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THE WHITE HOUSE

WASHINGTON

September 6, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: Draft GSA Bill to Amend Section 103 of
the Presidential Recordings and Materials
Preservation Act - Nixon Papers

With respect to your query, no move of the files, even if Congress passes this bill, is imminent. The San Clemente library project still has to be approved and the facility actually constructed before the Archivist can even consider moving the files. The bill is simply designed to remove an obvious legal impediment to consideration by Congress of the San Clemente library proposal. Enactment of the bill would not itself result in any movement of the files, and so there is no need for us to withhold our approval of the bill to ensure the geographic proximity of the files for any possible review in connection with the privilege questions.

Attachment

THE WHITE HOUSE

WASHINGTON

September 2, 1983

John
MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *John*
SUBJECT: Draft GSA Bill to Amend Section 103 of
the Presidential Recordings and Materials
Preservation Act - Nixon Papers

Greg Jones of OMB has asked if we have any objection to GSA's proposal to amend the Presidential Recordings and Materials Preservation Act to eliminate the requirement that the Nixon files be maintained in the Washington area. The provision was originally enacted to prevent the feared dispersal of evidence of alleged Watergate transgressions. GSA no longer believes the restriction to be necessary, and unless it is removed, GSA cannot go forward with plans for the Nixon library at San Clemente.

OMB and Justice have no objection, although some unidentified marginalian has suggested making the first sentence consistent with the preamble of the bill, a sound suggestion. I see no relation between this bill and the pending questions concerning our possible review of the Nixon special files scheduled to be released to the public.

Attachment

how so?
→

THE WHITE HOUSE

WASHINGTON

September 2, 1983

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Attachment

THE WHITE HOUSE

WASHINGTON

September 2, 1983

MEMORANDUM FOR GREGORY JONES
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING *Orig. signed by FFF*
COUNSEL TO THE PRESIDENT

SUBJECT: Draft GSA Bill to Amend Section 103 of
the Presidential Recordings and Materials
Preservation Act - Nixon Papers

Counsel's Office has reviewed the above-referenced draft bill and finds no objection to it from a legal perspective. We agree with the marginalia suggesting that the first sentence of the letter be revised to be consistent with the preamble of the bill.

FFF:JGR:aea 9/2/83

cc: FFFielding
JGRoberts
Subj.
Chron

THE WHITE HOUSE

WASHINGTON

September 2, 1983

MEMORANDUM FOR GREGORY JONES
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Draft GSA Bill to Amend Section 103 of
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FFF:JGR:aea 9/2/83

cc: FFFielding
JGRoberts
Subj.
Chron

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) 1 / 1Name of Correspondent: Gregory Jones☐ MI Mail Report

User Codes: (A) _____ (B) _____ (C) _____

Subject: Draft GSA Bill to amend Section 103 of
the Presidential Recordings and Materials Preservation
Act - Nixon Papers

ROUTE TO:

ACTION

DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
<u>CU401</u>	ORIGINATOR	<u>83,09,02</u>			<u>1 / 1</u>
	Referral Note:				
<u>CUAT18</u>	<u>A</u>	<u>83,09,02</u>		<u>2</u>	<u>1 / 1</u>
	Referral Note:				
		<u>1 / 1</u>			<u>1 / 1</u>
	Referral Note:				
		<u>1 / 1</u>			<u>1 / 1</u>
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		<u>1 / 1</u>			<u>1 / 1</u>
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
ROUTE SLIP

TO <u>C</u> <u>Mr. Fielding</u>	Take necessary action ☐
_____	Approval or signature ☐
_____	Comment ☐
_____	Prepare reply ☐
_____	Discuss with me ☐
_____	For your information ☐
_____	See remarks below ☐
FROM <u><i>GJ</i></u> <u>Gregory Jones (x3856)</u>	DATE <u>8/30/83</u>

REMARKS

Do you have any objection to the attached GSA draft bill concerning the papers of former President Nixon?

It appears unobjectionable to OMB staff; Justice Dept. has no objection.

Thank you.



Honorable George Bush
President of the Senate
Washington, DC 20510

Dear Mr. President:

Transmitted herewith for referral to the appropriate committee is a draft bill prepared by the General Services Administration "To amend title 44, United States Code, to permit the removal of tape recordings and other materials acquired by the Government under the Presidential Recordings and Materials Preservation Act, 88 Stat. 1695 (44 U.S.C. 2107 note) from the metropolitan area of the District of Columbia."

The proposed bill would amend the Presidential Recordings and Materials Preservation Act to delete the requirement that the Presidential historical materials of Richard Nixon be maintained by the Government in the Washington, DC metropolitan area. Plans were announced in April 1983 to establish The Richard Nixon Presidential Library in San Clemente, California, under terms of the Presidential Libraries Act, 69 Stat. 695 (44 U.S.C. 2108). This site was selected by the non-profit corporation which will build the library building and donate that building and site to the government for use as a presidential archival depository. Former President Nixon concurred in the site selection. Amendment of the Presidential Recordings and Materials Preservation Act is required to permit placement of these materials in the library, which would be operated by the General Services Administration.

The legislative history of this act indicates that the intent of Congress in retaining the records in the Washington area was to insure their preservation and availability for use by the Government in the prosecution of individuals allegedly involved in crimes known collectively as "Watergate." The preservation of these materials and access to them is assured under the implementing regulations issued under the Act. The regulations will remain in force irrespective of the geographic location of the materials. Proximity to Washington, DC no longer appears to be necessary. By moving the materials to a presidential library, the Archivist of the United States will be better able to carry out his statutory responsibilities for preserving, processing and making available the documentary record of the Nixon Administration.

The Office of Management and Budget has advised that from the standpoint of the Administration's program, there is no objection to the submission of the proposed legislation to Congress.

Sincerely,

Enclosure

gcr

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consistent
w/ title
on
next
pg*

A BILL

To amend Section 103 of the Presidential Recordings and Materials Preservation Act, 88 Stat. 1695 (44 U.S.C. 2107 note), to remove the restriction that the materials be maintained in Washington, District of Columbia, or its metropolitan area.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 103 of the Presidential Recordings and Materials Preservation Act, 88 Stat. 1695, (44 U.S.C. 2107 note), is amended by deleting the final sentence, so that the new section will provide as follows:

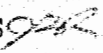
"Sec. 103. The Administrator shall issue at the earliest possible date such regulations as may be necessary to assure the protection of the tape recordings and other materials referred to in section 101 from loss or destruction, and to prevent access to such recordings and materials by unauthorized persons."

THE WHITE HOUSE

WASHINGTON

October 3, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS 

SUBJECT: DOJ Proposed Report on S. 383, a Bill
to Request the Chief Justice to Give an
Annual Address to Congress on the State
of the Judiciary

Jim Murr has asked for our views by October 26 on the above-referenced proposed report. S. 383 would amend Title 28 to request the Chief Justice to deliver an annual address to Congress on the state of the judiciary. In a display of legislative masochism, the Senate passed an identical bill in 1980.

The Justice report neither endorses nor opposes the bill, simply noting pros and cons. The report recognizes that judicial reform proposals, even noncontroversial ones, have a difficult time in Congress and that an annual address might help such proposals gain consideration. On the other hand, the report tactfully notes that if the annual address were ill-attended, the bill could have precisely the opposite effect. I have no objections.

Attachment

THE WHITE HOUSE

WASHINGTON

October 3, 1983

MEMORANDUM FOR JAMES C. MURR
ASSISTANT DIRECTOR FOR LEGISLATIVE
REFERENCE
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING *Orig. signed by FFF*
COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Proposed Report on S. 383, a Bill
to Request the Chief Justice to Give an
Annual Address to Congress on the State
of the Judiciary

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

FFF:JGR:aea 10/3/83

cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

October 3, 1983

MEMORANDUM FOR JAMES C. MURR
ASSISTANT DIRECTOR FOR LEGISLATIVE
REFERENCE
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Proposed Report on S. 383, a Bill
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Counsel's Office has reviewed the above-referenced proposed report, and finds no objection to it from a legal perspective.

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Name of Correspondent: James C. MURK

☐ MI Mail Report

User Codes: (A) (B) (C)

Subject: DOJ proposed report on S. 383, a bill to request the Chief Justice to give an annual address to Congress on the State of the Judiciary.

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CUH011	ORIGINATOR	82, 09, 30 VS			1 / 1
CUAT 18	Referral Note: A/D	83, 09, 30	VS	S	83, 10, 20
	Referral Note:	1 / 1			1 / 1
	Referral Note:	1 / 1			1 / 1
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

174115 *cl*

September 28, 1983

LEGISLATIVE REFERRAL MEMORANDUM

TO: LEGISLATIVE LIAISON OFFICER

Administrative Office of United States Courts

SUBJECT: DOJ proposed report on S. 383, a bill to request the Chief Justice to give an annual address to Congress on the state of the Judiciary

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than

COB Wednesday, October 26, 1983.

Direct your questions to Branden Blum (395-3802), the legislative attorney in this office.


James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: K. Wilson

J. Cooney

F. Fielding



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This letter is in response to your request for the views of the Department of Justice on S. 383, a bill to amend Title 28 of the United States Code to request the Chief Justice to give an annual address to Congress on the state of the judiciary. ^{1/} The Department of Justice defers to the judgment of Congress and the Judiciary concerning the desirability of enacting this proposal.

The bill would add a new section to the Judicial Code providing that the Chief Justice may address a joint session of Congress at such times as may be mutually agreed on by the Chief Justice, the Majority Leader of the Senate, and the Speaker of the House of Representatives. The Chief Justice's address would include information on the state of the judiciary and recommendations concerning needed reforms. The Chief Justice would

^{1/} The bill is the same as S. 2483 of the 96th Congress, which passed the Senate in that Congress. See generally S. Rep. No. 909, 96th Cong., 2d Sess. (1980); State of Judiciary Address: Hearing on S. 2483 Before the Subcomm. on Jurisprudence and Governmental Relations of the Senate Comm. on the Judiciary, 96th Cong., 2d Sess. (1980); State Justice Institute/Annual Message of Chief Justice: Hearing on H.R. 6709, S. 2387, S. 2483 and H.R. 6597 Before the Subcomm on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary (1980). Similar proposals had been introduced in earlier Congresses. See S. Rep. No. 909, 96th Cong., 2d Sess. 2 (1980); State of Judiciary Address: Hearing on S. 2483 Before the Subcomm. on Jurisprudence and Governmental Relations of the Senate Comm. on the Judiciary 12 (1980).

transmit a written address to Congress in any year in which he did not personally appear to deliver such an address.

Certain points may be noted in support of this proposal. Starting with Chief Justice Taft, the Chief Justices have assumed a role of national leadership in promoting judicial improvement through institutional and legislative reform. 2/ Delivery of an annual address to Congress as proposed in S. 383 would accordingly be consonant with one of the most important contemporary functions of the Chief Justice.

As a general matter, legislative measures directed to improving the administration of justice often face extraordinary delays and difficulties in securing Congressional approval. The problems such proposals encounter include a disadvantage in competing for Congress's limited time with proposals of other sorts that have greater public visibility; the absence of an organized, politically powerful constituency promoting judicial improvement; and the opposition of special interests that have learned to take advantage of the deficiencies and inefficiencies of the existing system of adjudication. 3/ An address by the Chief Justice to Congress could be helpful in drawing public and Congressional attention to the problems of the courts and in overcoming the resistance that remedial measures frequently encounter.

Certain countervailing considerations may also be noted. The Chief Justice currently prepares an annual Year-End Report on the Judiciary and delivers an Annual Report on the State of the Judiciary before the American Bar Association. The proposals advanced by the Chief Justice in these presentations and other public addresses have in some instances attracted widespread media coverage and increased Congressional interest in certain reform proposals. While an address to a joint session of Congress would have larger symbolic import than these informal measures, the Chief Justice is not currently without means of making his views known to Congress and the public.

Concerns might also be raised about the existence of on-going support in Congress for this type of arrangement. While proposals for improving the administration of justice frequently raise issues of the greatest public importance, the subject of judicial

2/ See generally P. Fish, The Politics of Federal Judicial Administration (1973); Tamm & Reardon, Warren E. Burger and the Administration of Justice, 1981 B.Y.U.L. Rev. 447.

3/ See Meador, The Federal Judiciary -- Inflation, Malfunction, and a Proposed Course of Action, 1981 B.Y.U.L. Rev. 617, 637-41.

reform is not one that engages the active interest of most members of Congress. An annual address by the Chief Justice that was poorly attended or that was frequently dispensed with in favor of a written report might prove ineffective or counterproductive in relation to the proposal's objective of drawing attention to needed reforms. 4/

Hence, we see both certain benefits and certain possible drawbacks in the proposal of S. 383. Since the bill's proposal essentially concerns the relationship of the legislative and judicial branches of government, we consider it most appropriate to defer to the judgment of Congress and the Judiciary on this matter.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Robert A. McConnell
Assistant Attorney General

4/ See State Justice Institute/Annual Message of Chief Justice: Hearing on H.R. 6709, S. 2387, S. 2483, and H.R. 6597 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary 33-34 (1980). But see id. at 34-35; State of Judiciary Address: Hearing on S. 2483 Before the Subcomm. on Jurisprudence and Governmental Relations of the Senate Comm. on the Judiciary 5-7 (1980).

THE WHITE HOUSE

WASHINGTON

October 3, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: DOJ Proposed Report on S.J. Res. 39,
a Bill which Proposes a Constitutional
Amendment to Establish a Ten-Year Term
of Office for Federal Judges

James Murr of OMB has asked for our views on the above-referenced proposed report. S.J. Res. 39 proposes a constitutional amendment to limit the term of office of federal judges to ten years, after which their names would be submitted to the Senate for reconfirmation to an additional term. The Justice Department's proposed report opposes such an amendment, noting that life tenure is critical to the independence of the judiciary and therefore to our system of separated powers. The Justice report also takes exception to the renomination process, which does not include any participation by the Executive.

The Justice report is similar to other reports it has filed in recent years and I do not propose to object to it. I would point out, however, that there is much to be said for changing life tenure to a term of years, without possibility of reappointment. The Framers adopted life tenure at a time when people simply did not live as long as they do now. A judge insulated from the normal currents of life for twenty-five or thirty years was a rarity then, but is becoming commonplace today. Setting a term of, say, fifteen years would ensure that federal judges would not lose all touch with reality through decades of ivory tower existence. It would also provide a more regular and greater degree of turnover among the judges. Both developments would, in my view, be healthy ones. Denying reappointment would eliminate any significant threat to judicial independence.

Furthermore, the Justice report is, on a theoretical level, somewhat disingenuous. The frequent citations to statements in The Federalist and in Judge Story's writings on the need for life tenure ignore the fact that those statements were predicated on a view of the judge's role that many if not most sitting federal judges would find unacceptably circumscribed. It is certainly appropriate to protect judges from popular pressure if their task is limited to discerning and applying the intent of the Framers or

legislators. To the extent the judicial role is unabashedly viewed as one in which judges do more than simply figure out what the Framers intended, the case for insulating the judges from political accountability weakens. The federal judiciary today benefits from an insulation from political pressure even as it usurps the roles of the political branches. At present, however, it probably makes more sense to seek to return the judges to their proper role than to revoke the protections defensible only if they are in that role.

THE WHITE HOUSE
WASHINGTON

October 3, 1983

MEMORANDUM FOR JAMES C. MURR
ASSISTANT DIRECTOR FOR LEGISLATIVE
REFERENCE
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING *Orig. signed by FFF*
COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Proposed Report on S.J. Res. 39,
a Bill which Proposes a Constitutional
Amendment to Establish a Ten-Year Term
of Office for Federal Judges

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

FFF:JGR:aea 10/3/83

cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

October 3, 1983

MEMORANDUM FOR JAMES C. MURR
ASSISTANT DIRECTOR FOR LEGISLATIVE
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JR

Name of Correspondent:

James C. MURK

☐ MI Mail Report

User Codes: (A) (B) (C)

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

174171 *ML*

September 28, 1983

LEGISLATIVE REFERRAL MEMORANDUM

TO: LEGISLATIVE LIAISON OFFICER

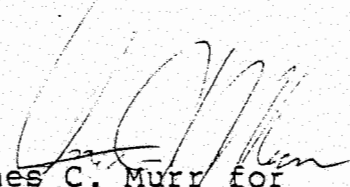
Administrative Office of the United States Courts

SUBJECT: DOJ proposed report on S.J.Res. 39, a bill which proposes a constitutional amendment to establish a ten year term of office for Federal judges

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than COB TUES., October 25, 1983
(Note: This report is similar to Justice report dated 6/18/82, on S.J.Res. 21 and S.J.Res. 24, 97th Congress)

Direct your questions to Branden Blum (395-3802), the legislative attorney in this office.


James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: K. Wilson J. Cooney M. Uhlmann F. Fielding



U. S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Strom Thurmond
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This responds to your request for the views of the Department of Justice on S.J. Res. 39, 98th Cong., 1st Sess., which would propose a constitutional amendment pursuant to which federal judges would be appointed for a term of office of ten years and hold office for that term during good behavior. The bill would provide that:

"During the tenth year of each term of office of any such judge, his nomination for an additional term of office for that judgeship shall be placed before the Senate for its advice and consent to such additional term, unless that judge requests that his nomination not be so placed. Any judge whose nomination for an additional term of office is so placed may remain in office until the Senate gives its advice and consent to, or rejects, such nomination."

While the proposal is not explicit as to the manner in which a judge's nomination is to be placed before the Senate, the implication to be drawn from the language of the resolution is that, unless the judge requests that his name not be considered, the nomination is submitted to the Senate automatically by a procedure not involving the President.^{1/}

In commenting on the proposed amendment, the Department of Justice acknowledges that Article V of the Constitution assigns to Congress the responsibility for proposing constitutional amendments to the States and that the Executive branch has no direct role in this process, in particular that joint resolutions of this variety are not subject to the veto

^{1/} Under the Constitution the President's functions are, with a few exceptions, discretionary rather than ministerial. We therefore do not interpret the proposal as intending to impose on the President a ministerial duty to renominate a judge whose term is about to expire.

power of the President, Hollingsworth v. Virginia, 3 Dallas (3 U.S.) 378 (1798). Nonetheless you have asked for the views of the Department of Justice and we set them forth in this letter.

The Department of Justice opposes the proposed amendment. The constitutional provision "that the judges, both of the supreme and inferior Courts shall hold their Offices during good Behavior" (Art. III, § 1) is one of the cornerstones of the constitutional plan for the independence of the Judicial Branch and therefore of the separation of powers, the basic structural doctrine of the Constitution. Northern Pipeline Construction Co. v. Marathon Pipeline Company, ___ U.S. ___, 102 S.Ct. 2858, 2864-66 (1982).

In The Federalist No. 78, Alexander Hamilton stated:

"The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body.^{2/} And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws."

During the last decade Congress, including your Committee, conducted extensive and searching inquiries into the crucial interrelationship between the independence of the judiciary and the provision in Article III for judicial tenure during good behavior terminable only by impeachment proceedings. The issue arose in connection with legislative proposals to provide in judicial proceedings for the removal or the involuntary retirement of judges who had allegedly violated the good behavior requirement or who had become incapacitated. Senators and Representatives of both political parties considered this proposal so serious a threat to the independence of the judiciary

^{2/} In Toth v. Quarles, 355 U.S. 11, 16 (1955), the Supreme Court stated: "The provisions of Article III [of the Constitution which include the Good Behavior Clause] were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government." See generally United States v. Will, 449 U.S. 200, 217-19 (1980); Northern Pipeline Construction Co. v. Marathon Pipeline Co., supra, ibid.

that it was ultimately abandoned and replaced by the disciplinary provisions of § 3 of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 94 Stat. 2036, 28 U.S.C. § 372(c). 3/

For example, Senator Laxalt stated his view that even 28 U.S.C. § 372(c) as ultimately enacted went too far in impinging on judicial independence. He stated:

Lifetime appointment and a slow and cumbersome system of impeachment have insured us of a Federal Judiciary which remains free and independent, and has helped to assure us that cases are decided on their merits and on the law. Where unpopular decisions are warranted by the law, as they often are, a judge may render such a decision knowing that he will be free of pressure from the public, from the press, and from the rest of the judiciary. We are assured, in short, that the case will be decided as it should be, and according to law.

The Federal Courts are the final link in our system of checks and balances. They are the last to act, and the last to change. After the legislature and the executive branches have acted, after the press has analyzed, reported and commented, and even after the public has experienced changes and additions to our system and to our laws, the courts finally rule on the legality, the constitutionality, the application, and the scope of those changes and laws. That review follows the debate on the need for and the advisability of such changes with good cause. Making that process more susceptible to political pressure will not, in my opinion, improve our system of Government.

S. Rep. No. 362, 96th Cong., 1st Sess. 29 (1979).

3/ S. Rep. No. 362, 96th Cong., 1st Sess. 4-7, 23, 29-30 (1979); H.R. Rep. No. 1313, 96th Cong. 2d Sess. 1-5, 16-19 (1980); Hearings on the Independence of Federal Judges before the Subcommittee on Separation of Powers of the Senate Committees in the Judiciary, 91st Cong. 2d Sess. 329-351 (1970); Hearings on Judicial Tenure and Discipline--1979-80, before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 96th Cong., 1st & 2d Sess. (1980).

Proposals to appoint judges for terms of years "to make their decisions conform to the will of the people"^{4/} are not new. A century and a half ago Judge Story felt it necessary to demonstrate that the appointment of judges for terms of years would not have the effect of subjecting their decisions to the "will of the people" but rather would make judges subservient to the political branches of the Government, and make the meaning of the Constitution dependent on every biennial or quadrennial election rather than on the judges' deliberate judgment. Story, Commentaries on the Constitution of the United States, Vol. II §§ 1613-1621 (Fifth Ed. 1891).^{5/}

The following passages are representative of Judge Story's discussion:

"If the judges are appointed at short intervals, either by the legislative or the executive department, they will naturally, and, indeed, almost necessarily, become mere dependents upon the appointing power. If they have any desire to obtain, or to hold office, they will at all times evince a desire to follow and obey the will of the predominant power in the state. Justice will be administered with a faltering and feeble hand It will decree what best suits the opinions of the day, and it will forget that the precepts of the law rest on eternal foundations. Sec. 1613.

. . . .

"If the will of the people is to govern in the construction of the powers of the Constitution, and that will is to be gathered at every successive election at the polls, and not from their deliberate judgment and solemn acts in ratifying the Constitution, or in amending it, what certainty can there be in those powers? If the Constitution is to be expounded, not by its written text, but by the opinions of the rulers for the time being, whose opinions are to prevail; the first or the last?

^{4/} See Story, Commentaries on the Constitution of the United States, Vol. II § 1615 (Fifth Ed. 1891).

^{5/} The first edition was published in 1833.

When, therefore, it is said that the judges ought to be subjected to the will of the people, and to conform to their interpretation of the Constitution, the practical meaning must be that they should be subjected to the control of the representatives of the people in the executive and legislative departments, and should interpret the Constitution as the latter may from time to time deem correct." Sec. 1616.

The logic of Judge Story's analysis is still valid. If judges are appointed for a definite term subject to re-appointment, it is inevitable that at least some of them will seek to avoid offending those who have the power to block their reappointment. It would, of course, be possible to guard against that danger by providing that judges would be ineligible for reappointment. In that event, however, many lawyers, although highly qualified to become judges, might be reluctant to give up their practice for a temporary judicial appointment,^{6/} and even among those who do, some may be suspected toward the end of their term of seeking to curry favor with those who may be of assistance to them in reentering private practice.

For the foregoing reasons, and without intending to foreclose further Congressional consideration of the "good behavior" issue or the entirely separate issue of "judicial restraint," the Department of Justice is in principle opposed to the abolition of tenure during good behavior for the federal judiciary as contemplated by S.J. Res. 39. Two significant specific aspects of S.J. Res. 39 which aggravate the harm connected with the abolition of such tenure require additional comment.

First, as we understand the proposal, the renomination of a judge whose term has expired would come automatically before the Senate, and if the Senate were to give its advice and consent to the additional term, the term would be automatically extended. The President would take no part in the processes of nomination and appointment; he would not have the power to refuse to renominate a judge or to deny reappointment to a judge to whose reappointment the Senate has given its advice and consent. The reappointment process thus would be under the exclusive control of the Senate. The Department of Justice strenuously objects to this aspect of the joint

^{6/} See the final argument in The Federalist No. 78 (Alexander Hamilton).

resolution, because it is in conflict with the constitutional plan embodied in Article II, § 2 of the Constitution pursuant to which the nomination and appointment of federal officers are the discretionary acts of the President, even if as regards certain officers the latter can be performed only with the advice and consent of the Senate. Marbury v. Madison, 1 Cranch (5 U.S.) 137, 155 (1803). We are not aware why this rule should not apply to the reappointment of judges. Indeed, this aspect of the joint resolution accentuates the objections to the provisions giving judges terms of years, since it makes judges dependent exclusively on the Senate for their reappointment. This alters the constitutional plan of checks and balances and tilts the scale toward one branch, the Legislative, and away from the Judiciary and the President.

Second, the joint resolution would provide that when a nomination for an additional term is placed before the Senate, the judge "may remain in office until the Senate gives its advice and consent to, or rejects, such nomination." (p.2, lines 15-16). By refusing to take any action on the renomination, the Senate, or indeed a Committee of the Senate or, under Senate practice relating to confirmations, initially one Senator,^{7/} can place the judge in a position for an indefinite period in which he or she can be ousted at any time for any decision which may displease the Senate. To have such a sword of Damocles hang over a judge is totally inconsistent with our constitutional system of three separate branches "entirely free from the control or coercive influence direct or indirect of either of the others." Humphreys Executor v. United States, 295 U.S. 602, 629 (1935). As the Court held in that case:

"For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will."

^{7/} In The changing role of the Senate Judiciary Committee on judicial selection, 62 Judicature 502, 504-05 (1979), Professor Slotnick documents the fact that, under the "Blue Slip" procedure, a single Senator of the nominee's home state may prevent the scheduling of the hearing and consequently the advice and consent of the Senate on a Presidential nominee. To the same effect, Slotnick, Reforms in judicial selection: will they affect the Senate's role? 64 Judicature 60, 62-63 (1980). This process is also described in Adams and Kavanagh-Baran, Promise and Performance: Carter Builds a New Administration 111-13 (1979). Thus, a single Senator could by utilizing present practices keep a judge's reconfirmation in suspense for an indefinite period of time.

Ibid.8/ We should not forget that one of the charges against King George III in the Declaration of Independence was:

"He has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries."

The Department of Justice therefore opposes the proposed constitutional amendment.

The Office of Management and Budget has advised that it has no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs

8/ See also Story, op. cit. § 1614:

"Does it not follow, that, to enable the judiciary to fulfil its functions, it is indispensable that the judges should not hold their offices at the mere pleasure of those whose acts they are to check, and, if need be, to declare void?"

THE WHITE HOUSE

WASHINGTON

October 5, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: DOJ Proposed Report on H.R. 1793
and H.R. 2048 "to eliminate the
exemption for Congress or for the
U.S. from the application of certain
provisions of Federal law relating to
employment, privacy, social security,
and for other purposes"

OMB has asked for our views by October 25 on the above-referenced proposed report. The bills in question would eliminate many of the exemptions Congress has written into the laws it has foisted on the private sector and the Executive branch. In particular, the bills would extend coverage of the Freedom of Information Act and the Civil Rights Act of 1964, would grant employees of the legislative branch the same collective bargaining rights accorded Executive branch employees, would make OSHA applicable to Executive and legislative branch employees, and would bring legislative branch employees within the scope of the Social Security Act.

The proposed Justice Department report notes no objection to the legislation, although it does indicate that Speech and Debate Clause questions of uncertain resolution may be raised. The bulk of the Justice report argues that the bills should specify that the proper party defendant in any suit under the extended acts should be the United States, as opposed to any individual congressman, and that the Justice Department should be designated as counsel in all cases arising under the proposed legislation. The latter proviso raises interesting questions, particularly under an extended FOIA. It is, for example, easy to imagine an FOIA suit against a congressman in which the congressman would not necessarily wish to share the documents in question with attorneys from the Executive branch charged with defending the suit. As a general rule, however, if the suits are going to be styled as against the United States, the Justice Department should appear on behalf of the defendant.

THE WHITE HOUSE

WASHINGTON

October 5, 1983

MEMORANDUM FOR JAMES C. MURR
ASSISTANT DIRECTOR FOR LEGISLATIVE
REFERENCE
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING *Orig. signed by FFF*
COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Proposed Report on H.R. 1793
and H.R. 2048 "to eliminate the
exemption for Congress or for the
U.S. from the application of certain
provisions of Federal law relating to
employment, privacy, social security,
and for other purposes"

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

FFF:JGR:aea 10/5/83

cc: FFFielding
JGRoberts
Subj
Chron

THE WHITE HOUSE

WASHINGTON

October 5, 1983

MEMORANDUM FOR JAMES C. MURR
ASSISTANT DIRECTOR FOR LEGISLATIVE
REFERENCE
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Proposed Report on H.R. 1793
and H.R. 2048 "to eliminate the
exemption for Congress or for the
U.S. from the application of certain
provisions of Federal law relating to
employment, privacy, social security,
and for other purposes"

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

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

- ☐ O - OUTGOING
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Name of Correspondent: James C. Murr

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Subject: DOJ proposed report on H. R. 1793 and HR 2048
"to eliminate the exemption for Congress or for the U.S. from the
application of certain provisions of Federal law relating to
employment, privacy, social security, and for other purposes"

ROUTE TO:

ACTION

DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
<u>CULLOII</u>	ORIGINATOR	<u>83.09.30</u>	<u>WS</u>		<u>1</u>
<u>CUAT 18</u>	Referral Note:	<u>83.09.30</u>	<u>WS</u>	<u>S</u>	<u>83.10.20</u>
	Referral Note:	<u>1/1</u>			<u>1/1</u>
	Referral Note:	<u>1/1</u>			<u>1/1</u>
	Referral Note:	<u>1/1</u>			<u>1/1</u>

ACTION CODES:

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to be used as Enclosure

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

174170 Cc

September 28, 1983

LEGISLATIVE REFERRAL MEMORANDUM

TO: LEGISLATIVE LIAISON OFFICER

Office of Personnel Management
Department of Health and Human Services
Department of Labor
Department of the Treasury

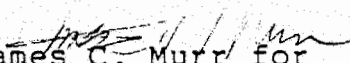
SUBJECT: DOJ proposed report on H.R. 1793 and H.R. 2048, bills "to eliminate the exemption for Congress or for the U.S. from the application of certain provisions of Federal law relating to employment, privacy, social security, and for other purposes."

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than

COB TUESDAY, OCTOBER 25, 1983.

Direct your questions to Branden Blum (395-3802), the legislative attorney in this office.


James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: C. Wirtz R. Veeder P. Woodworth F. Fielding H. Schreiber
K. Wilson B. Rideout M. Uhlmann



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Jack Brooks
Chairman
Committee on Government Operations
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on H.R. 1793 and H.R. 2048, Bills "to eliminate the exemption for Congress or for the United States from the application of certain provisions of Federal law relating to employment, privacy, and social security, and for other purposes." Subject to the comments set forth below, the Department of Justice has no objection to enactment of this legislation.

The proposed legislation would extend the coverage of the Civil Rights Act of 1964 to "all units of the legislative branch of the Federal Government," similarly extend coverage of the Equal Pay Act, and amend the Freedom of Information Act so that Congress will be subject to the disclosure requirement of that statute. The Bills would also give employees of the legislative branch the same statutory rights to organize and bargain collectively that the Civil Service Reform Act of 1978 gives executive branch employees, would make the provisions of the Occupational Safety and Health Act applicable to executive and legislative branch employees and, finally, would seek to bring legislative branch employees within the coverage of the Social Security Act.

In our view it would be virtually impossible to predict with any degree of accuracy the number of lawsuits that would be brought under the various provisions of the Bill. We also note that the legislation, specifically the application to Congress of the provisions of Title VII of the Civil Rights Act of 1964 regarding employment practices, raise constitutional questions under the Speech or Debate Clause. In this regard, the constitutional questions have not been resolved by the Supreme Court but the cases indicate that the collective action of Congress in enacting the bill might be sufficient to alleviate the constitutional problems identified. Thus, the Speech or Debate Clause issues must be regarded as open ones.

While, as stated above, we have no objection to the intent of the proposed legislation to extend various statutory safeguards to employees in the legislative branch of the government, we do have a number of comments to make concerning implementation of the Bills.

First, the Justice Department believes that the Bills should answer two questions: (i) who will be the proper party defendant in a suit by an employee of the legislative branch under one of the statutes referred to in the Bills and (ii) who will provide legal representation in such cases. The Department believes that these two matters should be resolved before the Bills are submitted for final approval.

As they are presently drafted, the Bills could be interpreted to create a cause of action against individual congressmen or employees of the House or Senate in their individual capacity. For example, a non-competitive employee in a Congressman's office alleging a violation of the Civil Rights Act of 1964 may sue the individual Congressman; a cafeteria worker alleging a violation of the Civil Rights Act of 1964 may sue the Chairman of the House Administration Committee for whom he or she works; and a legislative branch employee alleging a violation of the Occupational Safety and Health Act may sue the Architect of the Capitol. We would suggest that, to avoid this possibility, the Bills be modified to designate the United States as the proper and exclusive defendant in any action arising out of an alleged violation of the various statutes the coverage of which are extended under the Bills. Such an amendment, specifying the exclusivity of the remedy against the United States, could also rectify judicial interpretations permitting suits against executive branch employees in their individual capacity to be brought under one or more of such statutes.

On the issue of legal representation, we recommend that the Department of Justice be designated as counsel in all cases arising under the Bills. While representation by private counsel or by an office of legal counsel that the respective Houses might establish may be lawful, the Department has developed considerable expertise in handling litigation under the various statutes that the Bills would amend. In addition, it would be more efficient to employ the already existing litigation resources of the federal government than to utilize the other two alternatives. Finally, retention of private counsel or use of "house counsel" might be inappropriate because

litigation under the Bills could result in money judgments against the federal treasury and because important issues with implications for the entire federal government undoubtedly will be involved. If the federal government is to take consistent positions on these issues, the Department of Justice can most effectively accomplish that since it already handles comparable litigation matters for the executive branch.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ROBERT A. McCONNELL
Assistant Attorney General

THE WHITE HOUSE

WASHINGTON

October 11, 1983

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: Department of Justice Draft Bill to
Facilitate Improved Federal, State
and Local Cooperation in Drug Enforcement

OMB has asked for our views by November 2 on the above-referenced draft bill submitted by the Department of Justice. Assistant Attorney General McConnell provided us with a copy of the bill when he submitted it to OMB, and I reviewed it in a memorandum for Mr. Fielding dated October 7 (copy attached). I also submitted a draft memorandum for Mr. Fielding's signature noting no objection, which has been signed. That memorandum is responsive to OMB's request for our views. In short, we are ahead of the game on this one, and no further action is necessary.

Attachment

THE WHITE HOUSE
WASHINGTON

October 7, 1983

MEMORANDUM FOR DAVID A. STOCKMAN
DIRECTOR, OFFICE OF MANAGEMENT
AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

/s/

SUBJECT: Proposed DOJ Bill on Intergovernmental
Drug Task Forces

Counsel's Office has reviewed the above-referenced proposed bill submitted by the Department of Justice, and has no objection to it from a legal perspective.

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

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☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD)

1 1

Name of Correspondent: James C. MURR

☐ MI Mail Report

User Codes: (A) (B) (C)

Subject: Department of Justice draft bill to facilitate improved Federal, State and local cooperation in drug enforcement

ROUTE TO:

ACTION

DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUHOLL	ORIGINATOR	83110107			1 1
	Referral Note:				
CUOT 18	D	83110107		S	83110117
	Referral Note:				
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	Referral Note:				

ACTION CODES:

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

October 6, 1983

178346

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer

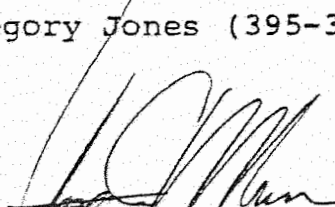
Department of the Treasury
Department of Transportation
Office of Personnel Management

SUBJECT: Department of Justice draft bill to facilitate improved Federal, State and local cooperation in drug enforcement.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than
Wednesday, November 2, 1983

Questions should be referred to Gregory Jones (395-3856), the legislative analyst in this office.


James C. Murr for
Assistant Director for
Legislative Reference

Enclosures

cc: Fred Fielding
Richard Williams

Karen Wilson
Hilda Schreiber

Roger Greene



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Thomas P. O'Neill, Jr.
Speaker
House of Representatives
Washington, D. C. 20515

Dear Mr. Speaker:

Enclosed for your consideration and appropriate reference is a legislative proposal "to facilitate improved Federal, State and local cooperation in drug enforcement."

The first section of the proposed bill would authorize the Attorney General to designate selected state and local law enforcement officers as Federal law enforcement officers for the purpose of enforcing Federal drug laws. This would enable the Drug Enforcement Administration (DEA) to maintain and enhance its cooperative effort with state and local law enforcement authorities to combat drug trafficking.

The drug trafficking problem is pervasive and, by its very nature, interjurisdictional. The Controlled Substances Act, 21 U.S.C. § 873, mandates a coordinated approach at all levels of Government to combat effectively drug flow and abuse. For this reason, DEA has entered into cooperative arrangements with state and local law enforcement authorities, under which non-Federal law enforcement officers work with DEA Agents in long-term task forces, joint investigations and special enforcement operations (major conspiracy investigations directed at specific trafficking organizations). The future of these cooperative efforts, however, would be enhanced if participating state and local law enforcement agencies can be assured of adequate civil and criminal liability protections for their officers while working with DEA.

The great majority of state and local officers have been under the impression that they are protected by an implied grant of Federal enforcement authority while working under DEA supervision. In fact, any state or local law enforcement officer who travels beyond his authorized jurisdiction while assisting DEA faces potentially substantial criminal and civil liability. Analysis of the law reveals the following conclusions.

First, a state or local law enforcement officer is not a Federal employee for purposes of the Federal Tort Claims Act and, therefore, the United States can neither assume liability nor be held liable for his actions. 28 U.S.C. § 1346(b). Moreover, a state or local officer is not a Federal law enforcement officer as defined by 28 U.S.C. § 2680(h) and the United States could not be liable for his intentional torts. Second, when operating beyond the geographic jurisdiction of their parent departments, state and local police officers, in most instances, have no greater law enforcement authority than private citizens. Finally, the possibility for personal civil liability of the state or local officer exceeds that of his DEA counterpart because the United States can only pay a judgment entered jointly against the United States and a Federal employee. Similarly, the potential for criminal liability is greater because the state or local officer could not defend on grounds of Federal law enforcement authority.

The assignment of a police officer to a task force does not vest that officer with any Federal law enforcement authority. Unless deputized as a Federal officer, a task force officer possesses only that authority conferred by state or local law upon any member of his parent organization. Consequently, where the enforcement responsibility of a task force is not coextensive with that of the officer's jurisdiction, the officer may be called upon to exceed his lawful authority when fulfilling his task force responsibilities.

Except for very limited circumstances, any police officer who operates beyond the jurisdiction of his parent agency has no greater authority than that of a private citizen and his authority to carry weapons, make arrests, execute warrants, and to conduct investigations is similarly limited. When operating beyond his jurisdiction, his potential civil and criminal liability are significantly increased, as the various "good faith" defenses available to law enforcement officers often cannot be pleaded successfully by private citizens. Nevertheless, task force investigations often cross jurisdictional lines.

In short, state and local law enforcement officers cooperating with DEA Agents in law enforcement activities outside their parent jurisdictions do so at their own peril. DEA expects that the cooperative arrangements developed over the past several years could be lost in many areas and severely impaired in others unless this disparate liability is corrected.

After a careful review of the liability problem, this Department has concluded that the most feasible solution would be to amend existing law, 21 U.S.C. § 878, to authorize the Attorney General to confer the Federal enforcement powers of DEA officers upon selected state and local law enforcement officers. Implementation of this authority will be strictly controlled through detailed procedures designed to guarantee full accountability

for all actions of any federally designated state or local officer. In addition, the proposal incorporates by reference Section 3374(c) of Title 5, U.S.C., to insure that important restrictions and controls in the Intergovernmental Personnel Act of 1970, as amended, are applicable to such state or local officers. 1/

Section 2 of the proposed bill will facilitate the continued funding of the nine-year DEA task force program. For many years, the Drug Enforcement Administration has entered into contractual agreements with various state and local law enforcement agencies for the establishment of joint task forces to enforce the Controlled Substances Act of 1970. These agreements have been based upon the general authority to enter into cooperative arrangements in 21 U.S.C. § 873 and more specific authorizations contained in DEA appropriations measures. Congress and OMB have consistently sought specific program legislation support appropriation authority. This "housekeeping legislation" is designed to provide such specific legislative authority.

In order to maintain the effectiveness of the DEA/state and local cooperation program, I respectfully urge that this proposal receive prompt consideration.

The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the submission of this legislation to the Congress.

Sincerely,

Robert A. McConnell
Assistant Attorney General

Enclosure

1/ Specifically, the federally designated officers would be deemed DEA employees for purposes of a variety of Federal statutes pertaining to employment limitations, political activities, foreign gifts and decorations, misconduct, bribery and graft, embezzlement and theft, disclosure of confidential information, lobbying with appropriated moneys; purchase, use, maintenance or repair of passenger motor vehicles and aircraft; the Federal Tort Claims Act, and other Federal tort liability statutes. Federally designated officers would also be subject to executive orders and regulations applicable to § 3374(c) matters. Moreover, the statute indicates that supervision of the duties of such officers could be governed by agreement between DEA and the state or local government concerned. Finally, a detail of a state or local officer to DEA could be made with or without reimbursement by DEA.

A BILL

To facilitate improved Federal, state and local cooperation in drug enforcement.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that section 508 of the Controlled Substances Act (21 U.S.C. 878) is amended to read as follows:

"§ 878. Powers of enforcement personnel

(a) Any officer or employee of the Drug Enforcement Administration or any state or local law enforcement officer designated by the Attorney General may --

(1) carry firearms;

(2) execute and serve search warrants, arrest warrants, administrative inspection warrants, subpoenas, and summonses issued under the authority of the United States;

(3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony;

(4) make seizures of property pursuant to the provisions of this subchapter; and

(5) perform such other law enforcement duties as the Attorney General may designate.

(b) State and local law enforcement officers performing functions under this section shall be deemed Federal employees

only for the purposes set forth in section 3374(c) of Title 5, United States Code."

Sec. 2.

Section 503(a) of the Controlled Substances Act (21 U.S.C. 873(a)) is amended by adding the following new paragraph (6):

"(6) notwithstanding any other provision of law, enter into contractual agreements with state and local law enforcement agencies to provide for cooperative enforcement and regulatory activities under this Title.".

THE WHITE HOUSE

WASHINGTON

December 22, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: Proposed DOJ Report on S.J. Res. 162,
a Bill to Limit the Number of Terms
Members of Congress May Serve

OMB has asked for our views on the above-referenced proposed report. S.J. Res. 162 would amend the Constitution to limit Senators to two terms and Representatives to six, with prospective application only. Justice's brief proposed report makes no recommendation on the policy questions, noting only that the provision limiting the amendment to prospective application is confusing and needs to be clarified. This "hands off" approach is doubtless wise, and I have no objection to the proposed report.

Attachment

THE WHITE HOUSE

WASHINGTON

December 22, 1983

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ANALYST
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Proposed DOJ Report on S.J. Res. 162,
a Bill to Limit the Number of Terms
Members of Congress May Serve

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

FFF:JGR:aea 12/22/83
cc: FFFielding/JGRoberts/Subj/Chron

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

FB031

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) 1/1

Name of Correspondent:

Branden Bunn

☐ MI Mail Report

User Codes: (A) _____

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Subject:

Proposed DOJ report on S.J. Res. 162,
a bill to limit the number of terms Members
of Congress may serve

ROUTE TO:

ACTION

DISPOSITION

Office/Agency	Staff Name	Action Code	Tracking Date YY/MM/DD	Type of Response	Completion Date YY/MM/DD
CW2011		ORIGINATOR	831215		1/1
CW2778		Referral Note:	831215	S	01/04
		Referral Note:			1/1
		Referral Note:			1/1
		Referral Note:			1/1
		Referral Note:			1/1
		Referral Note:			1/1

ACTION CODES:

A - Appropriate Action

C - Comment/Recommendation

D - Draft Response

F - Furnish Fact Sheet

E - 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

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Type of Response = Initials of Signer

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

192492 *ad*

ROUTE SLIP

TO <i>✓</i> F. Fielding	Take necessary action	☐
M. Uhlmann	Approval or signature	☐
K. Wilson	Comment	☐
J. Cooney	Prepare reply	☐
	Discuss with me	☐
	For your information	☐
	See remarks below	☐
FROM <i>BB</i> Branden Blum (x3802)	DATE	12/13/83

REMARKS

Proposed DOJ report on S.J. Res. 162,
a bill to limit the number of terms
Members of Congress may serve

Justice has indicated that some action may be taken on this resolution during the upcoming session. Please review the attached draft report and provide me w/ any comments by Wednesday, January 4, 1984.

12/13/83



Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Strom Thurmond
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This responds to your request for the views of the Department of Justice on S.J. Res. 162, 98th Congress, 1st Session, which would limit the number of terms which Members of the Senate and of the House of Representatives may serve.

Apart from the clarification of section 3, the proposed amendment involves only policy considerations as to which the Department of Justice makes no recommendation.

Section 1 of the proposed amendment would provide that the term of the Members of the Senate shall be six years and that no person shall be eligible to be elected to the Senate more than twice.

Section 2 would provide that the term of office of a Member of the House of Representatives shall be two years and that no person shall be elected to the House of Representatives more than six times.

Section 3 would provide that the limitations or elections provided for in sections 1 and 2 shall apply to elections of such Members of the House and the Senate occurring after the date on which the proposed amendment is ratified.

Section 4 would provide in effect that the proposed amendment would lapse unless ratified within seven years after its submission to the States.

In commenting on this proposed amendment, the Department of Justice fully realizes that Article V of the Constitution assigns to Congress the responsibility for proposing constitutional amendments to the States and that the Executive branch has no direct role in this process, in particular that the proposal is not subject to the veto power of the President, Hollingsworth v. Virginia, 3 Dallas (3 U.S.) 378 (1798).

The length of the terms of the Members of the Senate and the House of Representatives appears to be an area in which the Executive branch should pay especial deference to the experience and judgment of Congress. Our comments, therefore, will be addressed only to section 3 which provides in effect that the provisions of §§ 1 and 2 shall apply only to the election of Members occurring after the effective date of the amendment. It is not apparent whether this section is intended only to mean that the limitation on the number of terms which a Member may serve shall not apply to Members who have been elected prior to the effective date of the amendment, in particular that the amendment would not be applicable if it became effective between the election of a Member in November, and the beginning of his term of office on January 3 of the following year. On the other hand, the amendment could also be interpreted to mean that terms to which a Member had been elected prior to the effective date of the amendment are not to be counted in order to determine his eligibility under the amendment. In our view, either result would be permissible, but the proposal should be specific in indicating which solution is intended.

As stated above, apart from the clarification of the meaning of section 3, the adoption of this Joint Resolution involves policy only considerations as to which the Department of Justice makes no recommendations.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs