MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 14, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Enrolled Bill H.R. 3132 -- Energy and Water Development Appropriation Bill, 1984

Richard Darman has asked for comments by noon today on the above-referenced enrolled bill, which provides appropriations of $14.2 billion for water development programs in several different agencies. The bill adds $449 million to the President's request in the domestic area and deletes $278 million from his request in the defense area. OMB nonetheless recommends approval, and of course our office is in no position to evaluate that recommendation. The bill contains the typical collection of pet projects specifically funded and restraints on expenditures of funds. Section 504 provides that no funds shall be used to implement a regulation "disapproved pursuant to a resolution of disapproval duly adopted in accordance with the applicable law of the United States." Since the "law of the United States" now includes the Chadha decision, I do not think this provision presents any difficulties. I see no legal objections.

Attachment

THE WHITE HOUSE

WASHINGTON

July 14, 1983

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING FFF/RAH
COUNSEL TO THE PRESIDENT

SUBJECT: Enrolled Bill H.R. 3132 -- Energy and Water Development Appropriation Bill, 1984

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

FFF:JGR:aw 7/14/83

cc: FFFielding
JGRoberts
Subj.
Chron

THE WHITE HOUSE

WASHINGTON

July 14, 1983

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Enrolled Bill H.R. 3132 -- Energy and Water Development Appropriation Bill, 1984

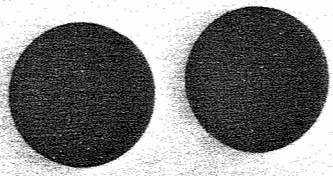
Counsel's Office has reviewed the above-referenced enrolled bill and finds no objection to it from a legal perspective.

FFF:JGR:aw 7/14/83

cc: FFFielding
JGRoberts
Subj.
Chron

ID # _____ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET



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

Name of Correspondent: Richard G. Darman

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

Subject: Enrolled. Bill H.R. 3132 -- Energy and Water Development Appropriations Bill, FY84

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CU4011	ORIGINATOR	83,07,14			1 1
	Referral Note:				
CUAT18	D	83,07,14		S	83,07,14 NOON
	Referral Note:				
		1 1			1 1
	Referral Note:				
		1 1			1 1
	Referral Note:				
		1 1			1 1
	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

Document No. 146549SS

WHITE HOUSE STAFFING MEMORANDUM

DATE: July 13, 1983 ACTION/CONCURRENCE/COMMENT DUE BY: NOON TOMORROW July 14, 1983

SUBJECT: Enrolled Bill H.R. 3132--Energy and Water Development Appropriation Bill, 1984

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	HARPER	☑	☐
MEESE	☐	☑	HERRINGTON	☐	☐
BAKER	☐	☑	JENKINS	☐	☐
DEAVER	☐	☑	McMANUS	☐	☐
STOCKMAN	☐	☐	MURPHY	☐	☐
CLARK	☐	☐	ROGERS	☐	☐
DARMAN	☐P	☑S	ROLLINS	☐	☐
DUBERSTEIN	☑	☐	VERSTANDIG	☑	☐
FELDSTEIN	☐	☐	WHITTLESEY	☑	☐
FIELDING	☑	☐	BRADY/SPEAKES	☐	☐
FULLER	☑	☐	_____	☐	☐
GERGEN	☑	☐	_____	☐	☐

REMARKS:

Please forward comments on this enrolled bill to my office by Noon tomorrow.

Thank you.

RESPONSE:

Richard G. Darman
Assistant to the President

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

JUL 13 1983

MEMORANDUM FOR THE PRESIDENT

SUBJECT: Enrolled Bill H.R. 3132 -- Energy and Water Development Appropriation Bill, 1984

Sponsor: Rep. Whitten (D), Mississippi

Last Day For Action

July 16, 1983

Purpose

Provides budget authority totaling $14,274 million for energy and water development programs in the Department of Energy, Department of Defense-Civil, Department of the Interior, and several independent agencies.

Agency Recommendations

Office of Management and Budget	Approval
Department of Energy	Approval (informally)
Department of Defense - Civil	Approval (informally)
Department of the Interior	Approval (informally)

Summary of Congressional Action

	Budget Authority (in millions of dollars)		
	Administration Request	Enrolled Bill	Congressional Change
Annually funded discretionary programs:			
Domestic.....	7,276	7,726	+449
Atomic energy defense activities.....	6,826	6,548	-278
Total, annually funded discretionary programs.....	14,102	14,274	+171

Detail may not add to total due to rounding.

Highlights

The enrolled bill exceeds the Administration's request for domestic programs (excluding the Clinch River breeder reactor) by $449 million, which raises questions about its acceptability. A hard line on the bill would be difficult to sustain, however, because:

-- the amount provided for these programs is significantly less ($248 million) than the FY 1983 enacted amount, even when the Jobs Bill add-ons in 1983 are excluded; and

-- the bill contains substantial reductions from your FY 1984 request for atomic energy defense ($278 million) and the Clinch River breeder reactor ($270 million), which the Congress will maintain is a reordering of priorities that produces an overall reduction for the bill.

While the enrolled bill provides $278 million less for Atomic energy defense activities than you requested for FY 1984, the funds provided represent a 15% increase (+$848 million) over the 1983 level of spending. This addition ensures that essential nuclear weapons research, development, and production requirements will be met.

Congressional action on the Clinch River Breeder Reactor, normally funded under this bill, has been deferred pending the development of an alternative financing arrangement.

The following table shows -- by major agency and program -- the effect of congressional action on this bill in relation to your request and the 1983 level of spending.

	Budget Authority (in millions of dollars)				
		1984		Congressional Change From	
	1983 enacted 1/	Admin. request	Enrolled bill	1983 enacted	1984 Request
Corps of Engineers.....	2,968	2,501	2,641	-327	+140
Bureau of Reclamation..	785	961	962	+176	*
Energy Programs.....	2,851	2,818	2,993	+142	+175
Power Marketing Administrations.....	179	245	255	+77	+10
Departmental Administration, DOE...	379	142	181	-198	+40
Appalachian Regional Development Programs..	165	80	145	-20	+65

Tennessee Valley Authority.....	176	61	78	-98	+17
All other.....	470	468	471	+1	+3
Domestic Total.....	7,974	7,276	7,726	-248	+449
Atomic Energy Defense Activities.....	5,700	6,826	6,548	+848	-278
Total.....	13,674	14,102	14,274	+600	+171

Detail may not add to total due to rounding.
* $500,000 or less.
1/ Excludes appropriations of $545 million provided in the Jobs Bill (P.L. 98-8) as follows: Corps of Engineers, $389 million; Bureau of Reclamation, $116 million; and TVA, $40 million.

The Credit Budget

	(in millions of dollars) Administration Request	Enrolled Bill	Congressional Change
Credit Limitations:			
Direct loans.....	80	92	+12
Guaranteed loans...	20	20	---

The $12 million overage occurs in the Department of the Interior, Bureau of Reclamation, Loan program.

Discussion

Corps of Engineers (+$140 million)

The majority of construction projects requested by the Administration are included in the enrolled bill and all of the proposed operations and maintenance projects are funded. The $140 million increase is $51 million below the House-passed total for the Corps.

However, the bill has two major problems. First, it deleted funds for new water project starts under the Administration's new cost sharing formula. Approval of these starts would have indicated Congressional approval for the efforts of the Administration to secure needed water projects under new cost sharing and financing arrangements which had been agreed to by 13 local project sponsors. If new Federal water projects are to move forward, new ways must be found to cost share and finance these projects at the non-Federal level. Second, the Congress added a number of studies and project

resumptions that have not demonstrated any showing of feasibiity and were not requested in your 1984 budget. With the current budget constraints, Federal money should not be wasted on these nonproductive projects.

Domestic Energy Programs (+$225 million)

Department of Energy domestic activities funded in this bill include Energy programs, Power Marketing Administrations, and Departmental Administration, for a total of $3,430 million. The largest proportionate increases are in solar (+$92 million) and other renewables (+$34 million). Still, the funding level for solar and other renewables remains below the FY 83 level, reflecting the continued phase-down of this effort.

Appalachian regional development programs (+$65 million)

The Administration requested $80 million for close-out costs of the Appalachian development highway system. The enrolled bill contains $100 million to continue funding for the highway system and an unrequested $45 million for other programs.

Atomic energy defense activities (-$278 million)

As the Administration requested before the conference, the conferees moved toward the higher House level of funding for Atomic energy defense activities, adding $47 million to the Senate allocation. The most significant reductions affect weapons production (-$233 million) and nuclear materials production (-$69 million). The enrolled bill increases funding for defense and by-product management (+$13 million).

Recommendation

While the spending priorities between defense and domestic programs in the enrolled bill presented to you differ slightly from your 1984 budget request for energy and water development programs, the overall balance is reasonable and in conformance with Administration program objectives. Moreover, relative to 1983 spending, domestic programs have been reduced moderately and defense spending increased substantially. This shift reflects congressional recognition of Administration priorities.

I recommend that you sign the enrolled bill.

David A. Stockman

David A. Stockman
Director

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release July 15, 1983

The President has signed the following legislation:

H.R. 3132 which provides budget authority totaling $14,274 million for energy and water development programs in the Department of Energy, Department of Defense-Civil, Department of the Interior, and several independent agencies; and,

H.R. 3135 which provides budget authority of $1,516.3 million and outlays of $1,531.2 million for activities of the Congress and other Legislative Branch activities.

###

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 28, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Enrolled Bill H.R. 2637 -- Increase in Authorization for Federal Payment to the District of Columbia

Richard Darman has requested our views on the above-referenced enrolled bill by close of business August 1, 1983. The bill, which passed both houses by voice vote, would increase the annual federal payment to the District from its current level of $361 million to $386 million. OMB recommends approval and, not surprisingly, so does the D.C. Government.

I have reviewed the bill and the memorandum for the President prepared by Naomi Sweeney, Acting Assistant Director of OMB for Legislative Reference. While our office obviously is in no position to assess the budgetary policy underlying the bill, I see no legal objections.

Attachment

THE WHITE HOUSE

WASHINGTON

July 28, 1983

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

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

SUBJECT: Enrolled Bill H.R. 2637 -- Increase in Authorization for Federal Payment to the District of Columbia

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

FFF:JGR:aw 7/28/83

cc: FFFielding
JGRoberts
Subj.
Chron

THE WHITE HOUSE

WASHINGTON

July 28, 1983

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Enrolled Bill H.R. 2637 -- Increase in Authorization for Federal Payment to the District of Columbia

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

FFF:JGR:aw 7/28/83

cc: FFFielding
JGRoberts
Subj.
Chron

ID # 146743 CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Richard G. Darman

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

Subject: Enrolled Bill H.R. 2637 - Supplemental Appropriation for Federal Payment to the District of Columbia

ROUTE TO: Office/Agency (Staff Name)	ACTION Action Code	Tracking Date YY/MM/DD	DISPOSITION Type of Response	Code	Completion Date YY/MM/DD
CW Holland	ORIGINATOR	83/07/27			/ /
	Referral Note:				
CWAT 18	D	83/07/27		S	83/08/01
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	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

Document No. 146743SS

WHITE HOUSE STAFFING MEMORANDUM

DATE: July 27 ACTION/CONCURRENCE/COMMENT DUE BY: c.o.b. MONDAY, AUGUST 1

SUBJECT: Enrolled Bill H.R. 2637 - Increase in Authorization for Federal Payment to the District of Columbia

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	HARPER	☑	☐
MEESE	☐	☑	HERRINGTON	☐	☐
BAKER	☐	☑	JENKINS	☐	☐
DEAVER	☐	☐	McMANUS	☐	☐
STOCKMAN	☐	☐	MURPHY	☐	☐
CLARK	☐	☐	ROGERS	☐	☐
DARMAN	☐P	☑SS	ROLLINS	☐	☐
DUBERSTEIN	☑	☐	VERSTANDIG	☑	☐
FELDSTEIN	☐	☐	WHITTLESEY	☐	☐
FIELDING	☑	☐	BRADY/SPEAKES	☐	☑
FULLER	☑	☐	_____	☐	☐
GERGEN	☑	☐	_____	☐	☐

REMARKS:

Please provide comments/recommendations by c.o.b. Monday, August 1.

Thank you.

RESPONSE:

Richard G. Darman

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

JUL 27 1983

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 2637 - Increase in Authorization for Federal Payment to the District of Columbia
Sponsor - Delegate Fauntroy (D) District of Columbia

Last Day for Action

August 6, 1983 - Saturday

Purpose

Increases the amount authorized to be appropriated for the annual Federal payment to the District of Columbia.

Agency Recommendations

Office of Management and Budget	Approval
District of Columbia Government	Approval

Discussion

Under the District of Columbia Home Rule Act of 1973, appropriations are authorized for a Federal payment to the District of Columbia. The annual Federal payment to the District provides the District with compensation for the unique costs and revenue losses that the District incurs in its role as the Nation's capital (e.g., foregone tax revenues caused by the massive Federal presence in the city). Under existing law, $361 million is authorized to be appropriated annually for the Federal payment to the District.

As requested in the 1984 budget, the enrolled bill authorizes appropriations of $386 million for the Federal payment for 1984 and succeeding years. This increase, from $361 million to

$386 million, in the Federal payment is necessary to enable the District to keep pace with steadily growing revenue losses and other costs related to the Federal presence.

* * * * *

H.R. 2637 passed both Houses by voice vote.

Naomi R. Sweeney

Acting Assistant Director for
Legislative Reference

Enclosures

H. R. 2637

Ninety-eighth Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Monday, the third day of January, one thousand nine hundred and eighty-three

An Act

To amend the District of Columbia Self-Government and Governmental Reorganization Act to increase the amount authorized to be appropriated as the annual Federal payment to the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 502 of the District of Columbia Self-Government and Governmental Reorganization Act (D.C. Code, sec. 47–3406) is amended by striking out "and for the fiscal year ending September 30, 1983, and for each fiscal year ending after September 30, 1983, the sum of $361,000,000" in the first sentence and inserting in lieu thereof "for the fiscal year ending September 30, 1983, the sum of $361,000,000; and for the fiscal year ending September 30, 1984, and for each fiscal year ending after September 30, 1984, the sum of $386,000,000".

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release August 3, 1983

The President has signed the following legislation:

H.R. 2637 which increases the amount authorized to be appropriated for the annual Federal payment to the District of Columbia; and

S. 419 which allows per capita payments to Indians, out of tribal trust revenue, to be made by either the Secretary of the Interior or tribal governments.

###

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release August 3, 1983

The President has signed the following legislation:

H.R. 2637 which increases the amount authorized to be appropriated for the annual Federal payment to the District of Columbia; and

S. 419 which allows per capita payments to Indians, out of tribal trust revenue, to be made by either the Secretary of the Interior or tribal governments.

###

THE WHITE HOUSE

Office of the Press Secretary
(Tampa, Florida)

For Immediate Release August 12, 1983

STATEMENT BY THE PRESIDENT

I have today signed H.R. 1646 which will prevent drastic railroad pension reductions that would otherwise have been necessary to save the system from insolvency. According to the Railroad Retirement Board's actuary, this bill will assure the solvency of the railroad pension system at least until the end of the decade.

In signing this bill, I wish to note that Section 416 of the bill requires the Board concurrently to submit to the Congress any "budgetary estimate, budget request, supplemental recommendations, prepared testimony for Congressional hearings, or comment on legislation" whenever it transmits such information to the President or the Office of Management and Budget. The section also specifically prohibits any agency of the United States from requiring the Board to submit this material to any officer or agency of the United States for approval or review prior to transmission to the Congress. The Attorney General has advised me that such concurrent reporting provisions raise serious issues with respect to the separation of powers under the United States Constitution. Such a provision would be an impermissible violation of the constitutionally required separation of powers if applied to a purely Executive agency. However, because it applies to the Railroad Retirement Board, which is an "independent agency" with quasi-judicial functions, the constitutional issues are less formidable.

# # #

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 15, 1983

FOR: FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Enrolled Bill H.R. 3232 -- Moving Expenses for Department of Justice Agents

Richard Darman has requested comments by 10:00 a.m. August 16 on the above-referenced enrolled bill. The bill, proposed by the Department of Justice and passed by voice vote, would authorize payment of moving expenses for newly hired FBI and DEA agents. Moving expenses are typically only reimbursable for transfers, not initial hires. All newly-hired agents must go through initial training at Quantico before being assigned to an office. GAO recently ruled that Quantico could not be treated as the first duty station, thereby eliminating the customary payment of moving expenses to the agents' first assignment after training. The bill would eliminate the need to assign newly-hired agents to their home towns for a brief period after training before assigning them to their "real" duty station, a practice which has arisen so that moving expenses could be paid. OMB, Justice, and OPM recommend approval.

I have reviewed the memorandum for the President submitted by James M. Frey, Assistant Director of OMB for Legislative Reference, and the bill itself. I have no objections.

Attachment

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 15, 1983

FOR: RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT AND
DEPUTY TO THE CHIEF OF STAFF

FROM: FRED F. FIELDING FFF/RAH
COUNSEL TO THE PRESIDENT

SUBJECT: Enrolled Bill H.R. 3232 -- Moving Expenses for Department of Justice Agents

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

FFF:JGR:ph 8/16/83
cc: FFFielding
JGRoberts
Subject
Chron.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 15, 1983

FOR: RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT AND
DEPUTY TO THE CHIEF OF STAFF

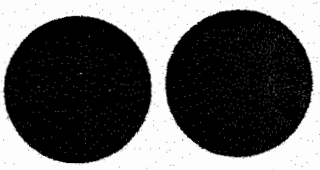
FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Enrolled Bill H.R. 3232 -- Moving Expenses for Department of Justice Agents

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

ID # _____ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET



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

Name of Correspondent: Richard G. DARMAN JR

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

Subject: Enrolled Bill H.R. 3232 - Moving Expenses for Department of Justice Agents

ROUTE TO: / **ACTION** / **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUHOU	ORIGINATOR	83/08/15			/ /
	Referral Note:				
CUOSTB	D	83/08/15		S	83/08/16 10:00 am
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	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: HP did - sw 10/8/86 CU

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

Document No. 146918SS

WHITE HOUSE STAFFING MEMORANDUM

DATE: Aug. 12, 1983 **ACTION/CONCURRENCE/COMMENT DUE BY:** 10:00 a.m. Tuesday ~~August 16, 1983~~

SUBJECT: Enrolled Bill H.R. 3232-Moving Expenses for Department of Justice Agents

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	HARPER	☑	☐
MEESE	☐	☑	HERRINGTON	☐	☐
BAKER	☐	☑	JENKINS	☐	☐
DEAVER	☐	☑	McMANUS	☐	☐
STOCKMAN	☐	☐	MURPHY	☐	☐
CLARK	☐	☐	ROGERS	☐	☐
DARMAN	☐P	☑SS	ROLLINS	☐	☐
DUBERSTEIN	☑	☐	VERSTANDIG	☑	☐
FELDSTEIN	☐	☐	WHITTLESEY	☑	☐
FIELDING	☑	☐	BRADY/SPEAKES	☐	☑
FULLER	☑	☐	_____	☐	☐
GERGEN	☑	☐	_____	☐	☐

REMARKS:

Please forward comments on this enrolled bill by 10:00 a.m. Tuesday, August 16.

Thank you.

RESPONSE:

Richard G. Darman
Assistant to the President

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

AUG 12 1983

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 3232 - Moving Expenses for Department of Justice Agents
Sponsor - Rep. Edwards (D) California

Last Day for Action

Purpose

Allows the Department of Justice to pay the travel and moving expenses of its newly-hired Special Agents from their place of residence at the time of hiring to the first actual duty station to which they are assigned following an initial training period.

Agency Recommendations

Office of Management and Budget	Approval
Department of Justice	Approval
Office of Personnel Management	Approval
General Services Administration	No objection

Discussion

H.R. 3232 was originally proposed by the Department of Justice and passed both Houses by voice vote. The bill would give the Attorney General special authority to reimburse newly-hired Special Agents of the Federal Bureau of Investigation (FBI) and Drug Enforcement Administration (DEA) for the travel and moving expenses incurred in moving to their first duty station following a training period at Quantico, Virginia.

Under current law, the Government does not pay the initial moving expenses of employees first entering Federal service, unless they are hired for positions for which there is a shortage of applicants with the required skills; i.e., engineers, scientists, and the like. Since there is no shortage of applicants for the position of Special Agent with the FBI and the DEA, newly-hired Justice Department agents are not entitled to the shortage category moving expense reimbursement. The Government does pay the moving expenses incurred in transferring

employees already on the rolls from one location to another, and such reimbursements are more generous than those provided to new hires in a shortage category.

The existing bar to paying moving expenses for new agents interferes with the efficient management of the DEA and FBI workforce. These agencies, unlike most others, recruit new agents on a nationwide basis, through Justice's 80 field offices throughout the country. New agents are hired by local offices with the understanding that they will be officially assigned to work in another location upon completion of a training course at Quantico, Virginia. Until the practice was disallowed by the General Accounting Office (GAO), Justice had for many years treated the Quantico training site as the agents' first duty station. When they were transferred to their first real assignment at the actual duty station, Justice paid their moving expenses.

Since the GAO ruling, new agents have been returned from Quantico to the local office which hired them for a six-month period, after which they are moved at Government expense to their actual first duty station. This cumbersome and costly practice can seriously imbalance FBI and DEA field offices and is wasteful, particularly as these agencies will be hiring 100 agents a month in 1983 and 1984 as part of this Administration's drug enforcement initiative.

H.R. 3232 would eliminate the return assignment to the local office by allowing new agents to be moved at Government expense to their first duty station immediately upon completion of training, under the same terms and conditions for moving expenses that apply to new hires in a shortage category.

(Signed) James M. Frey

Assistant Director for
Legislative Reference

Enclosures

H. R. 3232

Ninety-eighth Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Monday, the third day of January, one thousand nine hundred and eighty-three

An Act

To amend title 28 of the United States Code to authorize payment of travel and transportation expenses of newly appointed special agents of the Department of Justice.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 31 of title 28 of the United States Code is amended by adding at the end the following new section:

"§ 530. Payment of travel and transportation expenses of newly appointed special agents

"The Attorney General or the Attorney General's designee is authorized to pay the travel expenses of newly appointed special agents and the transportation expenses of their families and household goods and personal effects from place of residence at time of selection to the first duty station, to the extent such payments are authorized by section 5723 of title 5 for new appointees who may receive payments under that section.".

SEC. 2. The table of sections at the beginning of chapter 31 of title 28 of the United States Code is amended by adding at the end thereof the following new item:

"530. Payment of travel and transportation expenses of newly appointed special agents.".

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.

THE WHITE HOUSE

Office of the Press Secretary
(Santa Barbara, California)

For Immediate Release August 27, 1983

The President has signed the following legislation:

H.R. 1372, which extends authority for two foreign-built hovercraft to operate in Alaska;

H.R. 2895, which designates the Federal Building and Courthouse at 450 Golden Gate Avenue in San Francisco, California, as the "Phillip Burton Federal Building and United States Courthouse;"

H.R. 3190, which establishes an improved program for extra long staple cotton;

H.R. 3232, which allows the Department of Justice to pay the travel and moving expenses of its newly-hired Special Agents from their place of residence at the time of hiring to the first actual duty station to which they are assigned following an initial training period,

and, H.J. Res. 297, which appoints Jeannine Smith Clark to a vacancy on the Smithsonian Board of Regents.

# # #

THE WHITE HOUSE

WASHINGTON

August 29, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Justice's views on S. 1287, a bill to authorize appropriations for the Public Buildings Service of the General Services Administration for fiscal year 1984

The Department of Justice proposes to advise Chairman Howard of the House Committee on Public Works that two provisions of the above-referenced bill are unconstitutional. The provisions would require the concurrence of the Senate and House Public Works Committees before certain funds were obligated by GSA and before GSA selected the new building to house the International Trade Commission. Justice's letter correctly points out that such "committee vetoes" are clearly unconstitutional under INS v. Chadha.

Attachment

THE WHITE HOUSE

WASHINGTON

August 29, 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: Justice's views on S. 1287, a bill to authorize appropriations for the Public Buildings Service of the General Services Administration for fiscal year 1984

Counsel's Office has reviewed the above-referenced proposed report on S. 1287, and finds no objection to it from a legal perspective.

FFF:JGR:aea 8/29/83

cc: FFFielding
JGRoberts
Subj.
Chron

THE WHITE HOUSE

WASHINGTON

August 29, 1983

MEMORANDUM FOR GREGORY JONES
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Justice's views on S. 1287, a bill to authorize appropriations for the Public Buildings Service of the General Services Administration for fiscal year 1984

Counsel's Office has reviewed the above-referenced proposed report on S. 1287, and finds no objection to it from a legal perspective.

FFF:JGR:aea 8/29/83

cc: FFFielding
JGRoberts
Subj.
Chron

ID # 165440 CU

FE004

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

JGR

Name of Correspondent: James C. Murr

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

Subject: Justice's views on S. 1237, a bill to authorize appropriations for the Public Buildings Service of the General Services Administration for fiscal year 1984

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
WHO11		ORIGINATOR DD	83/08/23			/ /
		Referral Note:				
CWLT 18		DD	83/08/23		S	83/09/06
		Referral Note:				CWL
			/ /			/ /
		Referral Note:				
			/ /			/ /
		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

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

August 23, 1983

LEGISLATIVE REFERRAL MEMORANDUM

165440

TO: Legislative Liaison Officer

General Services Administration

SPECIAL

SUBJECT: Justice's views on S. 1287, a bill to authorize appropriations for the Public Buildings Service of the General Services Administration for fiscal year 1984

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 cob September 7, 1983.

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

Gregory M. Jones for

James C. Murr for
Assistant Director for
Legislative Reference

Enclosures

cc: Stuart Smith Mike Uhlmann Fred Fielding

U.S. Department of Justice
Office of Legislative Affairs

DRAFT

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable James Howard
Chairman
Committee on Public Works
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on §§4(b)(2) and 7(b)(1) of S. 1287, a bill "to authorize appropriations for the Public Buildings Service of the General Services Administration for fiscal year 1984." The Department believes that these sections contain provisions which are unconstitutional legislative veto mechanisms. See Immigration and Naturalization v. Chadha, No. 80-1832 (June 23, 1983) ("Chadha"). Accordingly, we oppose enactment of these provisions.

Section 4(b)(2) provides for an authorization of appropriations of $14 million for renovations and repairs of public buildings acquired by purchase. It further states:

> Provided, that prior to obligation of funds granted under authority of this subsection, approval of the Senate Committee on Environment and Public Works and the House Committee on Public Works and Transportation is secured.

Section 7(b)(1) requires the Administrator of the General Services Administration (GSA) to relocate the United States International Trade Commission. It further provides that:

> The selection of the building shall be made with the concurrence of the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives. The Administrator and the Chairman of the United States International Trade Commission shall each report separately in writing to the Committees on Public Works and Transportation and Ways and Means of the House of Representatives within sixty days of enactment of this Act and every thirty days thereafter on the progress in meeting the provisions of this section.

DRAFT

We believe that the provisions in §§4(b)(2) and 7(b)(1) that would authorize a single committee of either House to preclude the GSA from implementing a statutorily authorized decision constitutes an unconstitutional attempt to exercise legislative power. In its recent ruling in Chadha, supra, the Supreme Court made clear that when Congress purports to exercise its legislative power, it must act in conformity with the requirements of Art. I, §§1, and 7 of the Constitution; passage by a majority of both Houses and presentment to the President for approval or veto. "It emerges clearly that the prescription for legislative action in Art. I, §§1, 7 represents the Framer's decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." Chadha, slip op. at 31. Any attempt by Congress to exercise its legislative power in a manner that falls short of the requirements of Art. I, because it does not require passage by a majority of both Houses or because it does not require presentment to the President, is therefore unconstitutional.

Insofar as S. 1287 would allow a committee of either House to prevent the GSA from exercising discretion which is authorized by law, it clearly falls within the scope of the Court's decision in Chadha. Congress could, acting in conformity with Art. 1, pass a joint resolution or legislation preventing implementation of a decision, which would then have to be presented to the President for approval or veto. S. 1287, however, would vest that power in a single committee; the committee would be empowered to make a policy determination as to whether the decision should go into effect as determined by the GSA and to impose that determination by unilateral action without concurrence by both Houses or presentment to the President. As the Court stated in Chadha, disagreement with a decision by the Executive Branch made pursuant to its delegated authority "involves determinations of policy that Congress can implement in only one way: bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." Chadha, slip op. at 34. We believe the Court could not have spoken more clearly with respect to congressional action that purports to affect the legal rights and obligations of persons beyond Congress itself; all actions by Congress having "the purpose and effect of altering the legal rights, duties and relations of persons, including . . . Executive Branch officials . . . . ," slip op. at 32, are legislative actions that must be enacted pursuant to the Presentment Clauses.

For the foregoing reasons, the Department of Justice opposes enactment of §4(b)(2) and 7(b)(1) of S. 1287.

DRAFT

The Office of Management and Budget has advised this Department that there is no objectionn 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

September 8, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Justice Department Views on S. 804, the "Undercover Operations Act of 1983"

OMB has provided us with a copy of a proposed letter from Assistant Attorney General McConnell to Chairman Thurmond, generally objecting to S. 804. That bill, largely a reaction to Abscam, would circumscribe Justice undercover operations and expand the entrapment defense. The provisions as they would appear in 18 U.S.C., and Justice's views, are described below.

- 18 U.S.C. § 3801 would expressly authorize undercover operations and require the Attorney General to issue guidelines governing them. Justice notes several technical problems with this provision but registers no serious objection.

- 18 U.S.C. § 3802 would clarify the authority of undercover operations to use funds in running cover operations. Justice supports this provision.

- 18 U.S.C. § 3803 requires satisfaction of certain threshold requirements before an undercover operation may be commenced, including a highly restrictive "probable cause" standard for undercover investigations of "religious" or "political" organizations. Justice strenuously opposes these requirements.

- 18 U.S.C. § 3804 would expand the liability of the United States for tortious conduct with some nexus to an undercover operation, and is opposed by Justice on the ground that present remedies are adequate.

- 18 U.S.C. § 3805, which would require an annual report to Congress on undercover operations, is also opposed as burdensome and potentially disruptive of ongoing investigations.

A separate section of the bill would create a statutory entrapment defense far broader than that currently recognized by the courts. The bill would codify the

"objective test" rejected by the Supreme Court in United States v. Russell, 423 U.S. 411 (1973), under which the jury would consider not the subjective predisposition of the defendant to commit the crime but whether the methods used by the government would make it more likely than not that a normally law-abiding citizen would commit a similar offense. Justice opposes this radical departure from existing law, noting that it would simply provide a loophole for criminals.

I have no objection to the proposed letter.

Attachment

THE WHITE HOUSE

WASHINGTON

September 8, 1983

MEMORANDUM FOR JAMES C. MURR
OFFICE OF MANAGEMENT AND BUDGET

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

SUBJECT: Justice Department Views on S. 804, the "Undercover Operations Act of 1983"

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

FFF:JGR:aea 9/8/83

cc: FFFielding
JGRoberts
Subj.
Chron

THE WHITE HOUSE

WASHINGTON

September 8, 1983

MEMORANDUM FOR JAMES C. MURR
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Justice Department Views on S. 804, the "Undercover Operations Act of 1983"

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

FFF:JGR:aea 9/8/83

cc: FFFielding
JGRoberts
Subj.
Chron

ID # 166772 CU

JL003

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

JGR

cmts for file

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

Name of Correspondent: James C. Murr

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

Subject: Justice Department views on S. 804, the "Undercover Operations Act of 1983."

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CU H011		ORIGINATOR	DD 83/09/02			/ /
CU BT18		Referral Note:				
		D	83/09/02 DD		S	83/09/09 DD
		Referral Note:				
			/ /			/ /
		Referral Note:				
			/ /			/ /
		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

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

August 30, 1983

166772 cu

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer

Department of the Treasury

SUBJECT: Justice views on S. 804, the "Undercover Operations Act of 1983."

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 September 9, 1983.

Direct your questions to Gregory Jones (395-3856), of this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosures
cc: M. Uhlmann K. Wilson K. Collins A. Curtis
F. Fielding M. Horowitz

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 is in response to your request for the views of the Department of Justice on S. 804, a bill "[t]o reform the Federal criminal laws by establishing certain standards and limits for conducting Federal undercover operations and activities, and for other purposes."

RECOMMENDATION

For the reasons set forth below, the Department of Justice strongly opposes enactment of this legislation in its present form. While we have no objection to the bill's grant of specific authority to the Attorney General to direct the use of undercover operations by the Department and support the provisions of the bill which would remove certain fiscal restrictions on the conduct of such operations, the remaining provisions of S. 804 could seriously jeopardize the continuing effective use of undercover operations as a means of investigating significant criminal activity.

DISCUSSION

S. 804 is comprised of four sections. The majority of the bill's provisions appear in section two, which would create new sections 3801 through 3805 in title 18, United States Code. Each of section two's new provisions of title 18 is discussed below:

Proposed 18 U.S.C. §3801 - Undercover operations generally; Department of Justice guidelines

Subsection (a) of proposed section 3801 gives the Attorney General specific authority to authorize the conduct of undercover operations by the Department of Justice. Subsection (b) mandates the issuance of undercover guidelines for each law enforcement component of the Department and specifies six matters that must be addressed in these guidelines. All undercover operations must

be conducted in accordance with the guidelines and various limitations imposed by the bill.[1]/

In our view, there is no question but that the Attorney General's present authority to direct and supervise the investigation of federal offenses extends to the use of undercover operations and the issuance of governing guidelines. Such guidelines are now in effect for both the Federal Bureau of Investigation (FBI) and the Drug Enforcement Administration (DEA) and are being developed for the Immigration and Naturalization Service (INS). Thus, there is no particular need for codification of these authorities of the Attorney General. However, we have no objection to a grant of such specific statutory power.

There is a troubling ambiguity about the bill's articulation of undercover operations authority. This authority is limited to undercover operations undertaken by the Department of Justice at the direction of the Attorney General. Thus, a question arises whether the bill's failure to grant similar undercover authority to agencies outside the Department of Justice with criminal investigative responsibilities, such as the Customs Service and Internal Revenue Service of the Department of the Treasury, is intended to deny similar undercover operations authority to these other law enforcement components. The Department of Justice would strongly oppose such a diminution of the investigative capacities of sister federal agencies. On the other hand, if this bill is not intended to preclude undercover operations conducted by other Departments, we fail to see any rationale why the constraints the bill imposes on undercover activities should extend only to operations on the part of the Department of Justice. Because of these questions, the intended scope of the bill should be clarified.

---

[1]/ In light of the bill's stringent regulation of undercover operations and its reporting requirements, we are concerned that the term "undercover operation" is nowhere defined. Thus, it is unclear whether the fact that an agent would in a single isolated instance, and perhaps on an emergency basis, have to act in an undercover capacity would transform an investigation into an "undercover operation." Such a situation might arise, for example, in an airline hijacking where an agent posed as an airline official whose presence was demanded by the hijackers on threat of injury to passengers. Also, the term would appear to include foreign counterintelligence operations. The bill's provisions are not drafted with the exigencies of this category of investigation in mind. Moreover, as discussed below, its extensive public reporting requirements are inappropriate to the extremely sensitive nature of such investigations. A workable definition of the term "undercover operation" is necessary and should exclude foreign counterintelligence operations.

With respect to the issue of the bill's requiring the issuance of guidelines to govern undercover activities, it is generally the position of the Department of Justice to disfavor mandates that federal law enforcement be administered pursuant to regulatory schemes. However, since articulated guidelines for the initiation and conduct of undercover operations have proved useful and we see no reason to abandon this approach in the future, this Department does not strongly object to a statutory requirement of issuance of undercover guidelines.

The subject matters which subsection (b) requires to be included in such guidelines are, for the most part, appropriate ones. However, we do not support proposed subsection (b)(6) which requires that the Undercover Review Committee for each component of the Department have no less than six voting members, including one Assistant Director of the FBI and one representative of the Office of Legal Counsel. The composition of these committees should be left to the discretion of the Attorney General so that their membership can reflect the anticipated nature and quantity of the work of each committee. In particular, there is no reason for an official of the high level of an Assistant Director of the FBI to be required to serve on these committees. Indeed, under current FBI guidelines it is an Assistant Director who, based on the recommendation of the Undercover Review Committee, is authorized to make ultimate decisions regarding many proposed undercover operations. Moreover, there is no justification for requiring any official of the FBI to serve on a committee reviewing those operations proposed by agencies such as the DEA or INS.

Similarly, we do not believe it appropriate to require a representative of the Department's Office of Legal Counsel (OLC) to serve on each of these Committees. Generally, OLC attorneys do not have the extensive experience with criminal investigative matters that would be necessary to full participation in the decision-making of these committees. Where a legal question of particular difficulty or complexity arises, the committees can, as is current practice, solicit the advice of OLC. Membership of an OLC representative is not necessary to this function.

Subsection (c) of proposed section 3801 requires that all guidelines and any amendments to, or formal interpretations of, the guidelines be submitted to the House and Senate Judiciary Committees 30 days in advance of becoming effective. The Department's undercover guidelines are a matter of public record, and we have no objection to transmitting to the Congress any new or amended guidelines or to responding to congressional requests regarding the manner in which we interpret these guidelines.

Two aspects of this proposal are of concern, however. First, the general thirty-day delay requirement would inhibit our ability to respond quickly to a need to amend or formally

interpret the guidelines. Second, we would strongly oppose any requirement that the Congress be notified thirty days in advance of every instance in which the Department determines that an action would or would not be subject to a provision in the guidelines. Even if a procedure could be devised that would not risk undue delay to an investigation, other problems are significant. Our investigative agencies regularly request legal advice and interpretations from their own legal counsel and the Department's Office of Legal Counsel. It is important that such exchanges remain candid. A written report of these consultations to the Congress would only decrease their quality and frequency. Furthermore, requiring these reports during the pendency of an investigation could, in certain cases, represent an improper interference with the enforcement of the criminal laws which is charged to the Executive Branch.

Proposed 18 U.S.C. §3802 - Establishment of an undercover operation; authority

Proposed section 3802 would overcome certain limitations and ambiguities concerning the authority, in connection with undercover operations, to enter into contracts and leases, establish proprietaries, use the proceeds of a proprietary to offset its expenses, deposit appropriated funds, and enter into agreements with cooperating individuals. The Department of Justice strongly supports this provision with the following suggested amendments. First, we recommend that proposed section 3802(c) be amended to allow the use of proceeds not only of proprietaries, but of any operation, to offset necessary and reasonable expenses of the operation. Second, subsection 3802(d) which allows the deposit of appropriated funds in banks and other financial institutions should be expanded to include deposit of the proceeds of an undercover operation.[2/] Finally we suggest clarification, perhaps as part of explanatory legislative history materials, of the fact that authority to enter into reimbursement agreements with parties cooperating in undercover operations set out in section 3802(e) is not intended to preclude indemnification agreements in other contexts.

Proposed 18 U.S.C. §3803 - Limits on undercover operations; standards for selecting targets

The Department of Justice strongly opposes proposed section 3803 which would impose specific statutory limitations on the initiation of undercover operations and the offering of an opportunity or inducement to engage in a crime.

2/ This authority is currently provided in Continuing Resolution 97-377, and is contained in the Department of Justice authorization bills under consideration by the Congress.

Our overall objection to this part of the bill is that it casts certain specific standards in an inflexible framework that does not permit the latitude to respond to the variety of situations arising in actual investigations and cannot readily be adjusted to conform to evolving experience with undercover operations. In our view, the proper and most practical method for establishing investigative thresholds is through Attorney General guidelines, which set forth investigative procedures within the larger confines of the law. The advantages of guidelines are that they can be general enough to apply to varied fact situations and flexible enough to permit appropriate responses to specific cases. This allows for the exercise of judgment on the part of our most experienced investigators and prosecutors and consideration of the exigencies of each particular investigation. Moreover, guidelines are subject to constant refinement and improvement not possible with a statutory scheme.3/

In addition, certain of the standards set forth in proposed section 3803 are overly restrictive. Section 3803(a)(1) requires a reasonable suspicion that an individual has engaged, is engaging, or is likely to engage in criminal activity before an undercover operation may be used to obtain information about him. Undercover operations, like all investigations, may involve gathering information about witnesses, victims, and others not engaged in criminal activity. The names, addresses, and other data about such persons are often essential to the investigative process. This part of the bill would preclude the use of undercover techniques to obtain this vital investigative information.

For example, it may be necessary for an agent to act in an undercover capacity to obtain information about the location or identity of persons being held hostage, or to assess the reliability of a person who has provided a questionable "lead" in an investigation. Such conduct may occur either in a full undercover investigation or simply as a "pretext interview" in an investigation which does not otherwise involve undercover

---

3/ We also note that proposed section 3802(b), which specifies situations in which a proposed operation may not be approved by a field supervisor, is taken directly from present FBI undercover guidelines. As noted above, transforming these guidelines into statutory limitations removes the opportunity to amend these standards to accord with developing experience. We are also concerned that inasmuch as these guidelines were designed with specific reference to the organizational structure and investigative jurisdiction of the FBI, they are not necessarily wholly transferrable to investigations conducted by other agencies such as the DEA or INS.

techniques. Indeed, the Attorney General's Guidelines on General Crimes recognize that a pretext interview may be used, in certain circumstances, at the stage of a preliminary inquiry preceding a full investigation, to determine the truthfulness of a complainant's allegation that a crime is occurring or has occurred.4/ Moreover, routine "pretext interviews" (where an FBI agent uses an alias or cover to conceal his relationship with the FBI) that are not part of an undercover operation are not subject to the general limitations on use of undercover techniques in current FBI undercover guidelines.5/ Section 3803 of the bill would effectively bar use of this routine, and minimally intrusive, investigative tool.

Proposed sections 3803(a)(3) and (4) are also quite restrictive, for they impose a probable cause standard, the same quantum of evidence required for issuance of a search or arrest warrant. This is an extremely high threshold for use of an investigative technique, and indeed may, in many cases, define those situations in which an undercover operation would be unnecessary because probable cause already exists to arrest the subjects or to conduct a search.

The bill's probable cause standard is intended to apply to those situations which would involve religious or political entities or a risk that a person acting in an undercover capacity would enter into a confidential, professional relationship. We agree that the potentially sensitive nature of such operations requires particular care in determining whether use of an undercover technique is appropriate. However, the better approach is to require a high-level decision with respect to such operations as is now the case under the Department's FBI undercover guidelines, rather than to virtually exclude the opportunity to employ undercover techniques by imposing the extremely stringent probable cause standard. In effect, this standard would for the most part bar undercover operations directed at public corruption and at terrorism conducted by groups purporting to be "religious" or "political" organizations.6/ The problems

---

4/ See "The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations," General Crimes Guideline B(6)(f) (March 7, 1983).

5/ See "Attorney General's Guidelines on FBI Undercover Operations," Part K (December 31, 1980).

6/ The restrictive standard applicable to "political" organizations could have the same deleterious effect on operations in the area of foreign counterintelligence. As we urge in the discussion of the bill's reporting requirements below, it should be made clear that the "undercover operations" controlled by the bill do not include those involving foreign counterintelligence.

posed by this highly restrictive standard are complicated by the fact that the bill fails to define the terms "political" and "religious" organization and what it means to "infiltrate" such an organization.

Proposed 18 U.S.C. §3804 - Tort claim arising out of illegal undercover operation 7/

Proposed section 3804 would vastly expand the civil liability of the United States for tortious conduct with some nexus to an undercover operation. In effect, this section would make the United States strictly liable for wrongful acts bearing even the most tenuous connection to an undercover operation. What is particularly disturbing about this provision is that it would abandon the most basic principles of tort liability and impose liability on the United States irrespective of whether there was any showing that the proximate cause of the injury was a wrongful or negligent act on the part of the government or its employees. For example, the United States would be liable for damages caused by a private individual cooperating in an undercover operation even if he were acting in violation of specific instructions and concealed his conduct from supervising agents.

To the extent that injury to a private person is caused by the government's wrongful or negligent supervision of an undercover operation, a remedy is available under the present provisions of the Tort Claims Act (28 U.S.C. §2671 et seq.). Moreover, the concept of negligence is a flexible one under which the standard of care imposed on the government increases where a foreseeable risk of injury to the person or property of others is heightened because of the nature of a particular operation. There is no justification for making the United States civilly liable for an individual's tortious conduct for which the government bears no responsibility, whether in the context of undercover operations or other government activity.

Proposed 18 U.S.C. §3805 - Annual report to Congress

Proposed section 3805 would require the Attorney General to file an annual report with the Congress concerning all terminated undercover operations and all operations approved more than two years prior to the report date, irrespective of whether they had been ended. No less than twelve categories of information for each operation would be required to be included in the report. In principle, the Department of Justice has no objection to providing the Congress with information on our undercover operations. However, the reporting requirements imposed by this section are of serious concern for the following reasons.

7/ Despite the title of this proposed section, the expansive civil liability it provides is in no way confined to "illegal" undercover operations.

First, the extent of the information required would pose a tremendous administrative burden. For example, in 1982, there were hundreds of arrests and indictments resulting from undercover operations. Subsection (b)(9) and (10) would require separate entries for each one.[8]/ The huge amount of information required under this section would significantly enlarge administrative costs with little, if any, resultant gain to the legislative process.

Second, this section would require information on terminated operations that had not yet resulted in arrest, indictment, or trial, and also information on any ongoing operation if it had been approved more than two years earlier. The Department of Justice is strongly opposed to requirements that we disclose in a public document information about an undercover operation prior to the conclusion of trial or termination of covert activity for the obvious reason that such disclosure would jeopardize investigations and prosecutions as well as the safety of government agents, informants, and cooperating witnesses and victims.

Finally, section 3805 requires the Attorney General to report on "all undercover operations." Thus, it appears that the FBI's counterintelligence undercover operations would be encompassed by this requirement. Clearly, national security matters should be excluded from any public report. As noted above, we strongly recommend that the term "undercover operation" as used in this bill exclude foreign counterintelligence operations of the FBI.

Section three of the bill would create a statutory entrapment defense that would drastically alter the law of entrapment as it has developed over the last fifty years. Under current law, if the government has provided some inducement for the defendant to commit a crime, the government must establish that the defendant was predisposed towards the criminal activity. Hampton v. United States, 425 U.S. 484 (1976); United States v. Russell, 423 U.S. 411 (1973). The bill would substitute for this long-standing "subjective" test an "objective" test. Under the bill's proposed defense, the test for entrapment would be whether the defendant's actions were induced by the government's use of "methods that more likely than not would have caused a normally law-abiding citizen to commit a similar offense." In applying this test, the predisposition of the defendant to commit the crime would be irrelevant.

---

[8]/ Subsection (b)(10) would also require that the report identify persons named even in sealed indictments, a requirement that could obviously endanger an ongoing case.

For example, an established narcotics dealer could not be convicted of importation if he convinced a jury that the purchase price offered by an undercover agent would have been sufficient to cause a "normally law-abiding citizen" to commit such an act. The enormous profits to be reaped in illicit drug trafficking indeed represent an extraordinary temptation. This is one reason that public corruption has become such an alarming part of drug smuggling operations. In order to successfully accomplish an undercover drug buy, agents must offer the going price. The fact that a jury of "normally law-abiding" citizens would find the routine profit of a large drug sale shockingly high is no reason to allow the acquittal of an experienced trafficker. Yet the "objective" test proposed in the bill opens the door to this unjust result.

To legislatively establish the objective test for entrapment, the test rejected by the Supreme Court in Russell, supra, would serve no purpose other than to provide a windfall to wrong-doers who would be currently foreclosed from successfully asserting an entrapment defense because of their predisposition to commit the offense. If a "normally law-abiding citizen" is induced by the government to commit an offense, he can now defend the charges by showing lack of predisposition. Adoption of the objective test would benefit experienced criminals and provide no additional protection to the law-abiding citizen.

In addition to adopting the "objective" test, this section of the bill would create three irrebuttable presumptions which the defendant could use to establish a per se entrapment defense. We object to the creation of these presumptions both because they contain serious ambiguities and and because the proper approach is consideration of all the facts and circumstances, rather than application of a one-dimensional rule that would preclude the government from putting forth evidence in defense of its action.

The first of these presumptions would be triggered if the defendant commits the crime because the government threatens harm to the person or property of any individual. We agree that in such a case conviction generally should be barred. But the provision is extremely broad and could have unforeseen effects. For instance, in the midst of negotiations over a major narcotics sale, an undercover agent may have to "talk tough" or "threaten" an experienced street-wise seller who was attempting to renege on the deal or change its terms, in order for the agent to complete the transaction, maintain his credibility, or protect himself or others from harm. In the world of narcotics trade, such conduct in neither unreasonable nor unusual.

Also, the presumption contains no requirement that the defendant even be aware of the threatened "harm" to another individual. Thus, the presumption could apply where agents threatened prosecution of a low level participant in a drug ring

when he attempted to back out on an agreement to proceed with a purchase from the defendant. With the defendant not even aware of, much less influenced by, the pressure applied to the intermediary, there is no reason for him to be able to assert entrapment as a matter of law for a crime in which he willingly participated. Again, current law is adequate to protect innocent persons. Courts can consider duress as a defense, and can weigh government conduct against predisposition.

The second presumption would establish entrapment as a matter of law if the government "manipulated the personal, economic, or vocational situation of the defendant...." This provision is extremely vague and would provide no useful guidance to government agents. For example, every undercover operation involving the offering of a bribe, a fencing operation, or a narcotics purchase represents some manipulation of the "economic situation" of those who participate, no matter how willingly. This presumption offers numerous loopholes to be exploited by defendants, and the government would be powerless to rebut the presumption regardless of the defendant's criminal record or predisposition to commit the offense, or the reasonableness of the inducement in a particular case.

The third presumption would apply if the government provided goods or services necessary to the commission of the crime that the defendant "could not have obtained" without the government's help. This provision overturns the rule of Russell, supra, and other cases holding that the supplying of contraband or services does not constitute entrapment.9/ Thus, this provision would cast doubt on the government's accepted and reasonable practice of supplying limited amounts of contraband to show good faith or establish credibility with targets of an investigation. Moreover, it would seem to preclude a sale by an undercover agent of classified defense information or controlled high technology to a person who had amply demonstrated his desire to make such a purchase. This provision, like the other two presumptions, could bar the use of reasonable undercover techniques and allow acquittal of experienced, predisposed criminals without providing any additional protection to innocent citizens.

Section four of the bill simply makes two conforming amendments to a section of the Tort Claims Act (28 U.S.C. §2680) to reflect the vastly expanded civil liability of the United States set forth in section one of the bill.

9/ See, e.g., United States v. Ward, 696 F.2d 1315 (11th Cir. 1983); United States v. Jones, 693 F.2d 343 (5th Cir. 1982); United States v. Myers, 692 F.2d 823 (2nd Cir. 1982).

CONCLUSION

Undercover operations have long been an important part of federal law enforcement efforts and are crucial to the effective investigation of crimes characteristically committed in closed settings or by secretive, organized groups. These crimes include drug trafficking, racketeering, terrorism, and public corruption, the very types of crimes which are given the highest priority by the Department of Justice. Many of the requirements imposed by S. 804 are so restrictive and leave so little flexibility to address the exigencies of particular investigations that they could seriously jeopardize the effective use of undercover operation in our priority enforcement efforts.

Undercover operations may, indeed, pose legal and policy issues of particular sensitivity. The Attorney General's present undercover guidelines for the FBI and DEA and those being developed for the INS provide an effective means of addressing these issues in a context that at the same time allows for the flexibility and exercise of informed judgment necessary to meet the variety of circumstances and legitimate concerns that may arise in particular investigations. S. 804, with its overly stringent regulation of undercover operations and drastic alteration of the law of entrapment and tort liability, would unjustifiably diminish the utility of this valued and proven investigative technique. While it may be the intent of the authors of this legislation to benefit innocent law-abiding citizens, its impact would in fact be just the opposite, for it is the innocent public which would ultimately suffer from the serious impediments the bill would place on our ability to successfully investigate federal crimes.

The Office of Management and Budget advises 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
Office of Legislative Affairs