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U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

8 FEB 1984

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on the proposal to amend the District of Columbia Self-Government and Governmental Reorganization Act (the "Act") set forth in a letter to the Honorable Charles McC. Mathias, United States Senate, from the Honorable Marion Barry, Jr., Mayor, District of Columbia (November 17, 1983). For the reasons set forth below, the Department of Justice opposes enactment of this proposal.

The proposal submitted by the District of Columbia would provide as follows:

"Sec. 1. Any law which was passed by the Council of the District of Columbia prior to the date of the enactment of this Act is hereby deemed valid, in accordance with the provisions thereof.

Sec. 2. Part F of title VII of such Act is amended by adding at the end thereof the following new section:

Severability

Sec. 762. If any particular provisions of this Act, including any provisions of this Act with respect to adoption of resolutions by one or both Houses of Congress disapproving acts of the Council, or the application thereof to any person or circumstances, is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected thereby."

As stated in the Mayor's letter of November 17, 1983, the proposal is directed toward enabling the District of Columbia to issue municipal bonds. As a result of the Supreme Court's decision in Immigration and Naturalization Service v. Chadha, 103 S.Ct. 2764 (1983), which declared the so-called "legislative veto" device

unconstitutional, questions have been raised over the ability of the District of Columbia to obtain revenues through the bond market, since the Act contains several legislative vetoes. 1/ We take no position as to whether the proposal would in fact resolve those questions. Rather, our objections to the proposal evolve from other legal consequences which may ensue from its enactment.

Section 1 of the proposal, by affirming all previous actions of the D.C. Council, does not take into account those actions of the D.C. Council which never became effective, or which were invalidated after becoming effective, whether because they were subject to Congressional action, court challenge or otherwise. While we do not object to the general intent underlying section 1 -- to dispel any cloud Chadha may have cast over laws that previously took effect following passage by the D.C. Council -- we believe that this intent would be better served by a provision that affirmed only those laws which in fact came into effect and are currently valid. Section 1 does not account for laws which passed the D.C. Council but have been repealed, modified or amended, were temporary in nature or subject to a sunset provision and have lapsed, or have been judicially determined invalid.

1/ The Act contains four provisions which may be characterized as Legislative vetoes. These are:

(1) Section 303(b) provides that "an amendment to the charter . . . shall take effect only if . . . both Houses of Congress adopt a concurrent resolution . . . approving such amendment."

(2) Section 602(c)(1) provides that with respect to acts effective immediately due to emergency circumstances and acts proposing amendments to Title IV of this Act "no such act shall take effect until the end of the 30-day period . . . and then only if during such 30-day period both Houses of Congress do not adopt a concurrent resolution disapproving such act."

(3) Section 602(c)(2) provides that any Act affecting Titles 22, 23, or 24 of the District of Columbia Code "shall take effect . . . only if . . . one House of Congress does not adopt a resolution disapproving such act."

(4) Section 740(a) provides that either the House or the Senate may adopt a resolution terminating emergency presidential authority over the Metropolitan Police Department."

Section 2 of the proposal, if enacted, could have an impact extending far beyond merely inserting a severability provision into the text of the Act. If a court were to rely on section 2 to hold that the legislative veto provisions of the Act are severable, 2/ the result will be to sustain, with one exception, 3/ the actions of the D.C. Council in all matters subsequent to the passage of this proposal without the need to secure an enactment of a law by the Congress. In practical terms, the intent of the proposal runs contrary to our position on H.R. 3932, another bill to amend the Act upon which we have previously reported. See Letter to Honorable William V. Roth, Jr., Chairman, Committee on Governmental Affairs, United States Senate, from Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs (November 15, 1983). In that report, we expressed general support for H.R. 3932, which would correct the constitutionally invalid portions of the Act by requiring D.C. Council actions to be subject to disapproval by enactment of a joint resolution.

In the narrow area of criminal law, criminal procedure and prisoners, however, we urged that actions of the D.C. Council should take effect only upon enactment of a joint resolution of approval by the Congress. Section 2, by declaring that a provision of the Act is severable in the event it is determined invalid, would allow the remaining provisions to stand alone. If, for example, the invalid congressional review provisions were found to be severable from the remaining provisions of the Act, D.C. Council actions would become law without any subsequent Congressional examination. For the reasons set forth in our letter of November 15, 1983, we do not believe this to be an appropriate post-Chadha compromise, particularly in the area of criminal law,

2/ We note that the severability of a particular provision from a statute does not necessarily turn on the presence or absence within that statute of a severability clause. See United States v. Jackson, 390 U.S. 570, 585 n.27 (1968). While this letter is not intended to reflect on the severability of the legislative veto devices in the Act, we would expect a court to rest its ultimate inquiry into the question of severability on whether Congress would have enacted the remainder of the statute without the unconstitutional provision. See Consumer Energy Council of America v. FERC, 673 F.2d 425, 442 (D.C. Cir. 1982) aff'd mem., 103 S.Ct. 3556 (1983). We therefore would not expect the mere presence or absence of a severability clause passed subsequent to the Act to be determinative of the severability question.

3/ The Act precludes the D.C. Council from amending Title 11 of the D.C. Code (relating to organization and jurisdiction of the District of Columbia courts). See Section 602(a)(4) of the Act.

criminal procedure, and prisoners. Instead, we believe that the proper balance of lawmaking authority would be maintained if a joint resolution of approval were required in order for D.C. Council amendments to Titles 22, 23 and 24 of the D.C. Code to take effect.

In summary, we oppose the enactment of the recent proposal submitted by the District of Columbia. It does not take into account actions of the D.C. Council which did not become effective, are no longer effective, or have been held invalid. It also ignores the undesirable consequences that would likely result from simply inserting a severability clause into the text of the Act.

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 position.

Sincerely,

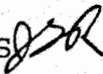
ROBERT A. McCONNELL
Assistant Attorney General

THE WHITE HOUSE

WASHINGTON

February 9, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS 

SUBJECT: Enrolled Bill H.R. 2727 -- Codification of
Recent Laws Concerning Money, Finance, and
Transportation

Richard Darman asked for our views on the above-referenced enrolled bill by 5:00 p.m. Friday, February 10. H.R. 2727 is part of the ongoing project to enact the titles of the United States Code as positive law. It would make certain conforming amendments to parts of 31 and 49 U.S.C. enacted as positive law, to reflect changes made by statutes that did not specifically refer to the codified versions. The bill passed both Houses by voice vote. OMB recommends approval, Transportation and Treasury have objection, and Justice has no comment. As with all bills that are part of the codification project, H.R. 2727 contains language to the effect that its passage effects no substantive change in the law, and that any offense committed under the uncoded version of the law is deemed to have been committed under the appropriate section of the codification.

I have reviewed the memorandum for the President prepared by OMB Assistant Director for Legislative Reference James M. Frey, and the bill itself, and have no objections. I have alerted the Executive Clerk to a technical error in the enrolled bill -- "appeal" in § 6(a) should be "repeal" -- but this does not affect the President's action.

Attachment

THE WHITE HOUSE
WASHINGTON

February 9, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM:

TO JOHN G. ROBERTS *JGR*

SUBJECT:

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Attachment

THE WHITE HOUSE

WASHINGTON

February 9, 1984

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. 2727 -- Codification of
Recent Laws Concerning Money, Finance, and
Transportation

Counsel's Office has reviewed the above-referenced enrolled bill, and finds no objection to it from a legal perspective. We have alerted the Executive Clerk to a technical error in the enrolled bill -- "appeal" in § 6(a) should be "repeal" -- and the Clerk has notified the appropriate Congressional officials. This does not affect the President's action.

FFF:JGR:aea 2/9/84

cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

February 9, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Enrolled Bill H.R. 2727 -- Codification of
Recent Laws Concerning Money, Finance, and
Transportation

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FFF:JGR:aea 2/9/84

cc: FFFielding/JGRoberts/Subj/Chron

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Richard G. DARMAN

☐ MI Mail Report

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

Subject: Enrolled Bill H.R. 2725 - Codification of
Recent Laws Concerning Money, Finance,
and Transportation

ROUTE TO:

ACTION

DISPOSITION

Office/Agency (Staff Name)

Action
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Date
YY/MM/DDType
of
ResponseCompletion
Date
YY/MM/DD

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ORIGINATOR

84/02/08

1 / 1

Referral Note:

B

84/02/08

S 84/02/10

Referral Note:

5:00p

Referral Note:

Referral Note:

Referral Note:

ACTION CODES:

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C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet
to be used as Enclosure

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R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:

A - Answered
B - Non-Special Referral
C - Completed
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WHITE HOUSE STAFFING MEMORANDUMDATE: 2/8/84 ACTION/CONCURRENCE/COMMENT DUE BY: 5:00 p.m. 2/10/84SUBJECT: Enrolled Bill H.R. 2727 - Codification of Recent Laws
Concerning Money, Finance, and
Transportation

	ACTION FYI			ACTION FYI	
VICE PRESIDENT	☐	☐	McFARLANE	☐	☐
MEESE	☐	☒	McMANUS	☐	☐
BAKER	☐	☒	MURPHY	☐	☐
DEAVER	☐	☒	OGLESBY	☒	☐
STOCKMAN	☐	☐	ROGERS	☐	☐
DARMAN	☐	☒	SPEAKES	☐	☒
FELDSTEIN	☐	☐	SVAHN	☒	☐
FIELDING	☒	☐	VERSTANDIG	☐	☐
FULLER	☒	☐	WHITTLESEY	☐	☐
HERRINGTON	☐	☐	_____	☐	☐
HICKEY	☐	☐	_____	☐	☐
JENKINS	☐	☐	_____	☐	☐

REMARKS:

Please forward any comments/recommendations to my
office by 5:00 p.m. FRIDAY, FEBRUARY 10, 1984.

Thank you.

RESPONSE:

1984 FEB -8 PM 1:59

Richard G. Darman
Assistant to the President
Ext. 2702



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

FEB 8 1984

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 2727 - Codification of Recent Laws
Concerning Money, Finance, and Transportation
Sponsor - Rep. Rodino (D) New Jersey

Last Day for Action

February 15, 1984 - Wednesday

Purpose

To codify without substantive change certain recent laws concerning money, finance, and transportation.

Agency Recommendations

Office of Management and Budget

Approval

Department of Transportation

No objection

Department of the Treasury

No objection (Informally)

Department of Justice

No comment (Informally)

Discussion

Public Law 97-258 restated, without substantive change, certain general and permanent laws related to money and finance and enacted those laws as title 31 of the United States Code. Public Law 97-449 did the same thing with respect to certain laws concerning transportation and enacted them as part of title 49 of the United States Code. Both of these public laws were part of the on-going program of the Office of the Law Revision Counsel of the House of Representatives to prepare all titles of the United States Code for enactment as positive law.

H.R. 2727, which passed both Houses by voice vote, further amends titles 31 and 49 of the United States Code to reflect changes made by laws that did not specifically amend those titles. The enrolled bill restates certain sections to reflect current law more accurately. It also makes technical conforming amendments to a number of other sections of the Code.

Interested Executive branch agencies are satisfied that H.R 2727 does not change existing law in any substantive way.

(Signed) James M. Frey

Assistant Director for
Legislative Reference

Enclosures

THE WHITE HOUSE
Office of the Press Secretary

For Immediate Release

February 14, 1984

The President has today signed the following legislation:

H.R. 2727 which codifies without substantive change certain recent laws concerning money, finance, and transportation; and

H.R. 3969 which allows the limited use of proxies by members of the Supervisory Board of the Panama Canal Commission.

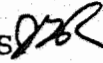
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THE WHITE HOUSE

WASHINGTON

February 14, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS 

SUBJECT: SBA Proposed Report on S. 2084

OMB has asked for our views on the above-referenced proposed report by the Small Business Administration (SBA) on S. 2084. This bill would substantially repeal an SBA regulation, the "opinion molder rule," which precludes the SBA from granting assistance to any applicant engaged in expressing or propagating ideas. 13 C.F.R. § 120.2(d)(4). The rule antedates this Administration, and was designed to avoid the First Amendment concerns raised by Government decisions to fund or terminate the funding of those engaged in the business of expressing ideas. S. 2084 would prohibit the SBA from denying loan guarantee assistance to organizations on this ground unless the aid would be used to (1) advance or inhibit religion, (2) threaten the unlawful overthrow of organized Government, or (3) engage in any illegal activity or the dissemination of obscene materials.

In the second paragraph on page 1, the SBA report states that the opinion molder rule is based on the fear that "censorship could result" from the SBA determining to support some ideas but not others. This strikes me as dangerously imprecise use of loaded terminology. The decision to fund or not to fund the expression of certain ideas may violate the First Amendment, but it is not censorship. The offensive ideas may be freely expressed without government assistance. I suggest deleting the last three sentences in the paragraph -- they are surplusage in any event -- and substituting "The SBA promulgated the opinion molder rule to avoid the potential First Amendment difficulties attendant upon government financial assistance to those engaged in the business of expressing ideas," or something similar.

The SBA draft report concedes that the opinion molder rule has been difficult to administer, and welcomes Congressional guidance. It makes several suggestions for revisions in S. 2084. Two of these raise concerns from the perspective of preserving legal flexibility for the SBA. In the fourth paragraph on page 2, the report objects to the provision permitting denial of assistance to organizations promoting the unlawful overthrow of organized government, in part because "this exception would require SBA to look to the

content of various publications or communications, which is constitutionally proscribed." I do not think this assertion of a constitutional proscription is necessarily accurate, and in any event SBA should not brand as unconstitutional something it may want to do in the future.

The carryover paragraph between pages 2 and 3 objects to the provision permitting denial of assistance to organizations publishing obscene materials, in part on the ground that this "would place SBA in the untenable role of censor." As noted above, SBA should not argue that denial of government assistance is tantamount to censorship.

A memorandum for OMB is attached.

Attachment

THE WHITE HOUSE

WASHINGTON

February 14, 1984

MEMORANDUM FOR WILLIAM A. MAXWELL
LEGISLATIVE ANALYST
OFFICE OF MANAGEMENT AND BUDGET
FROM: FRED F. FIELDING *Orig. signed by FFF*
COUNSEL TO THE PRESIDENT
SUBJECT: SBA Proposed Report on S. 2084

Counsel's Office has reviewed the above-referenced proposed report. While we express no view on the policy question of whether to support repeal of the opinion molder rule, we do object to several instances in the report in which SBA's legal analysis is either imprecise or unnecessarily definitive.

The last three sentences in the second paragraph on page one suggest that the denial of Federal financial assistance because of the expression of certain ideas could constitute "censorship." While such a practice may, under certain circumstances, violate the First Amendment, it is not censorship. The offensive ideas may still be expressed, only without government funding. We suggest deleting the last three sentences -- their point is more accurately stated in the first sentence of the paragraph in any event -- and substituting "The SBA promulgated the opinion molder rule to avoid the potential First Amendment difficulties attendant upon government financial assistance to those engaged in the business of expressing ideas," or something similar.

In the fourth paragraph on page 2, the report objects to the provision permitting denial of assistance to organizations promoting the unlawful overthrow of organized government, in part because "this exception would require SBA to look to the content of various publications or communications, which is constitutionally proscribed." This legal conclusion is debatable. We recommend changing "is constitutionally proscribed" to "would raise serious First Amendment concerns."

The first full sentence on page 3 repeats the imprecise use of the term "censor" discussed above. We recommend changing "would place SBA in the untenable role of censor and, in addition to possible constitutional problems" to "would raise possible constitutional problems, and."

FFF:JGR:aea 2/14/84

cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

February 14, 1984

MEMORANDUM FOR WILLIAM A. MAXWELL
LEGISLATIVE ANALYST
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: SBA Proposed Report on S. 2084

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FFF:JGR:aea 2/14/84

cc: FFFielding/JGRoberts/Subj/Chron

JV

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

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Received (YY/MM/DD) 1/1

Name of Correspondent: James C. MURR

☐ MI Mail Report

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

Subject: SBA proposed report on S. 2084 / Restructure
SBA's authority to deny financial assistance to small
business concerns because the primary business of
such concerns relates to the communication of ideas

ROUTE TO:

ACTION

DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Completion Date YY/MM/DD
CW BOLL	ORIGINATOR	DD 84/102106		1/1
CWAT 18	Referral Note:	DD 84/102106		S 84/102113
	Referral Note:			1/1
	Referral Note:			1/1
	Referral Note:			1/1
	Referral Note:			1/1

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C - Completed
S - Suspended

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Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

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

SPECIAL

202234 *cu*

February 2, 1984

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer

Department of Justice

Department of Commerce

SUBJECT: SBA proposed report on S. 2084/Restricts SBA's authority to deny financial assistance to small business concerns because the primary business of such concerns relates to the communication of ideas

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, FEBRUARY 14, 1984. ORAL COMMENTS ACCEPTABLE.

Direct your questions to William A. Maxwell (395-3890), the legislative analyst in this office.


James C. Murr for
Assistant Director for
Legislative Reference

Enclosures

cc: T. Elzey

J. Cooney

F. Fielding



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF THE ADMINISTRATOR

Honorable Lowell Weicker
Chairman
Committee on Small Business
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your request for the views of the Small Business Administration (SBA) on S. 2084, a bill to amend section 4(d) of the Small Business Act, 15 U.S.C. § 633(d), to restrict SBA's authority to deny financial assistance in the form of loan guarantees to small business concerns solely because the primary business operations of such concerns relate to the communication of ideas. This bill would substantially alter SBA's so-called "opinion molder rule," which, with numerous exceptions, precludes SBA from granting financial assistance to an "opinion molder," any applicant which "is engaged in the creation, origination, expression, dissemination, propagation, or distribution of ideas, values, thoughts, opinions or similar intellectual property, regardless of medium, form, or content." (13 CFR § 120.2(d)(4)).

The purposes of the opinion molder policy are (1) to avoid any possible accusation that the Government is attempting to control editorial freedom by subsidizing media or communications for political or propaganda purposes, and (2) to insure that constitutionally protected rights of freedom of speech and press are not compromised either by the fear of Government reprisal or by the expectation of Government financial assistance. As an Agency of the Federal Government, SBA may not censor ideas published or communicated by any applicant business. This censorship, however, could result from the Agency's setting standards to determine which ideas are deserving of financial assistance and which are not. To avoid such real or apparent censorship, SBA promulgated the opinion molder rule precluding it from granting financial assistance of any type of opinion molder.

Under the bill, SBA would be prohibited from denying loan guarantee assistance to any business solely because the primary operations of such business are the communication of ideas. The bill would authorize SBA to deny such assistance to an opinion molder if the aid would be used primarily to (1) advance or inhibit religion; (2) threaten the overthrow of organized Government by unlawful means; or (3) engage in any illegal activity or the dissemination of obscene materials which may be unlawful in any jurisdiction in which the small business concern may operate. The bill would allow an applicant a hearing in which to challenge its denial.

While SBA disagrees with certain portions of S. 2084 as it is currently drafted, SBA supports a congressional review of the opinion molder policy. The present rule, though necessary, has not been easy to administer. SBA has created numerous regulatory exceptions to the rule in order to reconcile its restrictions with the Agency's statutory purpose of fostering the growth and participation of small businesses in an environment of free competition (15 U.S.C. § 631(a)). Therefore, SBA welcomes congressional guidance in this area.

Nevertheless, SBA would like to suggest the following changes in S. 2084, as currently drafted. First, a major policy change such as is contemplated by this bill should apply to all loan assistance, not only to guarantee assistance. Therefore, the Agency would add "direct loans or" in front of the words "guarantees under this Act," in proposed section 4(d)(1).

Second, SBA would delete the exception found in proposed section 4(d)(2)(B) which would permit SBA to deny guarantee assistance to opinion molders where such assistance will be "used primarily to threaten the overthrow of organized government by unlawful means." SBA objects to this exception on two grounds. First, this exception would require SBA to look to the content of various publications or communications, which is constitutionally proscribed. Secondly, the exception is overly broad in that, for example, it would include publishers of even theoretical works advocating the overthrow of other nation's governments. Therefore, SBA would delete exception 4(d)(2)(B) in its entirety.

Third, in proposed section 4(d)(2)(C), SBA would delete the reference to "the dissemination of obscene materials which may be unlawful in any jurisdiction in which the small business concern may operate." As presently worded, the bill would

require SBA to determine whether certain communications are obscene in a given jurisdiction without benefit of such a determination officially by the local authorities. This would place SBA in the untenable role of censor and, in addition to possible constitutional problems, would be far more difficult to administer than the present opinion molder rule. In addition, the prohibition against assistance to illegal businesses contained in the bill is sufficient to thwart assistance to businesses already adjudged to violate local obscenity laws.

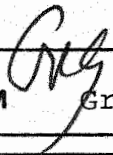
Fourth, SBA opposes the bill's inclusion of a hearing requirement for any applicant who has been denied financial assistance under the proposed exceptions. Such a requirement would be time-consuming and burdensome to administer and would, therefore, vastly increase the cost of administering the business loan program. Moreover, it would significantly delay an applicant's ultimate recourse to judicial review. Therefore, SBA would delete the phrase "after an opportunity for hearing" from proposed section 4(d)(2).

Similarly, SBA suggests deleting proposed section 4(d)(3) which provides for "review" of the Agency's determination. The right to judicial review of a denial of financial assistance is afforded any applicant under current law and does not require an explicit statutory reiteration.

Thank you for the opportunity to comment on S. 2084. We welcome congressional guidance in what has shown to be an administratively difficult area.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO John Roberts	Take necessary action ☐
	Approval or signature ☐
	Comment ☐
	Prepare reply ☐
	Discuss with me ☐
	For your information ☐
	See remarks below ☐
FROM  Greg Jones 2/16/84	DATE

REMARKS

OMB is on the hook to give the Committee a letter for its hearing next week on Presidential libraries.

Could you look this over* and see if you think it's OK?

Please call me or Jim Murr (x3856) . on Friday if you can and give us the word.

Thanks a million.

2/17
9:30 -
no direction
JGB



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

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

DRAFT

Dear Mr. Chairman:

This letter presents the views of the Office of Management and Budget (OMB) on legislation currently pending before your Committee concerning Presidential libraries. These bills would generally change the ways in which the libraries of former Presidents are funded and operated. In particular:

- o H.R. 2446 would prohibit the establishment of any new Federally-supported library for any former President after January 20, 1985. Instead, the bill envisions the construction of a single, central Presidential library for the use of all future former Presidents.1/
- o H.R. 3138 would prohibit the General Services Administration (GSA) from accepting a Presidential library on behalf of the United States unless there are sufficient privately-donated funds in the National Archives Trust Fund to maintain the library. (Under current procedure, maintenance costs are covered out of appropriated funds.)
- o H.R. 4017 would prohibit GSA from accepting any future Presidential libraries on behalf of the United States.

As you are certainly aware, this Administration is strongly committed to bringing the growth in unnecessary Federal spending under control, with a view toward elimination of all but absolutely essential expenditures.

1/ H.R. 2446 also concerns staff and services provided to former Presidents, as well as Secret Service protection afforded former Presidents, their families, and former Vice Presidents. In this connection, the Department of Justice has advised that section 303 of H.R. 2446, which would require the Secretary of the Treasury to obtain the approval of an advisory committee before extending Secret Service protection to particular individuals, would be an unconstitutional abrogation of the doctrine of separation of powers. The Justice Department has also advised that section 103 of H.R. 2446 -- concerning the President's authority to dispose of Presidential records -- must be interpreted to recognize the principle that the President, and not the Archivist of the United States, is the ultimate authority in determining the disposal of Presidential records. I understand that the Justice Department intends to communicate directly with the Committee with respect to these matters.

To the extent that the legislation pending before the Committee has as its goal a reduction in questionable spending, we are certainly sympathetic to its goals. As a general rule, however, the Administration is opposed to the imposition of additional legislative restrictions on the privileges and prerogatives of former Presidents. In our view, the existing statutory scheme with respect to former Presidents -- including their libraries -- is adequate and should not be changed in any major respect at this time. It is for this reason that the Administration opposes each of the bills that your Committee is considering.

We believe that the major changes affecting the libraries of former Presidents that this legislation envisions are neither necessary nor desirable. Libraries of former Presidents are national resources that are invaluable to scholars, students, and others engaged in historical research. The papers and other Presidential materials that they house belong to the United States and should be maintained and cared for by the Federal Government. This is, we think, an entirely appropriate Federal responsibility.

In its reports to the Committee, GSA has outlined many of the objections that we have to the specific bills under consideration, and I will not reiterate them here. I would, however, particularly direct your attention to the administrative reforms that GSA has undertaken to hold down the costs of operating and maintaining the libraries of former Presidents. GSA's guidelines establishing space requirements for Presidential libraries, for example, as well as the requirement that a new Presidential library must be fully equipped before GSA will accept it, have promise for helping to keep Federal costs under control. In addition, as GSA noted in its testimony before the Committee, Presidential libraries -- which, it should be recalled, are constructed with private funds -- are partially supported through additional private donations. These donations can reasonably be expected to increase as campaigns now underway at several libraries begin to bear fruit.

The Administration is certainly willing to work with the Committee to explore alternatives to the present system under which libraries of former Presidents are operated. We believe, however, that the bills pending before the Committee are too drastic in their approaches and do not recognize the obligation that the United States Government has for the protection and preservation of the records of former Presidents.

Sincerely,

David A. Stockman

Director



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

file
SPECIAL

February 16, 1984

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer

General Services Administration

Department of the Treasury

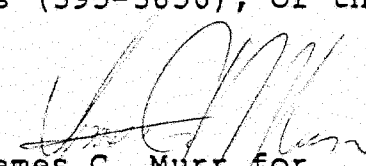
SUBJECT: Justice views on H.R. 2446, a bill entitled the
"Former Presidents Facilities and Services Reform Act
of 1983."

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

COB WEDNESDAY, FEBRUARY 22, 1984.

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


James C. Murr for
Assistant Director for
Legislative Reference

Enclosures

cc: J. Roberts
S. Smith
M. Chaffee



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 letter presents the views of the Department of Justice on H.R. 2446, a bill entitled the "Former Presidents Facilities and Services Reform Act of 1983." Our comments are confined to the constitutional issues raised by H.R. 2446. We understand that the ~~Department of the Treasury~~, the General Services Administration and the Office of Management and Budget will also convey their views on this legislation.

The Department of Justice opposes enactment of this legislation.

Title III - Section 303

Section 303 of H.R. 2446 authorizes the Secretary of the Treasury to provide for the extension or reinstatement of protection to a former President, his spouse or children beyond the period provided for in section 302(b) of H.R. 2446. Section 303(a) permits the Secretary of the Treasury to authorize protection for a period of one year in the case of a former President and six months in the case of a former President's spouse or minor child upon a finding that "a serious threat warranting such protection exists." However, protection can be extended beyond these initial periods only upon:

the written request of the individual desiring such protection and upon the approval of the advisory committee established by the first section of the joint resolution entitled "A joint resolution to authorize the United States Secret Service to furnish protection to major Presidential or Vice Presidential candidates" approved June 6, 1968 (82 Stat. 170; 18 U.S.C. 3056 note). (Emphasis added)

The advisory committee referred to in the quoted language of section 303(a)(2) consists of the Speaker of the House, the minority leader of the House of Representatives, the majority leader of the Senate, the minority leader of the Senate and one additional member selected by other members of the advisory committee. The evident intent of this provision is that the advisory committee should play an active and possibly determining role in providing for extensions of Secret Service protection to former Presidents and their families.

It is fundamental that officers who perform Executive duties must be appointed pursuant to the Appointments Clause of the Constitution. Art. II, section 2, cl. 2, Buckley v. Valeo, 424 U.S. 1 (1976). Those who are vested with authority that amounts to "the performance of a significant governmental duty exercised pursuant to a public law," Buckley v. Valeo, supra at 141, must be appointed in a manner consistent with that clause. In brief, such individuals must be appointed by the President by and with the advice and consent of the Senate, or if authorized by Congress, by the President alone, the courts or the heads of departments. Buckley v. Valeo, supra. at 124-41.

The Secret Service, as part of the Department of the Treasury, is an Executive Branch agency. It carries out basic law enforcement activities assigned to it by federal law. To the extent that the advisory committee, which consists of members of the Legislative Branch, will exercise effective control over decisions about Secret Service activities and thus will perform significant Executive functions, section 303 of H.R. 2446 is constitutionally objectionable. This is the case because the advisory committee members are not appointed in a manner consistent with the Appointments Clause.

We would add that 303(c)(1) establishes an "Advisory Panel on Secret Service Protection," the nine members of which are appointed by the Comptroller General. The role of the Advisory Panel appears to be limited to making recommendations, and not exercising "significant Executive functions." To the degree that the Advisory Panel's functions are so limited, the objections raised to the advisory committee are not pertinent to the panel.

Title I - Section 103

Section 103 of H.R. 2446 would amend present law, 44 U.S.C. 2203(c), to read as follows:

"(c) During his term of office, the President shall substantially complete the disposal of his Presidential records which no longer have administrative, historical, informational, or evidentiary value. Prior to disposing of any such records, the President shall obtain the

written views of the Archivist concerning the proposed disposal of such Presidential records and may not dispose of any records with respect to which the Archivist notifies the President that he intends to take action under subsection (e).".

Present 44 U.S.C. 2203(c) is similar to section 102 and provides:

(c) During his term of office, the President may dispose of those of his Presidential records that no longer have administrative, historical, informational, or evidentiary value if -

(1) the President obtains the views, in writing, of the Archivist concerning the proposed disposal of such Presidential records; and

(2) the Archivist states that he does not intend to take any action under subsection (e) of this section.

Section 103, like present law, appears to place in the Archivist the authority to make decisions concerning disposal of Presidential records. We believe that both the present and proposed provision must assume that the Archivist, in performing this function, is guided by the President and subject to this authority.

The Archivist is an appointee of the Administrator of the General Services Administration. See 44 U.S.C. 2102. The Administrator is himself a Presidential appointee who occupies a position within the Executive Branch and serves at the pleasure of the President, see 40 U.S.C. 751(b), as do other heads of Executive departments and agencies. As is true in general regarding such officials, they are ultimately responsible to the President and the President may instruct them in the performance of their duties in a manner consistent with applicable law.

Officials, such as the Archivist, who perform Executive functions must report ultimately to the heads of their respective departments and agencies, who, in turn, must report to the President. In order to fulfill his constitutional duty to take care that the laws are faithfully executed, the President must be able to supervise the execution of the laws within the Executive Branch. This follows from the principle, embodied in Article II of the Constitution, that the Executive power is vested in the President. See Myers v. United States, 272 U.S. 52, 163-64 (1926). In order to be consistent with the Constitution, section 103 must be interpreted to recognize the principle that the President is the ultimate authority in determining the disposal of records.

Title I in General

Finally, as now written, Title I of the bill would authorize the Administrator of GSA to submit to Congress a prospectus for the establishment of a central Presidential library, to provide for the temporary storage of the Presidential records of former Presidents, and to take certain steps "in administering the central Presidential library." The bill does not, however, explicitly give the Administrator the authority to establish a central Presidential library, and only implicitly authorizes administration of such library. Although we believe the intent of the bill is to give the Administrator such authority, we cannot read its terms as now written to provide such authority. We therefore must object to the bill unless revised to state explicitly the Administrator's authority to establish and administer a central Presidential library.

SUMMARY

For the above reasons, the Department of Justice strongly opposes enactment of H.R. 2446.

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

Sincerely, .

ROBERT A. McCONNELL
Assistant Attorney General

THE WHITE HOUSE

WASHINGTON

February 16, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: H.R. 2898 -- Utah Paiute Trust Lands
and Economic Development Act

Richard Darman has asked for comments by close of business today on the above-referenced enrolled bill. This bill would transfer 4,770 acres of Federal land to the Utah Paiute Tribe, and establish a \$2.5 million fund for the economic development of the Tribe. Public Law 96-227, enacted in April of 1980, authorized the transfer of 15,000 acres to the Tribe. Problems have arisen with that contemplated transfer, and this bill authorizes an alternative acceptable to all interested parties. The bill specifies that the 4,770 acres and \$2.5 million "shall be in complete fulfillment of the provisions of Public Law 96-227."

Of the miscellaneous provisions in the bill the only one raising legal issues is section 3(a), designed to preserve rights of the Paiute to use the land in question for religious purposes. The provision precludes the Secretary of Agriculture from denying the Paiutes the right to use the land on a nonexclusive basis for religious ceremonies, and on an exclusive basis for such purposes during four specified weeks. Under the Supreme Court's misguided and confused Establishment Clause jurisprudence, I can see someone articulating a credible challenge to this provision. For four weeks each year Federal law would deny to others possible use of the national forest land, for the explicit purpose of permitting religious rites to take place. I do not think such a challenge should succeed, in light of the special status of Indian trust lands, and in any event section 3(a) is probably severable from the remainder of the Act.

The bill passed both Houses by voice vote. OMB, Interior, and Agriculture recommend approval, Treasury has no objection, and Justice defers to Interior. I have reviewed the memorandum for the President prepared by OMB Assistant Director for Legislative Reference James Frey, and the bill itself, and have no objection to the President approving the bill.

THE WHITE HOUSE

WASHINGTON

February 16, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

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

SUBJECT: H.R. 2898 -- Utah Paiute Trust Lands
and Economic Development Act

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

FFF:JGR:aea 2/16/84

cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

February 16, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: H.R. 2898 -- Utah Paiute Trust Lands
and Economic Development Act

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

FFF:JGR:aea 2/16/84
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: Richard Darman☐ MI Mail Report

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

Subject: HR. 2898 - UTAH PAIUTE TRUST
Lands and Economic Development Act

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>CUHOLL</u>		ORIGINATOR	<u>84.02.15</u>			<u>1/1</u>
<u>CUAT18</u>		Referral Note: <u>D</u>	<u>84.02.15</u>			<u>S 84.02.16</u>
		Referral Note:				<u>C.O.B.</u>
			<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>
		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 C - Completed
B - Non-Special Referral S - Suspended

FOR OUTGOING CORRESPONDENCE:

Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

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Send all routing updates to Central Reference (Room 75, OEOP).

Always return completed correspondence record to Central Files.

Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

WHITE HOUSE STAFFING MEMORANDUM

DATE: 2/15/84 ACTION/CONCURRENCE/COMMENT DUE BY: c.o.b. TOMORROW, 2/16

SUBJECT: H.R. 2898 - UTAH PAIUTE TRUST LANDS AND ECONOMIC DEVELOPMENT ACT

	ACTION FYI			ACTION FYI	
VICE PRESIDENT	☐	☐	McFARLANE	☐	☐
MEESE	☐	☒	McMANUS	☐	☐
BAKER	☐	☒	MURPHY	☐	☐
DEAVER	☐	☒	OGLESBY	☒	☐
STOCKMAN	☐	☐	ROGERS	☐	☐
DARMAN	☐	☒	SPEAKES	☐	☐
FELDSTEIN	☐	☐	SVAHN	☒	☐
FIELDING	☐	☐	VERSTANDIG	☒	☐
FULLER	☒	☐	WHITTLESEY	☐	☐
HERRINGTON	☐	☐		☐	☐
HICKEY	☐	☐		☐	☐
JENKINS	☐	☐		☐	☐

REMARKS:

Please provide any comments/recommendations by c.o.b. tomorrow, February 16th.

Thank you.

RESPONSE:

1984 FEB 15 PM 1:48

Richard G. Darman
Assistant to the President
Ext. 2702



EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

FEB 15 1984

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 2898 - Utah Paiute Trust Lands and
Economic Development Fund
Sponsor - Rep. Marriott (R) Utah

Last Day for Action

February 21, 1984 - Tuesday

Purpose

- (1) Provides that approximately 4,770 acres of public land in the State of Utah be held in trust for the Utah Paiute Tribe and
- (2) establishes a \$2.5 million trust fund for the Tribe.

Agency Recommendations

Office of Management and Budget	Approval
Department of the Interior	Approval
Department of Agriculture	Approval (Informally)
Department of the Treasury	No objection (Informally)
Department of Justice	Defers to Interior

Discussion

In April of 1980 the Utah Paiute Tribe was restored to federally-recognized status by the Paiute Indian Tribe of Utah Restoration Act, P.L. 96-227. The Act also authorized the transfer of up to 15,000 acres of land to the Utah Paiute Tribe to be held in trust by the United States. Following extensive tribal consultation with Federal, State and local officials, it was apparent that obtaining the 15,000 acres called for in P.L. 96-227 would be problematical.

H.R. 2898 represents a compromise, supported by the Executive branch, Congress, the Paiutes, the State of Utah, and interested local citizens, that would (1) transfer 4,770 acres of Bureau of Land Management land to the Tribe, (2) ensure that the Paiutes have access to their religious sites in the National Forest at Fish Lake on a non-exclusive basis year-round, and on an exclusive basis for two, two week periods a year, and (3) establish a \$2.5 million Paiute Indian Tribe of Utah Economic Development and Tribal Government Fund for economic development and tribal government purposes. H.R. 2898 prohibits any distribution of (1) trust fund principal to the Tribe or its members and (2) accrued interest for per capita payments. In addition not

more than five percent of such funds may be used by the Tribe for the payment of legal counsel. The trust fund was included in H.R. 2898 in lieu of the additional lands that were authorized by P.L. 96-227, but unavailable for transfer to the Tribe.

The enrolled bill clearly stipulates that the land transfer, coupled with the establishment of the trust fund, fully meets the requirements of P.L. 96-227 regarding enlargement of the Paiutes' reservation. Consistent with most Indian reservation enlargement legislation, H.R. 2898 stipulates a number of technical terms and conditions regarding how the Secretary of the Interior will administer the Act.

Finally, the enrolled bill would approve two plans for judgment distributions awarded by the U.S. Court of Claims to the Creek Nation and the Sisseton-Wahpeton Sioux. However, as Interior notes in its enrolled bill views letter, this authority is no longer needed because these plans were approved administratively, under the Judgment Fund Distribution Act, in January.

As enrolled, H.R. 2898 incorporates the Administration's recommended amendments. H.R. 2898 passed both Houses of the Congress by voice vote.

(Signed) James M. Frey

Assistant Director for
Legislative Reference

Enclosures