASHINGTON

486046CR

A.B. –

→ need your opinion on this issue, which Senator Armstrong has raised with the President on several recent occasions.

Bill

cc: PT (cover letter only)

United States Senate
REPUBLICAN POLICY COMMITTEE
RUSSELL SENATE OFFICE BUILDING
WASHINGTON, DC 20510
202-224-2946

April 7, 1987

Hon. William L. Armstrong
United States Senate
Washington, D.C. 20510

Dear Senator Armstrong:

You have asked the President to order sexually explicit materials out of Federal stores, but questions have been raised about the constitutionality of such an order. At your request, I looked into the question and have concluded that a thoroughly researched and conscientiously drafted executive order can withstand the constitutional test. On the other hand, if the order is not carefully prepared and vigorously defended, it will fail.

The legal difficulties to be faced must not be minimized. Just last fall the Department of Justice lost a case that has important similarities with the current effort. A decade ago the City of Cleveland lost its case when it tried to order a vendor (in the city's airport) to remove sexually explicit magazines from the vendor's shelves. The law of these cases, and others like them, represent what might be called the common wisdom.

I think the common wisdom is wrong, and the enclosed memorandum outlines some of my reasons for believing that the Supreme Court will uphold a carefully tailored restriction on sexually indecent "speech" from, not just on, public property.

The following analogy is useful to me: In 1969, the Supreme Court held in Tinker that public high school officials could not deny students the right to make a political statement by wearing black armbands in the classroom. In 1971, the Supreme Court held in Cohen that a person could not be convicted of public indecency for wearing a jacket stenciled with the political (not sexual) slogan, "F[___] the Draft". Last term, the Court explained those cases by saying, "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket." 106 S.Ct. at 3164-66.
So you see, the idea of public decency is not altogether dead.

Government stores are not public schools, but they are not bawdy houses, either. Therefore, when Cohen's jacket sheds its political content for sexual content, and when Cohen insists on his rights to wear the jacket and have it sold in government stores, then Cohen is asking for more than the Justices are willing to squeeze out of the First Amendment.

Your effort is to be applauded. The idea of public decency needs constant reiteration and support.

Sincerely,

Lincoln C. Oliphant,
Legislative Counsel

enclosures

Washington Post

Add to
486046Cu
FE002

Rowland Evans and Robert Novak

Pornography: The Missing Executive Order

"This is an embarrassment!" stormed usually reserved Sen. William L. Armstrong, peeved not at an errant aide or a political foe but at his fellow conservative Republican, the president of the United States.

Armstrong used those words last September in writing President Reagan of his exasperation that his July 14 call for removal of "sexually explicit" materials from federal buildings had been brushed off. During the subsequent seven months, the president has not answered Armstrong's hot letter. He probably never saw it.

Nevertheless, Armstrong won't give up. He insists on learning whether there is any "social issues" content left in the seventh year of the fatigued Reagan Revolution. During the past month, he personally confronted the president and Vice President George Bush on this issue without getting a response, but it is only the start. "Our intention is to make life hell for the president until he acts on this," an Armstrong associate told us.

That means forcing the pornography issue on the table at biweekly GOP congressional leadership meetings with the president, attended by Armstrong as Senate Republican Policy Committee chairman. It also means inserting the issue into GOP election campaigns and getting religious leaders to wonder aloud why nothing is being done.

The issue distills the right's deepening frustration with America's most conservative president in 60 years. Surrounded by pragmatists who consider such issues a nuisance, the president is remote and unresponsive to his old constituency.

Pornography is no narrow New Right campaign. Social conservatives are joined by mainstream clergymen, radical feminists and ordinary Americans. They argue that Uncle Sam can clean up his own freedom-of-speech house without violating the First Amendment.

That was Armstrong's point when he wrote the president last July 14 that "the Federal government may now be the largest single purveyor of Playboy, Penthouse and other pornographic magazines" in military and other leased stores. Therefore, he requested an executive order "to rid government stores of pornographic magazines."

The Office of Management and Budget response? "It would not be prudent for the president to issue the proposed order at this time."

Armstrong responded with his Sept. 10 letter, neither drafted nor inspired by staff. Calling the OMB answer "pusillanimous" and a "two-page dose of bureaucratic double-talk," Armstrong told the president:

"While the views of members of your Administration are not without interest to me, I wrote to obtain the views of the President of the United States. Ronald Reagan surely does not think it would be 'imprudent' to halt the Federal government's pornography peddling."

Although the senator concluded that "I look forward to receiving your own reply," his letter went unanswered. When Gary Bauer switched from undersecretary of education to domestic policy chief at the White House late last year, he raised the issue. The embattled Donald Regan, then chief of staff, was uninterested.

Only after Armstrong confronted Reagan in the White House and Bush on Capitol Hill last month did presidential aide John Tuck make an oral response: we'd like to help you, senator, but we can't find one lawyer in the executive branch who would sign off on such an order.

On April 6, one lawyer dissented. Lincoln C. Oliphant, counsel of Armstrong's GOP Policy Committee, concluded that "a thoroughly researched and conscientiously drafted executive order can withstand the constitutional test." On April 9, Armstrong mailed Oliphant's opinion to a wide range of churchmen, urging them to ask Reagan "to follow his own instincts and issue the order."

Incoming mail, while not seen by the president, will be pressed on him by Armstrong at congressional leadership meetings. If that does not invigorate the antiporn executive order buried somewhere in the White House, it will signal to the right that mobilizing the president on the social agenda takes more than just getting his attention.

04.24

A.B.:

Bob Kruger stopped by to discuss the attached with you.

L.A.

United States Senate
REPUBLICAN POLICY COMMITTEE
RUSSELL SENATE OFFICE BUILDING
WASHINGTON, DC 20510
202-224-2946

MEMO
April 6, 1987

TO: Senator Armstrong

FROM: Lincoln C. Oliphant, Legislative Counsel

QUESTION: CAN THE FEDERAL GOVERNMENT EXCLUDE MAGAZINES FROM MILITARY STORES AND CIVILIAN STORES IN FEDERAL BUILDINGS BECAUSE OF THE NONOBSCENE, SEXUALLY EXPLICIT CONTENT OF THE MAGAZINES?

ANSWER: YES, IF THE EXCLUSION IS CAREFULLY DRAFTED AND ENERGETICALLY DEFENDED.

Twice in the last nine months you have written the President and urged him to order pornographic magazines out of government stores. No executive order has issued. Reportedly, one of the reasons for this failure is a question about the proposal's constitutionality.

I have concluded that a thoroughly researched and conscientiously drafted executive order can withstand the constitutional test. On the other hand, if the order is not carefully prepared and vigorously defended, it will fail.

The enormous legal resources of the Departments of Justice and Defense and the General Services Administration (GSA) must be brought to this task. In the end, the executive order will be put on a constitutional scale and weighed against competing interests and values. If the law and the facts have not been heaped high in the President's pan, he will -- I repeat -- lose. The publishers, the pornographers, and the civil libertarians will not leave their own pan empty.

The publishers are powerful; the civil libertarians are principled;[1] and the pornographers stand to lose enormous sums of money. In fact, the President's order would end the pornographers' lucrative relationship with their most valuable distributor, the Federal government. Here are the facts from your letter to the President of July 14, 1986:

> "This is not a case of the Federal government unwittingly letting an occasional copy of [sexually explicit] magazines pass through its portals. To the contrary, the Federal government may now be the largest single purveyor of Playboy, Penthouse, and other pornographic magazines.

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[1] The American Civil Liberties Union (ACLU) will be foremost among those principled groups crying "censorship." "Censorship," in this context and on their terms, means opposing the ACLU's view of the First Amendment. To the ACLU, no material, no matter how vile, can be legally obscene:

> "In 1970 the ACLU strengthened its policy on obscenity by voicing its adamant rejection of any restraint, under any obscenity statute, of the right 'to create, publish or distribute materials to adults or the right of adults to choose the material they read or view.' The 1970 policy made an exception for 'statutes which prohibit the thrusting of hard-core pornography on unwilling audiences in public places.' But three years later, [Franklyn] Haiman . . . successfully persuaded the board to rescind this proviso. In 1977 the board added to its objections all zoning plans that restricted the availability of pornographic books, movies, and other communications media. In the following year the Union made explicit its objection to restrictions on pornography in the broadcast media." Wm. Donohue, The Politics of the American Civil Liberties Union 293 (1985) (footnotes omitted).

To the ACLU, then, unconstitutional "censorship" includes display regulations, zoning laws, and broadcast restrictions, to name just three. Fortunately, the Supreme Court has never adopted their radical and perverse interpretation of the First Amendment.

In a triumph of petty consistency over good sense and justice, the ACLU also holds that the First Amendment forbids the state to control the circulation of child pornography. In 1977, its board adopted the following policy:

> "While the ACLU may [!] vigorously dislike [!] and reject sexual exploitation of children for commercial [!] purposes, activities in publishing and disseminating printed or visual materials are wholly protected by the First Amendment." Id. at 296 (editorial exclamations added by L.O.).

Fortunately again, a unanimous Supreme Court rejected this wicked nonsense in Ferber v. New York, 458 U.S. 747 (1982).

> "The General Services Administration licenses 526 shops in Federal buildings under the Randolph-Sheppard Act. Other Federal buildings contain shops that are operated by employee associations. . . . The military operates 413 major retail stores and thousands of smaller retail outlets throughout the world. Many of these outlets sell sexually explicit magazines. In sum, the national government may be selling Playboy and Penthouse (and worse) in thousands of retail outlets. . . .
>
> "Removing the magazines raises certain First Amendment issues, but I do not believe pornographers have a First Amendment right to have the government sell their indecent wares."[2]

When the President issues his order he will be charged with "censorship." This is lamentable, but unavoidable. The charge will be leveled by people who think the Constitution means that if a soldier wants to look at sexually provocative pictures of naked women (or naked men or animals or objects) and the government refuses to sell him the pictures in its own stores then the government is acting censoriously. But does the Constitution of the United States require the government of the United States to pander? Is the President to be panderer-in-chief?[3] No, of

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[2]The General Services Administration (GSA) forbids sales of magazines that are illegal: "Periodicals and publications shall not be displayed, offered for sale, or sold in violation of any valid State or Federal law, regulation, or judicial decision." 41 C.F.R. 101-20.205(e) (1985). However, GSA believes that the Constitution forbids it to exclude nonobscene publications:

> "The GSA is not authorized to ban the sale by vendors of reading material which some consider objectionable. According to a U.S. Supreme Court decision, the Constitution does not permit the government to censor certain types of materials merely because they offend the aesthetic or moral sensibilities of certain individuals. If problems arise in the form of public complaints, the buildings manager should contact the vendor and request that the reading material in question be displayed behind a wrapper or privacy shield, or be stored out of sight." GSA Handbook (no. PBS P 5815.2), Concessions Management, chap. 8, para. 8 (1985).

The military takes a similar position. See, II Attorney General's Comm'n on Pornography, Final Report 1488-93 (1986).

[3]Webster's Third New International Dictionary defines "panderer" as "1.a: a go-between in love intrigues[;] b: a man who solicits clients for a prostitute: procurer[;] 2: someone who caters to and often exploits the weaknesses of others[.]"

course not, the Constitution requires no such thing. But this straightforward understanding of the law must be argued, urged, and pushed at the Federal courts or the President will lose and the pornographers will win. A commonsense understanding of the American constitution is not sufficient; there are influential persons and subtle doctrines that must be faced and defeated in court.

I. CONSTITUTIONAL TEXTS

The Constitution, by express terms, grants Congress broad discretion over Federal property. "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ." U.S. Const., Art. IV, sec. 3. Congress has lawfully delegated its power to regulate activities on Federal property to the General Services Administration (GSA). See, e.g., 40 U.S.C. 318a (1982) and United States v. Adams, 502 F.Supp. 21 (D.C.Fla. 1980). Congress also has extensive powers over military personnel. "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces. . . ." Art. I, sec. 8, cl. 14. And, of course, "The President shall be Commander in Chief of the Army and Navy. . ." and he holds the "executive Power." Art. II, secs. 2 & 1. Although broad, these powers are not absolute, and they may conflict with other constitutional provisions, such as the First Amendment's guarantees of free expression[4] and the Fifth Amendment's guarantee of due process of

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[4] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., Amend. I.

law (including its "equal protection component"). Remember, however, that the commands of the First and Fifth Amendments are not absolute, either.

I am going to dispense with Fifth Amendment questions quickly because a careful draftsman will anticipate those questions and his executive order will answer them. For our purposes, the Fifth Amendment requires equal protection, i.e. that similar things be treated similarly, and due process, i.e. that persons be put on notice, in reasonably certain terms, as to what conduct is forbidden and that the government will establish and follow fair rules in determining penalties.[5] By and large, Fifth Amendment problems can be eliminated, or minimized at least, by careful drafting and conscientious enforcement. We are left with the key question: Does the First Amendment to the Constitution, as currently interpreted by the Federal courts, allow the President[6] to order the exclusion of magazines from military stores and civilian stores in Federal buildings because of the nonobscene, sexually explicit content of the magazines?

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[5]See, e.g., Hustler v. Gsell, Civ. no. R-79-1482 (D.C.Md. 1981), in which publishers of two sexually explicit magazines claimed that their magazines were being illegally excluded from certain military exchanges in violation of DoD regulations. Judgment was ordered in favor of defendants after they convinced the judge that the exclusions were based solely on merchandising considerations (no one was asking for the magazines) and not on content, as the DoD regulations required. See also, Overseas Media Corp. v. McNamara, 385 F.2d 308 (D.C.Cir. 1967) (SecDef may not deny a newspaper access to overseas exchanges in absence of established criteria) and United States v. Crowthers, 456 F.2d 1074, 1080 (4th Cir. 1972) (First Amendment, not Fifth Amendment case) (GSA regulation requiring official permission for pamphlet distribution on Federal property struck down because "[s]uch a regulation, without objective standards, is void on its face").

[6]I assume that if there is governmental power to exclude the magazines then the President may exclude them unilaterally. Of course, any lawsuit would ask whether the President exceeded his executive powers if he acts without express authorization from Congress. I do not address this issue separately because I believe the President has adequate authority, constitutional and statutory, express and implied, to act alone. (Similarly, I assume that what I say about magazines can also be said about other sexually explicit materials such as books and videotapes.)

II. CONTENT-BASED DECISIONS

Government actions based on the content of a publication are always disfavored, but not always prohibited. The classic, if extravagant, statement of the doctrine is from Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972), where civil rights pickets challenged an ordinance that allowed only labor picketing near schools:

> "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . [O]ur people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control.
>
> "[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. . . ." Id. at 95-6 (citations omitted).

Although this quotation from Mosley is stirring, taken from its context it does not accurately state the law. For example, the government regularly restricts fighting words, obscenity, disclosure of state secrets, and other utterances. The government also constitutionally regulates the time, place, and manner of expression. Our out-of-context quotation is a useful starting place, however, because it states a fundamental truth: The Constitution strongly disfavors content-based restrictions on protected expression.

III. STANDARD EXCEPTIONS

A. The Captive Audience

There are two common exceptions to the requirement for content neutrality, and both must be urged upon the courts that will review the President's executive order. First, in Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (plurality opinion), the Supreme Court carved out an

exception for the captive audience. In Lehman, city-owned buses prohibited political advertising while permitting ordinary commercial advertising. The rule was upheld, four justices saying:

> "Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. . . . The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles. . . .
>
> "Because state action exists, however, the policies and practices governing access to the transit system's advertising space must not be arbitrary, capricious, or invidious. . . ." Id. at 303 (citations omitted).

After outlining the law, the Court turned to the justifications for the advertising limitation and found several. Similar concrete, fact-based justifications must be developed and brought forward to defend the President's order. If GSA cannot articulate reasons for thinking that a Federal building has much in common with the interior of a city bus, then the captive audience argument will fail here.[7]

The Court gave the following reasons for sustaining Shaker Heights's exclusion of political advertising (keep in mind that freedom for political speech is the raison d'être of the First Amendment):

> . . . Revenues earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda. There

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[7] The constitutional law applied to Shaker Heights's buses has not been readily applied elsewhere. See, e.g., Lebron v. Washington Metro. Area Transit Authority, 749 F.2d 893 (D.C.Cir. 1984) (political poster could not be excluded from subway stations) (Bork, J., with Scalia and Starr, JJ., joining the opinion) and Penthouse International, Ltd. v. Koch, 599 F.Supp. 1338 (S.D.N.Y. 1984) (political poster cited for bad taste could not be excluded from subway stations). Both decisions were distinguished from Lehman.

> could be lurking doubt about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require." Id. at 304.

Justice Douglas, a First Amendment "absolutist," concurred in the judgment on other grounds. He focused on the competing rights of the captive commuters. Said Douglas, "While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it. [T]he right of commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience." Id. at 307.

B. Juveniles in the Audience

The second common exception which the President's lawyers must pursue (and capture) involves juveniles. Ginsberg v. New York, 390 U.S. 629 (1966).

Ginsberg was arrested and convicted of selling sexually explicit, but nonobscene (at least for adults), materials to a 16-year-old boy. His conviction was affirmed by the Supreme Court, which said: "'[T]he power of the state to control the conduct of children reaches beyond the scope of its authority over adults'" and "[t]he State also has an independent interest in the well-being of its youth." Id. at 638, 640.

How many minors pass through a Federal building or military exchange during a week, and what kind of exposure do they get to sexually explicit materials that are sold there? These kinds of questions, and some very good answers, will be required to help sustain the President's order.

IV. IS NONOBSCENE EXPRESSION A NEW EXCEPTION?

Perhaps there is a new exception to the rule of content neutrality. Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (plurality opinion of Stevens, J., for four members of the Court). This important development must be used to full advantage.[8]

Detroit enacted a zoning ordinance designed to disperse theaters that show "adult" movies. Specifically, "adult" theaters could not be located within 1,000 feet of any two other regulated uses (e.g., pool halls and bars) or within 500 feet of any residential area. The city defined "adult" movies in terms of depictions of specified sexual acts or specified anatomical areas.[9] The definition did not require a showing of legal obscenity.

The City was sued. The plaintiffs alleged that the classification unconstitutionally deprived them of their rights under the First Amendment because it was based on the content of constitutionally protected, i.e. nonobscene, expression. Justice Powell, concurring on other grounds, provided the majority for upholding the ordinance. The four other members of the majority spoke of a content-based exception for nonobscene speech:

> "Even within the area of protected speech, a difference in content may require a different governmental response. . . . Id. at 66.
>
> "[D]irectly in point are opinions [of the Court] dealing with the question whether the First Amendment prohibits the State and

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[8] See also, F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978), in which the Commission's authority to regulate nonobscene but indecent speech was affirmed.

[9] The Detroit ordinance provides an excellent definition of the kinds of depictions that the President will be trying to forbid in Federal stores. See, 427 U.S. at 53 n. 4.

Federal Governments from wholly suppressing sexually oriented materials on the basis of their 'obscene character.' In Ginsberg v. New York . . ., the Court upheld a conviction for selling to a minor magazines which were concededly not 'obscene' if shown to adults. Indeed, the Members of the Court who would accord the greatest protection to such materials have repeatedly indicated that the State could prohibit the distribution or exhibition of such materials to juveniles and unconsenting adults. Surely the First Amendment does not foreclose such a prohibition; yet it is equally clear that any such prohibition must rest squarely on an appraisal of the content of material otherwise within a constitutionally protected area.

"Such a line may be drawn on the basis of content without violating the government's paramount obligation of neutrality in its regulation of protected communication. For the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate; whether a motion picture ridicules or characterizes one point of view or another, the effect of the ordinances is exactly the same.

"Moreover, even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment. ['I disapprove of what you say, but I will defend to the death your right to say it.'] Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures." Id. at 69-71 (footnotes omitted, emphasis added).

"The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, '. . . There are myriad locations in the City of Detroit which must be over 1000 feet from existing regulated establishments. This burden on First Amendment rights is slight.' . . .

"The Court's opinion in Erznoznik [v. City of Jacksonville, 422 U.S. 205, 215 (1975)] presaged our holding today by noting that the presumption of statutory validity 'has less force when a classification turns on the subject matter of expression.' Respondents' position is that the presumption has no force, or more

precisely, that any classification based on subject matter is absolutely prohibited." Id. at 71-72 n. 35 (citations omitted).

The President's executive order will attempt to "legitimately use the content of [sexually explicit magazines] as the basis for placing them in a different classification from other" magazines sold in government stores. One class of magazines will be sold, the other will be barred. American Mini Theatres, a case involving private, not government, property, is extremely important to the President's effort and the rationale of its plurality must be well employed.

A. Secondary Effects

In a later case with similar facts, the Court said a city's ordinance was aimed not at the content of the pictures but at their "secondary effects." In this second case, six justices joined the majority opinion (by Rehnquist, J.) and a seventh justice concurred in the result.

> "The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views." City of Renton v. Playtime Theatres, Inc., -- U.S. --, 106 S.Ct. 925, 925. Cf., American Mini Theatres, supra at 71 n. 34.[10]

The President's lawyers need to compile a list of secondary effects of sexually explicit sales. Particularly important, it seems to me, would be

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[10]Cf. also, Justice Powell's concurrence in American Mini Theatres:

> "[The] dissent misconceives the issue in this case by insisting that it involves an impermissible time, place, and manner restriction based on the content of the expression. It involves nothing of the kind. We have here merely a decision by the city to treat certain movie theaters differently because they have markedly different effects upon their surroundings. . . . Moreover, even if this were a case involving a special governmental response to the content of one type of movie, it is possible that the result would be supported by a line of cases recognizing that the government can tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated. . . ." 427 U.S. at 82 n. 6 (citations omitted).

the effect that such magazines have on employee morale and recruitment (especially for women[11]); the effect they have on efficiency (for example, does stocking sexually explicit magazines encourage picketing and other forms of protest that tend to disrupt government workers?); and the effect the presence of such magazines has on nonconsenting viewers, juveniles, and, e.g., foreign visitors, all of whom must use Federal buildings.

B. Content Versus Viewpoint

There may be emerging a useful distinction between content-based restrictions and viewpoint-based restrictions. The Detroit and Renton City cases are the leading cases.

Justice Stevens put it this way in American Mini Theatres:

> "Such a line may be drawn on the basis of content without violating the government's paramount obligation of neutrality in its regulation of protected communication. For the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate; whether a motion picture ridicules or characterizes one point of view or another, the effect of the ordinances is exactly the same." 427 U.S. at 70.

Justice Rehnquist assented in City of Renton:

> "[T]he Renton ordinance is completely consistent with our definition of 'content-neutral' speech regulations as those that 'are justified without reference to the content of the regulated speech.' . . . The ordinance does not contravene the fundamental principle that underlines our concern about 'content-based' speech regulations: that 'government may not grant the use of a forum to people whose view it finds acceptable, but deny use to those wishing to express less favored or more controversial views.' [Police Dept. of Chicago v.] Mosley . . . ." 106 S.Ct. at 929 (citations omitted, emphasis by the Court).

I understand the Justices to be saying that nonobscene speech is protected speech, albeit not very important speech, that can be reasonably

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[11] Pornography cannot be defined as sex discrimination, however. American Booksellers Assn. v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (Easterbrook, J.), judg. aff'd, 106 S.Ct. 1172 (1986).

regulated on the basis of its sexual content so long as the government is not attempting to favor or disfavor the speaker's social, political, or philosophical views. In short, pornographers can be more readily regulated than other speakers provided the government restricts itself to the sexual content and doesn't begin discriminating between left wing pornographers and right wing pornographers. It is difficult to know exactly how many justices subscribe to this position, but it seems that at least four do, and perhaps as many as six. The President needs five.

V. THE FORUM

The Supreme Court has adopted a "forum doctrine" to determine when the First Amendment requires the government to allow a person to use government property for expressive activity. There are three forums (some jurists prefer calling them fora): One, the traditional public forum such as a highway or park. Two, pubic property which the state has opened for expressive activity such as university meeting rooms. This is called the designated public forum. Three, the nonpublic forum such as an interoffice mail system. Perry Education Assoc. v. Perry Local Educators' Assoc., 460 U.S. 37, 45-6 (1983). Nonpublic forums can be much broader than a school's mail cubicles, however. For example, the Combined Federal Campaign (CFC) is a nonpublic forum. Cornelius v. NAACP Legal Defense and Education Fund, -- U.S. --, 105 S.Ct. 3439 (1985). (In Cornelius, the CFC itself -- and not the Federal buildings in which it is conducted -- was held to be the forum. In drafting and defending the President's order, DoJ will probably take the position that the government's commercial enterprises, and not the Federal buildings alone, constitute the forum.) Every effort must be made to

support a finding that the forum in which the sexually explicit publishers desire to "speak" is a nonpublic forum.

In the first two forums,

> "[T]he government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Perry Education Assoc., supra at 45 (citations omitted).

In the third forum, the standards are sharply different:

> "[T]he 'First Amendment does not guarantee access to property simply because it is owned or controlled by the government.' In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. As we have stated on several occasions, '[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'" Id. at 46 (citations omitted).

The first test is nearly impossible to meet, but the test for a nonpublic forum can be met. Whether a place or program is a public or private forum will be determined by the facts, particularly including the government's purpose in creating the forum. Id. at 3451. Cornelius provides ample support for the belief that nonmilitary government shops that have been opened to a minimal degree of expressive activity (by, for example, offering magazines for sale) are nonpublic forums. Military shops are certainly no more than nonpublic forums, and perhaps less.

VI. THE MILITARY

Congress and the President have extraordinary powers to regulate military affairs. Therefore, sales of sexually explicit materials can be more easily eliminated from military bases and ships than from civilian-operated stores on Federal property. Military regulations that are challenged on First Amendment grounds are given a "far more deferential" review than "similar laws or regulations designed for civilian society." Goldman v. Weinberger, -- U.S. --, 106 S.Ct. 1310, 1313 (1986) (free exercise of religion). "The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." Id.

In Greer v. Spock, 424 U.S. 828 (1976), presidential candidate Benjamin Spock was denied permission to speak at an Army base. The denial was issued in compliance with the consistent policy of the Army and the base to prohibit political speeches. In sustaining the Army regulation, the Court said:

> "[I]t is . . . the business of a military installation . . . to train soldiers, not to provide a public forum. . . .
>
> "The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is . . . historically and constitutionally false.
>
> "[M]embers of the Armed Forces . . . are wholly free as individuals to attend political rallies, out of uniform and off base. But the military as such is insulated from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates." Id. at 838-39.

Political speech can be proscribed, or circumscribed, in the military context even though political speech holds the loftiest place in the First Amendment hierarchy.[12]

Military authority even extends beyond the base. 32 C.F.R. 631.11(b) (1986) allows military authorities to declare establishments off limits if they threaten the discipline, health, morale, safety, morals or welfare of members of the Armed Services. This regulation was upheld against constitutional challenge after a base commander declared an off base pornography shop off limits. Doe v. Fulham (no. 83-137-CIV-4, E.D.N.C. 1984), aff'd mem., -- F.2d -- (4th Cir. 4-29-85).

The President's order should speak plainly to the problem of military distribution of sexually explicit materials and he should order the materials out of military stores. (The new rule should be a paraphrase of Greer v. Spock. "It is the business of a military installation to train soldiers, not to provide Forum.") The effect on military morale should be emphasized, particularly the effect on women soldiers and "gender-integrated" units. If the order is properly prepared, objectively enforced, and courageously defended I certainly expect it to be upheld as to military establishments.

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[12]At the time of Greer v. Spock, Army regulations permitted a base commander to withhold permission to distribute a publication only where "it appears that the dissemination of [the] publication presents a clear danger to the loyalty, discipline, or morale of troops at [the] installation." By letter, the Army gave the following examples of materials that a commander need not allow to be distributed: "[P]ublications which are obscene or otherwise unlawful (e.g., counselling disloyalty, mutiny, or refusal of duty)." 424 U.S. at 831 n. 2. Base commanders were not, however, to "prevent distribution of a publication simply because he does not like its contents." Id. at 840. Regarding these regulations, the Court said, "There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command." Id.

VII. GOVERNMENT'S OWN EXPRESSION

The order should be upheld in the military context, first because of the unique circumstances of military discipline, and second because expression on and from military property looks and sounds too much like expression by the government itself. For this same reason, the President's order should be upheld in nonmilitary contexts where the government itself -- and not a private licensee, for whom a more difficult question arises[13] -- operates the store.

The Fifth Circuit, sitting en banc, had this to say about the effect of the First Amendment on government speech:

> ". . . To find that the government is without First Amendment protection is not to find that the government is prohibited from speaking or that private individuals have the right to limit or control the expression of government. . . . As Justice Stewart aptly noted in Columbia Broadcasting Systems, Inc. v. Democratic National Committee, 412 U.S. 94, 139 n. 7 (1973) (Stewart, J., concurring), '[g]overnment is not restrained by the First Amendment from controlling its own expression . . . "[t]he purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents."'*
>
> "*Government expression, being unprotected by the First Amendment, may be subject to legislative limitation which would be impermissible if sought to be applied to private expression. . . ." Muir v. Alabama Educational Television Comm'n, 688 F.2d 1033, 1038 & n. 12 (1982), cert. denied, 103 S. Ct. 1274.

When a government store sells a sexually explicit magazine there is a question as to who is "speaking," and the answer is critically important. If the government is "speaking" it may simply stop, and no one may compel it

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[13] In Penthouse International, Ltd. v. Putka, 436 F.Supp. 1220 (N.D.Ohio 1977) the City of Cleveland failed in its effort to require a private shop to which it leased space in the city airport to remove sexually explicit magazines.

to begin again. However, the pornographers provide a different answer. They say they are the speakers and that the government's order to stop is not directed against itself, but against them, the pornographers. This, they claim, is a violation of their First Amendment rights. Muir may be some help in resolving this problem.

In Muir, two public television stations had refused to air the program "Death of a Princess". Both were sued in an effort to force broadcast of the program, which concerned the execution for adultery of a Saudi princess and her lover. The Fifth Circuit sustained the editorial refusals of the stations' managers.

Muir's guidance must be taken with care because it concerned the government as broadcaster and because electronic broadcast cases are factually (and therefore legally) distinct from publishing cases. Nevertheless, Muir recognized that the government cannot be compelled to distribute the speech of third parties. This is all the President will be seeking with his executive order.

VIII. OBSCENITY

This memorandum treats the difficult question of whether sexually explicit but nonobscene materials can be excluded from federal stores.[14] There is a related (but easier) issue that the President should also address in his executive order. (That order should, of course, be drafted so that

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[14] A recent case emphasizes the difficulty of the problem. In American Council of the Blind v. Boorstin, Civ. no. 85-3836 (D.C.D.C. Sept. 23, 1986), appealed then appeal dismissed on appellant's (DoJ's) motion, no. 86-5699 (D.C.Cir. Dec. 18, 1986), the Librarian of Congress was ordered to reinstate Playboy magazine in the Library's braille program. The Court held that the Library's initial action in removing the magazine was unconstitutional "viewpoint-based discrimination impinging on freedom of expression."

any section of it that may be declared unconstitutional can be severed from the body of the enactment which otherwise will become effective.)

Obscene publications can be excluded and removed from Federal premises (and private, commercial property for that matter) because "obscenity is not within the area of constitutionally protected speech or press." Roth v. United States, 354 U.S. 476 (1957) and Miller v. California, 413 U.S. 15 (1973). I make this point about a settled area of law because it is highly unlikely that all Federal establishments are free of obscene matter. For example, one of your correspondents visited a Navy exchange in the Norfolk, Virginia area and reported that the following magazines were available: Forum, Gallery, Genesis, Hustler, Penthouse, Playboy, Players, Playgirl, and Swank.[15] Issues of most of these magazines have been found legally obscene at one time or another.[16] While it is true that a finding of obscenity for one issue of a magazine cannot prejudice the question for succeeding issues, it is also true that issues currently available in Federal stores are no better, and probably are far worse, than the earlier editions that were held obscene.

Obscene materials should be driven out of Federal stores. The executive order should provide a constitutional method for doing so.

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[15]The Commission on Pornography called these magazines "mainstream sexually explicit magazines." II Attorney General's Comm'n on Pornography, Final Report 1400-06 (1986) contains a description of twelve of these "mainstreamers." I take the phrase "mainstream sexually explicit magazine" to mean that you can find the publication in your government store.

[16]Held obscene: Gallery, Genesis, Playgirl in City of Belleville v. Morgan, 376 N.E.2d 704 (App.Ct.Ill. 1978); Hustler in Georgia v. Flynt, 264 S.E.2d 669 (Ga. 1980), cert. denied, 449 U.S. 888; Swank in South Carolina v. Pee Dee News Co., no. 83-GS-26-393 (Horry Co. Circ. Ct.), rev'd for prosecutorial misconduct, 336 S.E.2d 8 (S.C. 1985); and Penthouse in Penthouse v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980) and Penthouse v. Webb, 594 F.Supp. 1186 (N.D.Ga. 1984).

IX. CONCLUSION

Issuing an executive order banning sexually explicit but nonobscene materials from Federal stores raises important constitutional issues, but anyone who believes that the First Amendment compels the Federal Government to pander has lost sight of the great and noble purposes of that Amendment.

Supporters of the executive order do not seek an uninhibited right to favor or forbid reading material that is sold on Federal property. Justice Rehnquist's position in an analogous situation seems correct:

> "Limitations on the use of municipal auditoriums by government must be sufficiently reasonable to satisfy the Due Process Clause and cannot unfairly discriminate in violation of the Equal Protection Clause. A municipal auditorium which opened itself to Republicans while closing itself to Democrats would run afoul of the Fourteenth Amendment. . . .
>
> "A municipal theater may not be run by municipal authorities as if it were a private theater, free to judge on a content basis alone which plays it wishes to have performed and which it does not. But, just as surely, that element of it which is 'theater' ought to be accorded some constitutional recognition along with that element of it which is 'municipal.' . . ." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 572 n. 2, 573-74 (1975) (Rehnquist, J. dissenting). (Needless to say, if Rehnquist had written the majority opinion the President's legal position would be stronger today.)

The concept of public decency must not be abandoned. Indecent emanations from public buildings must be restrained whether or not the material, taken as a whole, is legally obscene. Such is the theme of the proposed executive order.

For the reasons given above, and others,[17] a properly prepared order will be held constitutional in whole or in large part. But to succeed, the order must be conscientiously prepared and vigorously defended.

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[17] E.g., Piarowski v. Illinois Comm. College, 759 F.2d 625 (7th Cir. 1985) (Posner, J.) (artist had no right to demand exhibit of sexually explicit art in college's main floor gallery); Seyfried v. Walton, 668 F.2d 214 (3rd Cir. 1981) (school authorities had power to forbid the performance of a play they deemed inappropriate because of its sexual content); and Advocates for the Arts v. Thomson, 532 F.2d 792 (1st Cir. 1976) (art grant could be denied literary magazine because it had published sexually explicit poem).

THE WHITE HOUSE

WASHINGTON

March 13, 1987

March 6 87

Dear Senator Armstrong:

I am writing in response to your letter of October 14, 1986 to the President that addressed your proposal suggesting the use of an Executive Order to ban the sale of sexually-oriented magazines from Federal buildings and military installations. I apologize for the delay in this response to your last letter and understand, from your remarks to the President during your meeting with him ~~last~~ Thursday, your dissatisfaction with an earlier reply.

As you know, the President shares fully your concern with the problems presented by the distribution of sexually explicit material. The Administration has taken several major steps to address this issue, including creation of the Attorney General's Commission on Pornography with on-going efforts to implement its recommendations. These efforts have not gone unnoticed, as indicated by the decision by private firms to restrict the sale of certain magazines.

Your proposal to limit the sale of specific magazines on Federal property, however, raises significant constitutional questions that do not apply to private businesses. Such businesses, as the firms mentioned in your letter, are not bound by the constitutional constraints that apply to the Federal Government and therefore have much greater freedom of action. The Federal Government is bound by the First Amendment and judicial decisions applying its provisions. Those decisions impose severe limitations upon the Federal Government's ability to prohibit the sale of constitutionally protected material.

We have discussed this matter with the Department of Justice Office of Legal Counsel and have been advised that until sexually-oriented materials have been judicially declared to be obscene, there is no secure constitutional basis for an order requiring their removal from stores on government property.

We have carefully reviewed this situation in light of your renewed expression of concern, which we fully share. Nonetheless, in further analysis, it is our view that issuance of the proposed

order would not be appropriate because of the constitutional problems involved.

While I know that this response is not what you want, I hope that you appreciate the reasons for it. While the President accepts the responsibility to chart the proper moral course for our Nation, he must also act in a manner consistent with the laws he is sworn to observe even in those circumstances where his personal views may differ. I regret this response could not be more favorable.

With best wishes,

Sincerely,

William L. Ball, III
Assistant to the President

The Honorable William L. Armstrong
United States Senate
Washington, D.C. 20510

THE WHITE HOUSE

WASHINGTON

86 NOV 6 A10:10

November 5, 1986

MEMORANDUM FOR: LARRY HARLOW

FROM: KATHY RATTÉ JAFFKE

THROUGH: BETH STRAUSS

SUBJECT: Sale of Playboy, Penthouse etc. in Federal Buildings

The President has received a follow-up letter from Senator Armstrong indicating his disappointment with the response he received to his July 14 letter urging the issuance an Executive Order banning the sale of certain magazines in Federal buildings.

I would appreciate your assistance in securing a draft response appropriate for Will Ball's signature.

cc: Records Management - FYI (ID# 429654)

24112

WILLIAM L. ARMSTRONG
COLORADO

429654

United States Senate

WASHINGTON, DC 20510

October 14, 1986

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

I have rarely been more disappointed than by the response from the administration to my letter to you on July 14th. And I honestly cannot believe that the response I received reflects your own views.

I was seeking your moral leadership...leadership of the kind which you have so often and so effectively provided in the past. Specifically, I asked your consideration for an executive order banning the sale of sexually explicit publications in federal buildings and installations.

This action on your part would be particularly timely in view of the recent decision by private firms such as Eckerd Drugs and Southland Corporation to remove magazines such as Playboy, Penthouse and the like from their shelves. They have done so because of the growing realization that publications of this type are destructive of the personal, family and community values of our country...the values for which you have carried the banner with extraordinary effectiveness.

Under the circumstances, with private firms taking the lead, it seems only natural that the federal government would wish to restrict the sale of sexually explicit material. Unfortunately, however, the federal government is a very large distributor of such material in the 526 shops in federal buildings licensed under the Randolph-Sheppard Act, shops operated by employee associations, the 413 major retail stores operated by the military and thousands of smaller outlets throughout the world.

Larry Harlow's response to my letter--to the effect that it would "not be prudent for the President to issue the proposed order" is not only disappointing, it is completely and totally inconsistent with the fundamental values on which your administration rests.

Please take a personal interest in this matter, Mr. President. And please call on me if I can be of assistance in this matter.

Sincerely,

William L. Armstrong

WLA:dj

For these reasons, we have determined not to issue the Executive Order you propose. Although we are unable to respond affirmatively to your request, I appreciate your thoughtful concern with this important issue.

Sincerely,

Larry Harlow
Associate Director
for Legislative Affairs

LIAM L. ARMSTRONG
COLORADO

United States Senate

WASHINGTON, DC 20510

July 14, 1986

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

Southland Corporation and Eckerd Corporation have demonstrated moral leadership by removing Playboy, Penthouse, and similar magazines from the shelves of their retail stores. The courage of those decisions is widely recognized -- in part because both companies stand to lose a substantial sum of money -- but their importance cannot be measured in dollars.

Millions of Americans hope that the example shown by Eckerd and Southland will be emulated by other companies, large and small. I am particularly interested in having the nation's largest enterprise, the Federal government, follow their example of corporate leadership. So today I am writing to ask you to issue an executive order banning the sale of such magazines from Federal buildings and installations.

This is not a case of the Federal government unwittingly letting an occasional copy of such magazines pass through its portals. To the contrary, the Federal government may now be the largest single purveyor of Playboy, Penthouse, and other pornographic magazines.

The General Services Administration licenses 526 shops in Federal buildings under the Randolph-Sheppard Act. Other Federal buildings contain shops that are operated by employee associations. (The Hubert H. Humphrey building, for example.) The military operates 413 major retail stores and thousands of smaller retail outlets throughout the world. Many of these outlets sell sexually explicit magazines. In sum, the national government may be selling Playboy and Penthouse (and worse) in thousands of retail outlets.

Mr. President, as Commander-in-Chief and Chief Executive, you have unilateral authority to rid government stores of pornographic magazines. Most Americans, particularly most women, will welcome your action.

Removing the magazines raises certain First Amendment issues, but I do not believe pornographers have a First Amendment right to have the government sell their indecent wares.

Please let me know if I may assist you with this important effort.

Sincerely,

William L. Armstrong

WLA:lco