Collection: Roberts, John G.: Files
Folder Title: JGR/Enrolled Bills – July 1984 (3 of 5)
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THE WHITE HOUSE

WASHINGTON

July 13, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Enrolled Bill H.R. 4997 -- Marine Mammal Protection Act Appropriation Authorizations and Miscellaneous Amendments

Richard Darman has asked for comments on the above-referenced enrolled bill by close of business today. The bill authorizes appropriations for the marine mammal protection activities of the Departments of Commerce and the Interior and the Marine Mammal Commission (MMC).

The bill also contains several other, objectionable provisions. None of these are serious enough to counsel a veto, but both State and Justice have submitted signing statements addressed to separate items. The bill changes the procedures for selecting the members of the MMC, requiring that the President choose from a list unanimously agreed to by the Chairman of the CEQ, the Secretary of the Smithsonian, the Director of the NSF, and the Chairman of the National Academy of Sciences. This is an unfortunate restriction on the President's powers, but it is not unconstitutional. The President can insist on successive lists if no candidate meets his approval, and the requirement that the appointees secure the approval of the named individuals is simply a qualification for the office, not a *post hoc* veto of the President's choice.

Title II of the bill requires the Secretary of Commerce to establish a federally-funded National Coastal Resource Research and Development Institute. The Director of this Institute, however, is to be appointed by the Chancellor of the Oregon Board of Higher Education, and the policies of the Institute would be set by a Board of Governors composed of representatives of the governors of Oregon, Alaska, Washington, California, and Hawaii. Justice objects to this provision as potentially violative of the Appointments Clause, if the Institute -- established by Federal law -- is considered a Federal agency, and if the Board of Governors and Director -- not appointed by the President -- exercise direct authority to make grants and dispense Federal funds for specific projects. Justice thinks the constitutional problems can be avoided by a careful construction of the bill, treating the Institute as a state entity and retaining authority in the Secretary of Commerce over any grants the Institute might make from Federal funds. Justice has submitted a signing statement calling attention to the problem and stating that the President has directed the Secretary of Commerce to consult with the Attorney General on implementation of the Act. Justice's interpretation is obviously not what Congress intended, but it would avoid a constitutional problem. Insisting on that interpretation at this point permits the President to preserve the constitutional point without vetoing the bill. I do not, however, foresee smooth sailing for this Institute.

An unrelated rider to Title II would provide relief to a parish in Louisiana that, unlike seven other similarly affected parishes, failed to appeal a FEMA determination within the established deadline. The provision would permit the delinquent parish to pursue its appeal.

Title III of the bill extends and amends the Fisherman's Protective Act, continuing and revising an insurance program to compensate owners and crews of vessels seized by foreign governments. With respect to this provision State recommends a signing statement stressing that claimants are not entitled to compensation if their vessels were seized because of violations of international agreements recognized by the United States. The proposed signing statement also quite properly characterizes a distinction in the statute between executive agreements and treaties as "legally unsound." As representatives of the executive we should resist any Congressional effort to denigrate the legal status of executive agreements as opposed to treaties. As State points out in the draft statement, the distinction in the bill has no practical effect, since claimants must first prove the seizure violated international law. If the seizure was pursuant to an executive agreement, it would not violate international law, so the provision rendering the program inapplicable to seizures pursuant to treaties adds nothing with respect to treaties not already applicable to executive agreements.

Title IV would expand exemptions from inspection requirements for medium-sized and small fishing vessels.

I agree with both State and Justice on the need for their respective signing statements. This bill was poorly drafted as the latest recess neared, and as a result it contains several flawed provisions. Those provisions will cause problems, particularly with respect to the legally bizarre Institute, but they do not justify disapproval. We should simply put the best possible face on the bill, which is what the State and Justice statements attempt to do.

THE WHITE HOUSE

WASHINGTON

July 13, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

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

SUBJECT: Enrolled Bill H.R. 4997 -- Marine Mammal Protection Act Appropriation Authorizations and Miscellaneous Amendments

Counsel's Office has reviewed the above-referenced enrolled bill. I agree with the comments of several affected departments and agencies that the bill contains problematic provisions, but also agree that these provisions do not justify disapproval of the entire bill. It seems likely that establishment and administration of the National Coastal Resources Research and Development Institute will be particularly difficult. I agree that the Justice Department signing statement should be issued, but would note that the Justice interpretation of the pertinent provisions -- necessary to preserve the Institute from constitutional infirmity -- is likely to come as something of a surprise to the draftsmen of the statute.

I also agree that the State Department statement should be issued. From the point of view of Presidential power, it is particularly important to reject in this context, as the State signing statement does, the distinction between executive agreements and treaties approved by the Senate. Obviously the State and Justice statements should be merged into a single statement.

FFF:JGR:aea 7/13/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

July 13, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Enrolled Bill H.R. 4997 -- Marine Mammal Protection Act Appropriation Authorizations and Miscellaneous Amendments

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FFF:JGR:aea 7/13/84
cc: FFFielding/JGRoberts/Subj/Chron

ID # 216538 CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

JGR

Name of Correspondent: Richard Darman

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

Subject: Enrolled Bill H.R. 4997 - Marine Mammal Protection Act Appropriation Authorizations and Miscellaneous Amendments

ROUTE TO: Office/Agency (Staff Name)	ACTION: Action Code	Tracking Date YY/MM/DD	DISPOSITION: Type of Response	Code	Completion Date YY/MM/DD
Cutton	ORIGINATOR	84/07/13			/ /
Referral Note:					
CUAT 18	D	84/07/13		S	84/07/13
Referral Note:					OOB
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Referral Note:					

ACTION CODES:
- A - Appropriate Action
- C - Comment/Recommendation
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- F - Furnish Fact Sheet to be used as Enclosure
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DISPOSITION CODES:
- A - Answered
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- S - Suspended

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Document No. 216538SS

WHITE HOUSE STAFFING MEMORANDUM

DATE: 7/12/84 ACTION/CONCURRENCE/COMMENT DUE BY: c.o.b. FRIDAY, 7/13

SUBJECT: Enrolled Bill H.R. 4997 - Marine Mammal Protection Act Appropriation Authorizations and Miscellaneous Amendments

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

REMARKS:

May we have your comments/recommendations on the attached enrolled bill by cob FRIDAY, July 13.

Do you recommend the attached signing statement be issued? If so, please review.

Thank you.

RESPONSE:

1984 JUL 13 AM 8: 05

Richard G. Darman
Assistant to the President
Ext. 2702

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

1984 JUL 12 PM 5: 18

JUL 12 1984

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 4997 - Marine-Mammal Protection Act Appropriation Authorizations and Miscellaneous Amendments
Sponsors - Rep. Breaux (D) Louisiana and Rep. Forsythe (R) New Jersey

Last Day for Action

July 18, 1984 - Wednesday

Purpose

(1) Authorizes appropriations for the Departments of Commerce and the Interior and the Marine Mammal Commission for marine conservation and management activities; (2) extends a general permit allowing the incidental catch of certain marine mammals by commercial tuna fishermen; (3) extends three Governing International Fishing Agreements; (4) stipulates marine mammal protection requirements for certain tuna exporting nations; (5) provides for the establishment of the National Coastal Resources Research and Development Institute; (6) amends the Fishermen's Protective Act; (7) amends safety and manning laws governing commercial fishing vessels; and (8) contains a provision related to a determination made by the Federal Emergency Management Agency.

Agency Recommendations

Office of Management and Budget	Approval
Department of Commerce	Approval
Department of the Interior	Approval
Department of State	Approval (Signing statement attached)
Department of the Treasury	Approval
Marine Mammal Commission	Approval(Informally)
National Science Foundation	Approval
Smithsonian Institution	Approval(Informally)
Council on Environmental Quality	Approval
Department of Justice	No objection (Signing statement attached)
Department of Transportation	No objection
Federal Emergency Management Agency	Defers

Discussion

H.R. 4997, as originally introduced and supported by the Administration, authorized appropriations for marine mammal protection activities of the Departments of Commerce and the Interior and the Marine Mammal Commission (MMC). As enrolled, however, H.R. 4997 contains numerous miscellaneous, and in some cases unrelated, provisions which were added just prior to the recent Congressional adjournment. While some of these provisions are objectionable to individual agencies, the concerned agencies generally believe that on balance the provisions governing certain international fishery agreements and fishery conservation and management programs are of sufficient importance to warrant your approval of the enrolled bill.

A discussion of the major provisions of H.R. 4997 follows.

Title I -- Marine Mammal Protection Act and Other Fishery Law Amendments

-- Marine Mammal Protection Act (MMPA)

Title I of H.R. 4997 would authorize appropriations for marine mammal protection activities, pursuant to the MMPA, of $2.5 million for fiscal year 1985 and $3 million annually for each of fiscal years 1986-1988 for the Department of the Interior. Appropriations of $8.8 million would be authorized for each of fiscal years 1985 through 1988 for the Department of Commerce, and $1.1 million for each of those years for the Marine Mammal Commission. The 1985 authorization levels in total exceed the 1985 Budget requests by $3.4 million.

In addition, Title I would amend the MMPA to require that Marine Mammal Commission members be selected by the President from a list of nominees submitted by the Chairman of the Council on Environmental Quality and unanimously agreed to by the Chairman, the Secretary of the Smithsonian Institution, the Director of the National Science Foundation and the Chairman of the National Academy of Sciences. Title I would also require that the staff of the Commission must be no less than 11 at any one time; there are currently 9 employees.

-- Extension of General Fishing Permit and New Monitoring Program

H.R. 4997 would extend indefinitely the current permit issued to the American Tunaboat Association in 1980 for the incidental taking of porpoise and other marine mammals in connection with commercial purse seine tuna fishing. In its enrolled bill views letter, the Department of Commerce advises that this legislative extension will avoid a lengthy formal rulemaking proceeding, during which time the fishing industry could be shutdown for lack of authority to fish. According to Commerce, such a shutdown could result in severe economic damage to the industry.

The extension of this fishing permit is, however, subject to conditions specified in the enrolled bill (e.g., the Secretary of Commerce may make adjustments to the permit with regard to fishing gear requirements). Also, beginning on January 1, 1985, the Secretary would be required to conduct a scientific research program to monitor, for at least 5 consecutive years, stock levels of porpoise and other marine mammals taken incidentally during tuna fishing. If such monitoring demonstrates that the fishing is having an adverse effect, the Secretary would be authorized to take actions to mitigate such effects. Appropriations of $4 million for the period 1985-1988 are authorized for the monitoring program.

-- Governing International Fishing Agreements (GIFA's)

Under existing law, foreign nations are prohibited from fishing in the U.S. fishery conservation zone unless such fishing is conducted pursuant to a GIFA or other acceptable international agreement. The enrolled bill would extend the GIFA between the United States and the European Economic Community, which expired on July 1, 1984, until the effective date of a new GIFA or September 30, 1984. It would also extend the GIFA between the United States and both the Soviet Union and Poland from July 1, 1984, until December 31, 1985.

Extension of these agreements will benefit U.S. fishermen, who engage in joint venture fishing operations with the foreign fishing vessels, as well as the concerned foreign nations. In its enrolled bill views letter, the Department of State expresses strong support for extension of the GIFA's.

-- Provision Affecting Tuna Exporting Nations

H.R. 4997 would require that any nation exporting yellowfin tuna harvested with purse seine nets in the eastern tropical Pacific Ocean must demonstrate to the Secretary of Commerce that: (1) it has adopted a regulatory program, comparable to that of the United States, governing the incidental taking of marine mammals and (2) its average rate of incidental taking is comparable to that of the United States. This requirement is intended to insure the equitable treatment of the United States tuna fleet when compared with foreign fishing fleets.

Title II - Coastal Resources Research and Development Institute

Title II of H.R. 4997, sponsored by Senator Packwood, would require the Secretary of Commerce to provide for the establishment of a National Coastal Resources Research and Development Institute, to be administered by the Oregon State Marine Science Center. The Director of the Institute would be appointed by the Chancellor of the Oregon Board of Higher Education. The Institute would conduct research and carry out projects to promote efficient and responsible development of ocean and coastal resources. Annual appropriations of $5 million would be authorized for this purpose beginning in 1985. Institute policies would be set by a Board of Governors composed of representatives of the Governors of Oregon, Alaska, Washington, California, and Hawaii. The enrolled bill also specifies that employees of the Institute will not be considered employees of the Federal Government for any purpose.

The Department of Commerce states in its enrolled bill views letter, and we agree, that funds for Institute activities should only be made available through competition with other institutions of higher learning. Accordingly, we anticipate that any request for funds for the Institute will be subject to close scrutiny.

The Department of Justice in its enrolled bill views letter expresses concern that unless establishment of the Institute is carried out properly by Commerce, it could raise constitutional questions as to the Appointments Clause. Accordingly, Justice recommends that a signing statement be issued to address this concern and to direct the Secretary of Commerce to seek the advice of the Attorney General in establishing the Institute in a constitutional manner. Justice has prepared a signing statement, which is attached to its views letter, for your consideration.

-- Unrelated Federal Emergency Management Agency (FEMA) Provision

Title II of H.R. 4997 also provides that for purposes of the National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973, a flood elevation determination made by the Director of FEMA for Cameron Parish, Louisiana, would not be final until one year after enactment of this legislation. According to a statement on the House floor, the practical effect of this provision will be to relieve the parish from having to comply with certain FEMA construction standards (i.e., minimum elevation requirements for buildings to avoid flood damage) in order to maintain eligibility for certain Federal housing loan programs. This one-year delay will permit Cameron Parish to appeal the FEMA requirement as 7 other Louisiana parishes are doing; for some unexplained reason, Cameron failed to file an appeal within an established deadline. While FEMA has serious concerns about the precedent established by this provision, it defers to other concerned agencies with respect to approval or disapproval of the enrolled bill.

Title III - Fishermen's Protective Act (FPA) Amendments

-- Extension of Section 7 of the FPA

As requested by the Administration, Title III of H.R. 4997 would extend Section 7 for 3 years, through October 1, 1987. This section provides for a voluntary insurance program to compensate U.S. fishing vessel owners and crews who suffer financial losses resulting from the seizure of their vessels by foreign governments on the basis of jurisdictional claims not recognized by the U.S. Government. As also requested by the Administration, the enrolled bill would consolidate in the Department of State the administration of claim payments to fishermen. Currently, both the Departments of State and the Treasury are involved in the administration of payments.

-- Other FPA Amendments

Title III would also: (1) revise existing standards for reviewing evidence in cases of factual disputes over claims; (2) make the FPA applicable to vessels seized under any fishing convention or treaty to which the U.S. is a party, if they were made with the advice and consent of the Senate and were in force at the time; and (3) permit the payment of claims for violations of foreign fishing jurisdictions recognized by the United States but enforced by a foreign nation in a manner inconsistent with international law as recognized by the United States. In its enrolled bill views letter, the Department of State expresses concern about the revised standard for reviewing evidence and recommends that a signing statement, which is attached to its views letter, be issued to clarify how this language will be construed. Finally, these provisions would apply retroactively to April 1983, which could permit the payment of a limited number of claims not heretofore eligible for payment. A final determination on such claims would still have to be made by the State Department, however.

With respect to item number three in the preceding paragraph, the Department of Transportation notes in its views letter that this may (1) complicate its general international law enforcement cooperative activities and (2) lead to violations of existing law which prohibit U.S. vessels from fishing in another country's recognized territorial waters or fishery conservation management zones. Notwithstanding these concerns, however, the Department does not object to approval of the enrolled bill.

Title IV -- Commercial Fishing Industry Vessel Act

Title IV of H.R. 4997 would expand and make permanent existing exemptions from marine safety inspection laws for fishing, fish tender, and fish processing vessels. Current law provides exemption from inspection requirements for only these types of vessels operating in specific fisheries of Alaska, Oregon, and Washington. The exemptions for the fish processing and tender vessels expire in 1988. The enrolled bill would grant a permanent exemption to fishing, fish tender, and fish processing vessels without any geographic or fishery limitations. Generally, under the provisions of H.R. 4997, large fish processing and fish tender vessels would still be subject to full inspection by the Coast Guard. Medium-size fish processing vessels, although exempt from inspection, would have to meet minimum safety standards (e.g., certain navigation, lifesaving, and fire protection equipment). In addition, H.R. 4997 would create a new category of "able seaman" -- involving less strict qualification criteria than currently required -- for medium-size fishing vessels. This would permit the employment of individuals who might not otherwise qualify for employment aboard a fishing vessel.

H.R. 4997 would also require the Secretary of Transportation to consult with the fishing industry when prescribing safety regulations for large fish processing or fish tender vessels. Other miscellaneous provisions in the Title would (1) expand the exemption for certain fishing vessels operators from the withholding requirements of State tax laws to fish tender vessels and all sizes of fish processing vessels and (2) permit certain fishing vessels to transport general cargo to remote Alaskan communities if such communities are not served by common carriers. This latter authority would expire on January 1, 1990.

The Department of Transportation notes concern, in its views letter, that this Title will result in reductions in the number and qualifications of crew members and may increase the risk of vessel casualties.

Conclusion

As stated earlier, H.R. 4997 contains numerous miscellaneous provisions affecting a number of agencies. While some of these provisions are objectionable to individual agencies, none are sufficiently objectionable to warrant an agency making a veto recommendation. On balance, the provisions of the enrolled bill extending Governing International Fisheries Agreements and authorizing fishery conservation and management programs are of sufficient importance to warrant approval of H.R. 4997.

The enrolled bill was passed by voice vote by both Houses.

David A. Stockman
Director

Enclosures

Presidential Signing Statement

I am pleased to approve H.R. 4997, legislation to authorize funds for implementation of the Marine Mammal Protection Act. I consider this legislation a major contribution to this Administration's conservation program. This legislation also provides for extension of three governing international fishery agreements between the United States and Poland, the Soviet Union and the European Economic Community. It thereby permits further joint venture operations between fishermen of the United States and fishermen of Poland, the Soviet Union, and our European trading partners.

I am signing this bill on the understanding that nothing contained in Section 303 will have the effect of permitting payment where the claimant was fishing in violation of regulations established in accordance with international law as recognized by the United States. Accordingly, claimants will continue to bear the burden of establishing the factual basis for any claim that a seizure was effected contrary to international law as recognized by the United States, and information received from foreign governments will continue to be taken into account in assessing such claims. Where the evidence in support of a claim is otherwise clear and convincing, a contrary statement of a foreign official will not preclude payment unless it is supported by similarly clear and convincing evidence. Further, I consider the textual distinction between Executive Agreements and Treaties to be legally unsound. However, since any seizure effected in accordance with an agreement in force is in accordance with international law as recognized by the United States, for purposes of Section 303, the amendment is without practical effect and I am therefore prepared to sign this bill notwithstanding my opposition to such unsupportable legal distinctions.

JV 1

ID # 241239 CU

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WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: Robert A. McConnell

John

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

Subject: H.R. 4997 an Act to authorize appropriations to carry out the Marine Mammal Protection Act of 1972

ROUTE TO: ACTION DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
W Holland	ORIGINATOR	84/07/11			/ /
Referral Note:	DD				
CWAT 18	A	DD 84/07/12			/ /
Referral Note:					
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U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

241239

11 JUL 1984

Honorable David A. Stockman
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Stockman:

This Department has examined a facsimile of the enrolled bill H.R. 4997, an Act to authorize appropriations to carry out the Marine Mammal Protection Act of 1972, for fiscal years 1985 through 1988, and for other purposes. Because we believe that Title II of the bill, establishing the National Coastal Resources Research and Development Institute (the "Institute"), raises important and fundamental constitutional issues, we recommend that the President include a signing statement with the bill expressing his concern regarding its constitutionality and directing the Secretary of Commerce to implement the Act, after consultation with the Attorney General, consistent with all applicable constitutional requirements.

Title II of the bill states that the Secretary of Commerce "shall provide for the establishment" of the Institute, which is to be "administered" by a state agency, the Oregon State Marine Science Center. In fulfilling its statutory mandate, the Institute would "conduct research and carry out educational and demonstration projects designed to promote the efficient and responsible development of ocean and coastal resources, including arctic resources." The "policies" of the Institute would be determined by a six member Board of Governors, composed of representatives appointed by the Governors of five states -- Alaska, California, Hawaii, Oregon, and Washington. A separate state agency, the Oregon Board of Higher Education, would name the Institute's Director. Although the activities of the Institute would be subject to an "ongoing evaluation" by the Secretary of Commerce "to ensure that funds received by the Institute under this title are used in a manner consistent with [its] provisions," the bill specifies that employees of the Institute are not to be considered employees of the Federal government.

Because the Institute would be established under Federal law, a question can be raised whether the procedures for selecting its Board of Governors and Director satisfy the requirements of the Appointments Clause, Article II, § 2, cl. 2, of the Constitution. This Clause provides that the President shall nominate all "Officers of the United States" whose appointment is not otherwise provided in the Constitution. The Supreme Court has stated that the term "Officers" includes any persons "exercising significant authority pursuant to the laws of the United States." Buckley v. Valeo, 424 U.S. 1, 126, 140-41 (1976). Persons who are not Officers may perform functions that are basically "investigative and informative," which are removed from the administration and enforcement of the public law, such as advisory functions. Id. at 137-139. The Court has explicitly stated, however, that certain functions must be performed by properly appointed Officers of the United States. Id. at 140-141. These include, for example, the power (1) to make "determinations of eligibility for [public] funds," (2) to promulgate rules and regulations, (3) to issue advisory opinions, and (4) to conduct litigation to vindicate public rights. Id.

Unless a careful construction is given to Title II of this bill, the appointment by state officials of the Institute's Board of Directors, who set the "policies" for the Institute, and of its Director, who "administer[s]" the Institute, might be held to be unconstitutional. Under the Act, the Institute is to "conduct research and carry out educational and demonstration projects." Although the Appointments Clause does not preclude "investigative and informative" responsibilities from being undertaken by persons who are not Officers of the United States, the carrying out of "educational and demonstration projects" by the Institute appears to go beyond these functions to include the exercise of "significant authority" within the meaning of Buckley. In addition, the Act could be interpreted to give the Director and the Board of Governors independent authority to make grants and disperse funds for such projects. The right to "determin[e] . . . eligibility for [public] funds" is specifically reserved to Officers of the United States under Buckley. To avoid the constitutional problems occasioned by the appointment of these officials by state authorities, the Department of Justice would have opposed the bill in its present form if it had been asked to comment before its passage.

Despite our concerns, we believe that these constitutional problems can be avoided in this case through a careful construction of the bill -- a construction that would be supported by an appropriate Presidential signing statement and strict adherence to the fundamental principle that statutes should be construed to avoid constitutional problems. See Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). For example, the statute probably can be read merely to direct the Secretary of Commerce to "provide for the establishment" of the Institute under the auspices of the respective state governments pursuant state law, rather than as creating a Federal entity. This would make the Institute an instrumentality of state law, instead of Federal law. In addition, the authority of the Secretary of Commerce "to ensure that funds received by the Institute under this title are used in a manner consistent with the provisions of this title" could be read to require that he establish a grant agreement with the Institute and approve all grants of Federal money made by the Institute. Under this interpretation, Institute officials would not be making "determinations of eligibility for [public] funds." Thus, although we would only give a definitive construction to this statute after we have consulted with the Secretary of Commerce, we believe it could be implemented in a constitutional manner.

Because of these constitutional issues, it is important that the President express serious concerns in his signing statement regarding the bill's constitutionality and recognize the need for the bill to be construed carefully to avoid constitutional problems. This statement would also serve to remind Congress of the constitutional difficulties raised in the establishment of entities of this type, and would create a basis for a narrowing construction of the statute by the Executive branch. We have attached suggested language for a signing statement which we believe would accomplish these objectives.

Sincerely,

Robert A. McConnell

Robert A. McConnell
Assistant Attorney General
Office of Legislative and
Intergovernmental Affairs

STATEMENT BY THE PRESIDENT

I have today signed H.R. 4997, a bill to authorize appropriations to carry out the Marine Mammal Protection Act of 1972, for fiscal years 1985 through 1988, and for other purposes.

As its title indicates, the bill would authorize appropriations for the Marine Mammal Protection Act of 1972, as well as make several statutory amendments to that Act. The bill also provides for the establishment of a National Coastal Research and Development Institute. This Institute would "conduct research and carry out educational and demonstration projects designed to provide the efficient and responsible development of ocean and coastal resources."

Although I believe the Institute's efforts will make a valuable contribution to our understanding of important environmental issues, I am concerned that the structure Congress has chosen for administering the Institute could raise fundamental constitutional questions. Under the bill, the six member Board of Governors for the Institute, which sets the Institute's policies, would be appointed by Governors of various Western States, rather than by the President. The Director of the Institute would also be appointed by a state agency. The Attorney General has advised me that this vesting of appointment authority outside the Executive branch could constitute a violation of the Appointments Clause, Article II, § 2, cl. 2. The Supreme Court has decided that all "Officers of the United States," in other words, all persons "exercising significant authority pursuant to the laws of the United States," must be appointed by the President. Buckley v. Valeo, 424 U.S. 1, 126 (1976).

I fully support the important environmental goals which the Institute seeks to further. Nevertheless, this valid and worthy objective must be carried out consistent with the Appointments Clause. Accordingly, I have directed the Secretary of Commerce to seek the advice of the Attorney General in implementing this Act to ensure that the Act does not transgress constitutional limitations.

Memorandum

Subject	Date
Enrolled bill H.R. 5653	JUL 13 1984

To Robert A. McConnell
Assistant Attorney General
Office of Legislative and
Intergovernmental Affairs

From Larry L. Simms
Deputy Assistant Attorney
General
Office of Legal Counsel

Attn: John Logan

Attached please find a letter, prepared for your signature, to Director Stockman of the Office of Management and Budget, reflecting the Department's views on § 116 of enrolled bill H.R. 5653, "making appropriations for energy and water development for the fiscal year ending September 30, 1985, and for other purposes." As we discuss in the letter, § 116 contains an unconstitutional committee approval device. We do not recommend a veto or a presidential signing statement on this issue, but we do not suggest that our views be communicated to the Army Corps of Engineers, which will be responsible for implementing that provision.

7/16 –
Advised Darman's office that signing statement not necessary – will be signed today without one.
[illegible]

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable David A. Stockman
Director, Office of Management
and Budget
Washington, D.C. 20503

Dear Mr. Stockman:

We have examined a facsimile of the enrolled bill, H.R. 5653, "making appropriations for energy and water development for the fiscal year ending September 30, 1985, and for other purposes." Our comments are directed exclusively to § 116 of the bill. We believe this provision is unconstitutional under the decision of the Supreme Court in INS v. Chadha, 103 S. Ct. 2764 (1983), because it would purport to give committees of Congress the power to affect the legal rights of the Executive Branch, here the Secretary of the Army. We recommend that our conclusion with respect to the constitutionality of § 116, and our interpretation of the effect of that section, be communicated to the Chief Counsel of the Army Corps of Engineers. We do not, however, recommend a presidential signing statement on this issue.

Section 116 as written authorizes the Secretary of the Army to use funds appropriated by the bill to acquire improved real property or unimproved real property and to construct or have constructed on that property "an appropriate residence for the official use of Corps of Engineers Division Commanders in those areas where appropriate housing cannot otherwise be provided," and to operate and maintain that property. That authority is expressly made "[s]ubject to approval by the Committees on Appropriations." Thus, the Secretary of the Army may acquire property, construct residences, and operate and maintain that property if the Committees on Appropriations both "approve" the planned action. The Secretary's authority is, in effect, subject to veto if one of those committees fails to approve a particular exercise of that authority.

There is no doubt that this provision permits committees of Congress to affect the legal rights and duties of the President and the Secretary of the Army. As the Chief Justice stated, writing for the Court in Chadha, all actions by Congress (or its committees) having "the purpose and effect of altering the legal rights, duties and relations of persons, including . . . Executive Branch officials . . . ," 103 S. Ct. at 2787, are legislative actions that must be enacted pursuant to the Presentment Clauses of the Constitution (passage by both Houses of Congress and presentment to the President for his approval or veto). Because this provision falls squarely within the Court's analysis of legislative veto devices in Chadha, it is unconstitutional.

The question remains whether the unconstitutional committee approval device is severable from the underlying authority provided by § 116 to the Secretary of the Army to acquire, construct, operate, and maintain residences for the official use of Corps of Engineers Division Commanders. The severability of an unconstitutional provision from the rest of the statute to which it is attached presents a question of legislative intent: "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independent of that which is not," the invalid portion should be severed and the remaining statutory authority continued. INS v. Chadha, 103 S. Ct. at 2774, quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932). As further guidance, the Court in Chadha explained that "[a] provision is . . . presumed severable if what remains after severance 'is fully operative as a law'." 103 S. Ct. at 2775, quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. at 234.

In the short time available, we have been unable to obtain, and therefore to research, the legislative history of this bill. That history might give some indication of congressional intent on this question. However, the Supreme Court's analysis of the severability issue in Chadha, and particularly its summary affirmance of the D.C. Circuit's legislative veto decision in Consumer Energy Council of America v. Federal Energy Regulatory Commission, 673 F.2d 425, 442 (D.C. Cir. 1982), */ indicate that the presumption in favor of severability is strong, and that in the absence of very clear legislative history to the contrary, the Court would be reluctant to find a legislative veto device to be inseverable. We suggest that the Chief Counsel

*/ Aff'd sub nom. Process Gas Consumers Group v. Consumer Energy Council of America, 103 S. Ct. 3556 (1983).

of the Army Corps of Engineers may want to pursue this issue further, since his staff is undoubtedly familiar with the legislative history of this enrolled bill.

Because § 116 is a relatively minor provision of this enrolled bill, we do not believe it is necessary for the President to discuss the constitutionality of the section in a signing statement. We recommend, however, that our interpretation of the effect of this section be communicated to the Chief Counsel of the Army Corps of Engineers.

The Department of Justice defers to those agencies more directly concerned with the subject matter of the bill as to whether it should receive Executive approval.

Sincerely,

Robert A. McConnell
Assistant Attorney General
Office of Legislative and
Intergovernmental Affairs

THE WHITE HOUSE

WASHINGTON

July 13, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Enrolled Bill H.R. 3075 -- Small Business Computer Security and Education Act of 1984

Richard Darman has asked for comments on the above-referenced enrolled bill by close of business today. This bill creates an advisory committee, known as the Small Business Computer Security and Education Advisory Council, to advise the Small Business Administration (SBA) on the problem of computer crime as it effects small businesses. The membership is to include specified Federal Government officials as well as individuals representing various segments of the computer industry. (Since the latter type of appointee will serve in a representative capacity, the Federal conflict of interest laws will not apply to them). The bill also requires the SBA Administrator to establish a program to provide small businesses with information on computer crime.

A separate section of the bill authorizes the SBA to cooperate with profit-making entities in providing services to small businesses. This expands the SBA's authority, which is currently limited to cooperating with non-profit entities. The bill requires the SBA to take steps to ensure that its cooperation is not viewed as an endorsement of the profit-making entity. The provisions strike me as curious since the actions of the SBA in acting as a "co-sponsor" (the statutory term) with the profit-making entity cannot help but constitute an endorsement of the entity.

OMB and SBA recommend approval; Commerce and Defense have no objection; Justice defers. 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.

Attachment

THE WHITE HOUSE

WASHINGTON

July 13, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

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

SUBJECT: Enrolled Bill H.R. 3075 -- Small Business Computer Security and Education Act of 1984

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

FFF:JGR:aea 7/13/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

July 13, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Enrolled Bill H.R. 3075 -- Small Business Computer Security and Education Act of 1984

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

FFF:JGR:aea 7/13/84
cc: FFFielding/JGRoberts/Subj/Chron

ID # 216531 CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

Name of Correspondent: Richard Darman

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

Subject: Enrolled Bill H.R. 3075 - Small Business Computer Security and Education Act of 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
CUHOU	ORIGINATOR	84/07/12			/ /
Referral Note:					
CUAT 18	D	84/07/12		S	84/07/13
Referral Note:					COSB
		/ /			/ /
Referral Note:					
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Referral Note:					
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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.
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5/81

Document No. 216531SS

WHITE HOUSE STAFFING MEMORANDUM

DATE: 7/12 ACTION/CONCURRENCE/COMMENT DUE BY: c.o.b. FRIDAY, 7/13

SUBJECT: Enrolled Bill H.R. 3075 - Small Business Computer Security and Education Act of 1984

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

REMARKS:

Please provide comments/recommendations on the attached enrolled bill by c.o.b. TOMORROW, FRIDAY, JULY 13

Thank you.

RESPONSE:

1984 JUL 12 PM 2:12

Richard G. Darman
Assistant to the President
Ext. 2702

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

1984 JUL 12 PM 1:23

JUL 12 1984

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 3075 - Small Business Computer Security and Education Act of 1984
Sponsors - Rep. Wyden (D) Oregon and 23 others

Last Day for Action

July 18, 1984 - Wednesday

Purpose

To (1) establish the Computer Security and Education Advisory Council; (2) assist small businesses fight computer crime; and (3) encourage the private sector to cooperate in providing technical training to small businesses.

Agency Recommendations

Office of Management and Budget	Approval
Small Business Administration	Approval
Department of Commerce	No objection
Department of Defense	No objection
Department of Justice	Defers

Discussion

-- Computer Crime

Computer-related crime is a growing problem. According to the report of the House Committee on Small Business on H.R. 3075, computer crime may result in losses to industry in excess of $1 billion annually.

Many believe that small businesses face special problems with respect to computer crime. For example, small businesses are said often to lack the resources that are needed to establish and implement computer security measures. They are also said frequently to be without information about the potential losses that may result from computer-related crime.

The enrolled bill addresses the issue of computer crime as it affects small business in a number of ways. Its key provisions:

- o Require the Small Business Administration (SBA) to establish a "Small Business Computer Security and Education Advisory Council," to be comprised of representatives of SBA, the Departments of Commerce, Defense, and Justice, manufacturers of computer hardware and software, the computer security and services industry, the insurance industry, and the small business community;

- o Authorize the new Advisory Council to advise the SBA on a number of matters, including (1) the nature and scope of computer-related crime as it affects small business; (2) the effectiveness of existing law in deterring computer crime; and (3) the development of informational materials to assist small businesses in evaluating the effectiveness of their computer security systems;

- o Authorize SBA to request such information from other Federal agencies as may be necessary for the Advisory Council to carry out its responsibilities and require the agencies to provide the requested information, subject to the limitations of the Freedom of Information Act; and

- o Require SBA to establish a new small business security and education program to provide (1) small businesses with information about computer crime and security for computers owned or used by small business concerns; (2) periodic forums for small businesses to increase their awareness of computer crime; and (3) training opportunities to increase the understanding of small businesses of computer security techniques.

The Advisory Council, which would be required to meet at least once annually, terminates on October 1, 1988, although SBA may continue it indefinitely thereafter under other provisions of the Federal Advisory Committee Act or the Small Business Act. Federal members of the Council will serve without additional pay, and non-Federal members would be reimbursed for actual expenses, to the extent permitted under existing law.

-- Private Sector Cooperation

Under current law, SBA is authorized to cooperate with non-profit organizations in providing small businesses with counseling, technical training, and other kinds of management assistance. The enrolled bill extends this authorization on a trial basis to allow SBA to cooperate with for-profit organizations in providing management-related training and assistance (including assistance with respect to computer security matters). SBA is required, however, to take appropriate steps to ensure that its cooperation with a for-profit entity in providing technical assistance or training is not construed as an endorsement of the organization's services or products. These provisions terminate on October 1, 1988.

SBA will also be required to report to Congress no later than December 1, 1987, on the results of the assistance provided in cooperation with profit-making organizations.

* * * * *

H.R. 3075 passed both Houses by voice vote:

James M. Frey
Assistant Director for
Legislative Reference

Enclosures

Ninety-eighth Congress of the United States of America

AT THE SECOND SESSION

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

An Act

To amend the Small Business Act to establish a small business computer security and education program, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Small Business Computer Security and Education Act of 1984".

FINDING AND PURPOSES

SEC. 2. (a) The Congress hereby finds that—

(1) there is increased dependency on, and proliferation of, information technology (including computers, data networks, and other communication devices) in the small business community;

(2) such technology has permitted an increase in criminal activity against small business;

(3) small businesses in particular frequently lack the education and awareness of computer security techniques and technologies which would enable them to protect their computer systems from unauthorized access and the manipulation or destruction of their computer hardware, software, and stored data;

(4) profitmaking organizations have substantial expertise in computer technology, communications, and management assistance that is not otherwise available; and

(5) the use of this expertise in the Small Business Administration's training delivery system would improve substantially the quantity and quality of the agency's management assistance programs.

(b) The purposes of this Act are—

(1) to improve the management by small businesses of their information technology,

(2) to educate and encourage small businesses to protect such technology from intentional or unintentional manipulation or destruction; and

(3) to permit cooperation with profitmaking organizations in providing management assistance to small business.

COMPUTER SECURITY AND EDUCATION ADVISORY COUNCIL

SEC. 3. Section 4(b) of the Small Business Act (15 U.S.C. 633(b)) is amended by adding at the end thereof the following:

"(3)(A) The Administrator shall, not later than ninety days after the effective date of the Small Business Computer Security and Education Act of 1984, establish an advisory council to be known as the Small Business Computer Security and Education Advisory Council (hereinafter referred to as the 'advisory council').

"(B) The advisory council shall consist of the following members:

"(i) an official of the Small Business Administration, appointed by the Administrator;

"(ii) an official of the Institute for Computer Sciences and Technology of the Department of Commerce, appointed by the Secretary of Commerce;

"(iii) an official of the Department of Justice, appointed by the Attorney General, who is knowledgeable about issues of computer security and its protection;

"(iv) an official of the Department of Defense, appointed by the Secretary of Defense, who is knowledgeable about issues of computer security;

"(v) one individual, appointed by the Administrator, who is representative of the interests of the manufacturers of computer hardware to small business concerns;

"(vi) one individual, appointed by the Administrator, who is representative of the interests of the manufacturers of computer software to small business concerns;

"(vii) one individual, appointed by the Administrator, who is representative of the interests of the providers of computer liability insurance to small business concerns;

"(viii) one individual, appointed by the Administrator, who is representative of the interests of the providers of computer security equipment and services to small business concerns;

"(ix) one individual, appointed by the Administrator, who is representative of the interests of associations of small business concerns, other than small business concerns engaging in any of the activities described in clauses (v) through (viii); and

"(x) such additional qualified individuals from the private sector, appointed by the Administrator, as the Administrator determines to be appropriate.

"(C) It shall be the function of the advisory council to advise the Administration on—

"(i) the nature and scope of computer crimes committed against small business concerns;

"(ii) the effectiveness of Federal and State law in deterring computer-related criminal activity or prosecuting computer-related crimes;

"(iii) the effectiveness of computer technology and management techniques available to small business for increasing their computer security;

"(iv) the development of information and guidelines to be made available to the Administrator to assist small business concerns in evaluating the security of computer systems; and

"(v) such other appropriate functions of the small business computer security and education program.

"(D) The Administrator shall designate one of the non-Federal members of the advisory council as its chairperson. The advisory council shall meet at least annually and at such other times as requested by the Administrator. A majority of the members of the advisory council shall constitute a quorum. Vacancies on the council shall be filled in the same manner as the original appointment.

"(E) Each member of the advisory council shall serve without additional pay, allowances, or benefits by reason of such service. Each non-Federal member shall be reimbursed for actual expenses, including travel expenses, as authorized by section 5703 of title 5, United States Code.

"(F) Upon request of the chairperson of the advisory council, the Administrator may request directly from any Federal agency information necessary to enable the advisory council to carry out its functions under the Small Business Computer Security and Education Act of 1984. Upon the request of the Administrator, the head of such agency shall furnish to the Administrator such information, subject to the requirements of section 552 of title 5, United States Code.".

COMPUTER SECURITY AND EDUCATION PROGRAM

SEC. 4. Section 4(b) of the Small Business Act (15 U.S.C. 633(b)) is further amended by adding at the end thereof the following:

"(4)(A) The Administrator shall establish a small business computer security and education program to—

"(i) provide small business concerns information regarding—

"(I) utilization and management of computer technology;

"(II) computer crimes committed against small business concerns; and

"(III) security for computers owned or utilized by small business concerns;

"(ii) provide for periodic forums for small business concerns to improve their knowledge of the matters described in clause (i); and

"(iii) provide training opportunities to educate small business users on computer security techniques.

"(B) The Administrator, after consultation with the Director of the Institute of Computer Sciences and Technology within the Department of Commerce, shall develop information and materials to carry out the activities described in subparagraph (A) of this paragraph.".

PRIVATE SECTOR COOPERATION

SEC. 5. (a) Section 8(b)(1)(A) of the Small Business Act is amended—

(1) by inserting "computer security," after "wage incentives,"; and

(2) by striking at the end thereof "Administration; and" and by inserting the following: "Administration. Such assistance also may be provided to small business concerns by the Administration through cooperation with a profit-making concern (hereafter in this paragraph referred to as a "cosponsor") to provide training: *Provided,* That the Administration shall take such actions as it deems appropriate to ensure that the cooperation does not constitute or imply an endorsement by the Administration of the products or services of the cosponsor, to avoid unnecessary promotion of the products or services of the cosponsor, and to minimize utilization of any one cosponsor in a marketing area. Such actions shall include, but not be limited to: (i) developing an agreement which specifies the standard terms and conditions of the cooperation, the use of which shall be mandatory; (ii) prohibiting any fee or charge from being imposed upon any small business concern for receiving assistance in excess of a minimal amount to cover the direct costs of providing such assistance; (iii) prohibiting the release to the cosponsor of any of the Administration's lists of names and addresses of small business concerns; and (iv) requiring that all

printed materials which contain the names of both the Administration and the cosponsor include a prominent disclaimer that the cooperation does not constitute or imply an endorsement by the Administration of the products or services of the cosponsor."

(b) Not later than December 1, 1987 the Small Business Administration shall report to the Committees on Small Business of the Senate and the United States House of Representatives on the impact of the assistance provided in cooperation with profitmaking concerns pursuant to the amendment made by section 5(a)(2) of the Small Business Computer Security and Education Act of 1984. The report shall include information on benefits provided to small business concerns assisted by the Administration's cooperation with profitmaking concerns and any negative impact upon small businesses resulting from such cooperation with profitmaking concerns.

COMPUTER CRIME DEFINITION

SEC. 6. Section 3 of the Small Business Act is amended by adding at the end thereof the following—

"(j) For purposes of this Act—

"(1) the term 'computer crime' means—

"(A) any crime committed against a small business concern by means of the use of a computer; and

"(B) any crime involving the illegal use of, or tampering with, a computer owned or utilized by a small business concern.".

EFFECTIVE DATES

SEC. 7. (a) This Act shall take effect on October 1, 1984.

(b) The amendments made to section 4(b)(3) of the Small Business Act by section 3 of this Act and the amendments made to section 8(b)(1)(A) of the Small Business Act by section 5(a)(2) of this Act are repealed on October 1, 1988. Nothing in this section shall preclude the Administrator from continuing such committee under the authority of section 8(b)(3) of the Small Business Act and the Federal Advisory Committee Act.

Speaker of the House of Representatives.

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

THE WHITE HOUSE

WASHINGTON

July 13, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Enrolled Bill H.R. 5740 -- Barrow Gas Transfer Act

Richard Darman has asked for comments on the above-referenced enrolled bill by close of business today. Under a 1976 statute the Department of the Interior is required to supply gas to the native village of Barrow, Alaska. The requirement was imposed when Interior was given authority to explore for petroleum in the area. Exploration is now complete, and this bill would get Interior out of the utility business by transferring the gas fields and facilities to the village, and repealing the requirement that Interior supply gas. In essence, the bill "privatizes" this particular government function, consistent with Administration policy. The bill incorporates by reference a detailed transfer agreement signed by the Secretary of the Interior and village leaders.

OMB and Interior recommend approval; Defense has no objection. 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.

Attachment

THE WHITE HOUSE

WASHINGTON

July 13, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Enrolled Bill H.R. 5740 -- Barrow Gas Transfer Act

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

FFF:JGR;aea 7/13/84
cc: FFFieldng/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

July 13, 1984

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THE WHITE HOUSE

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July 13, 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. 5740 -- Barrow Gas Transfer Act

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THE WHITE HOUSE

WASHINGTON

July 13, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

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COUNSEL TO THE PRESIDENT

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cc: FFFieldng/JGRoberts/Subj/Chron

ID # 216544 CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

JGR

☐ O - OUTGOING

☐ H - INTERNAL

☐ I - INCOMING

Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: Richard Darman

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

Subject: Enrolled Bill H.R. 5740 - Barrow Gas Transfer Act

ROUTE TO: Office/Agency (Staff Name)	ACTION: Action Code	ACTION: Tracking Date YY/MM/DD	DISPOSITION: Type of Response	DISPOSITION: Code	DISPOSITION: Completion Date YY/MM/DD
CUHOLL	ORIGINATOR	84/07/13			/ /
	Referral Note:				
CUAT 18	D	84/07/13		S	84/07/13
	Referral Note:				COB
		/ /			/ /
	Referral Note:				
		/ /			/ /
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		/ /			/ /
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Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

Document No. 216544SS

WHITE HOUSE STAFFING MEMORANDUM

DATE: 7/12/84 ACTION/CONCURRENCE/COMMENT DUE BY: c.o.b. FRIDAY, 7/13

SUBJECT: Enrolled Bill H.R. 5740 - Barrow Gas Transfer Act

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

REMARKS:

Please provide comments/recommendations on the attached enrolled bill by cob FRIDAY, JULY 13.

Thank you.

RESPONSE:

Richard G. Darman
Assistant to the President
Ext. 2702

1984 JUL 13 AM 8:05

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

1984 JUL 12 PM 5

JUL 12 1984

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 5740 - Barrow Gas Transfer Act
Sponsor - Representative Young (R)- Alaska

Last Day for Action

July 18, 1984 - Wednesday

Purpose

(1) Repeals the statutory requirement that the Secretary of the Interior provide natural gas to the North Slope Borough of Alaska, and (2) requires the Secretary to convey to the Borough Federal interests in gas fields in the area, plus up to $30 million for their operation and maintenance.

Agency Recommendations

Office of Management and Budget	Approval
Department of the Interior	Approval
Department of Defense	No objection

Discussion

Background

The Naval Petroleum Reserves Production Act of 1976 required the Department of the Interior to assume jurisdiction from the Department of the Navy over the Naval Petroleum Reserve in Alaska (NRPA). The Act also requires Interior to conduct petroleum exploration in the NPRA and supply gas at reasonable and equitable rates to the native village of Barrow and Federal agency facilities in the area. The exploration program has been completed, so there is currently very little Federal activity in the Barrow area. Therefore, Interior is acting as a natural gas utility primarily for the local population, providing gas at highly subsidized rates (annual Federal costs are about $4 million).

Provisions of H.R. 5740

Similar to a proposal transmitted to Congress by the Department of the Interior in support of the President's budget for fiscal year 1985, H.R. 5740 would allow Interior to discontinue those operations by deleting the statutory requirement in the 1976 Act, and ensure that the local population is adequately prepared to continue natural gas production for itself. In this regard, the enrolled bill would provide the force of law to existing agreements between Interior and the North Slope Borough, and Interior and the Arctic Slope Regional Corporation dealing with conveyance to the Borough of the gas fields and related facilities. Under these agreements incorporated in the enrolled bill, the Secretary of the Interior would convey to the local government entity, the North Slope Borough, the following lands and interests:

-- the Barrow gas fields;

-- the Walakpa gas discovery site;

-- sand and gravel in those lands necessary for exploration, development, and production;

-- certain associated mineral lands;

-- related support facilities;

-- the surface estate of a former Distant Early Warning site at Cape Simpson; and

-- the right to select the surface estate to 320 acres within the boundaries of the North Slope Borough.

The enrolled bill would also authorize the North Slope Borough to explore for, develop, and produce minerals from the Barrow gas fields, the Walakpa gas discovery site, and associated mineral lands. In addition, the Borough would be provided with other sources of gas for heating and electricity, including portions of royalty gas from Federal oil and leases within the NPRA. The agreement between Interior and the Borough incorporated in H.R. 5740 would also require payment to the Borough of up to $30 million to assist it in operating, maintaining, and developing the resources and facilities conveyed. This payment would be made in part from funds previously appropriated to Interior for NPRA exploration or operation of the Barrow gas fields.

Finally, the enrolled bill would grant to the Ukpeagvik Inupiat Corporation (UIC), subject to valid existing rights, the right, title and interest now held by the United States to a portion of the sand and gravel underlying the surface estate owned by the UIC in the Barrow Gas fields and the Walakpa gas discovery site.

James M. Frey
Assistant Director for
Legislative Reference

Enclosures

inety-eighth Congress of the United States of America

AT THE SECOND SESSION

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

An Act

Entitled, the "Barrow Gas Field Transfer Act of 1984".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. The following may be cited as the "Barrow Gas Field Transfer Act of 1984".

SEC. 2. (a) The Secretary of the Interior (hereinafter "the Secretary") shall convey to the North Slope Borough the subsurface estate held by the United States to the Barrow gas fields and the Walakpa gas discovery site, related support facilities, other lands, interests, and funds in accordance with the terms and conditions of the agreement, including appendix numbered 1, between the Secretary of the Interior and the North Slope Borough dated September 22, 1983 (hereinafter "the NSB Agreement"), on file with the Senate Energy and Natural Resources Committee and the House Interior and Insular Affairs Committee, which is hereby incorporated into this Act.

(b) Upon conveyance, the North Slope Borough is authorized, notwithstanding any other provision of law, to explore for, develop, and produce fluid hydrocarbons within the lands and interests granted: *Provided,* That section 301(a) of the NSB Agreement shall not reduce revenues which would otherwise be shared with the State of Alaska under the provisions of Public Law 96–514 by providing for the disposition of gas at less than the value referred to in section 301(d) of the NSB Agreement or as a result of the crediting provisions of section 301(a)(3) of the NSB Agreement.

(c) The Barrow gas fields and related support facilities shall continue to be exempt from the Pipeline Safety Act, title 49 of the Code of Federal Regulations, and all other rules and regulations governing the design, construction, and operation of gas pipelines, wells, and related facilities.

(d) The provisions of the National Environmental Policy Act shall apply to any land conveyance under section 203(b) of the NSB Agreement. During the NEPA process, the North Slope Borough shall consult with the United States Fish and Wildlife Service, the Alaska Department of Fish and Game, and the National Park Service concerning the fish, wildlife, cultural, and historic values of the area to be selected. The Secretary is authorized to approve or deny the selection. If denied, the North Slope Borough shall be entitled to identify an alternative site, which shall be subject to the review process set forth in this section.

(e) The North Slope Borough shall not make a selection under section 203(b) of the NSB Agreement in areas designated by the Congress or the Secretary under section 104(b) of the Naval Petroleum Reserves Production Act of 1976 for the protection of surface values, as depicted on the map set forth on page 125 of the "Final Environmental Impact Statement on Oil and Gas Leasing in the National Petroleum Reserve in Alaska" dated February 1983, or within the boundaries of the Kasegaluk Lagoon Potential Natural Landmark as identified in study report numbered 2 prepared pursuant to section 105(c) of that Act, or within any area withdrawn or designated for study pursuant to section 604 of the Alaska National Interest Lands Conservation Act.

(f) Notwithstanding the time limit specified in the NSB Agreement, the North Slope Borough shall have ten years from the date of this Act to make its selection under section 203(b) of the NSB Agreement. If, within ninety days of the expiration of the ten-year period, or after the expiration of such period, the Secretary denies any selection, the North Slope Borough shall select an alternative site within ninety days of such denial. If an alternative site is denied, the selection and review process in this subsection shall be repeated until a site is approved by the Secretary.

(g) Notwithstanding any provision of the NSB Agreement, the North Slope Borough shall obtain the right to divert, use, appropriate, or possess water solely through compliance with applicable laws of the United States and the State of Alaska.

(h) Notwithstanding any provision of the NSB Agreement, the right of the North Slope Borough to exploit gas and entrained liquid hydrocarbons from Federal test wells in the National Petroleum Reserve-Alaska shall not apply to test wells in areas designated by the Congress or the Secretary under section 104(b) of the Naval Petroleum Reserves Production Act of 1976 for the protection of surface values, as depicted on the map set forth on page 125 of the "Final Environmental Impact Statement on Oil and Gas Leasing in the National Petroleum Reserve in Alaska" dated February 1983, or within the boundaries of the Kasegaluk Lagoon Potential Natural Landmark as identified in study report numbered 2 prepared pursuant to section 105(c) of that Act, or within any area withdrawn or designated for study pursuant to section 604 of the Alaska National Interest Lands Conservation Act.

(i) The Secretary shall process any application submitted by the North Slope Borough under section 203(d) of the NSB Agreement for a right-of-way which crosses, in whole or in part, any lands within any area designated by the Congress or the Secretary under section 104(b) of the Naval Petroleum Reserves Production Act of 1976 for the protection of surface values, as depicted on the map set forth on page 125 of the "Final Environmental Impact Statement on Oil and Gas Leasing in the National Petroleum Reserve in Alaska" dated February 1983, or within the boundaries of the Kasegaluk Lagoon Potential Natural Landmark as identified in study report numbered 2 prepared pursuant to section 105(c) of that Act, or within any area withdrawn or designated for study pursuant to section 604 of the Alaska National Interest Lands Conservation Act, under the provisions of title XI of the Alaska National Interest Lands Conservation Act. In processing any such application for a right-of-way which crosses, in whole or in part, any lands within any area designated by the Congress or the Secretary under section 104(b) of the Naval Petroleum Reserves Production Act of 1976, the protection of the values and the continuation of the uses specified in section 104(b) of that Act shall be considered to be the purposes for which the area was established.

(j) Nothing in this Act or in the NSB Agreement shall be construed as amending the provisions of the Alaska National Interest Lands Conservation Act or as amending or repealing any other provision of law applicable to any conservation system unit, as that term is defined in section 102(4) of that Act.

SEC. 3. The Secretary of the Interior shall convey to Ukpeagvik Inupiat Corporation (hereinafter "UIC"), subject to valid existing rights, all right, title, and interest held by the United States to sand and gravel underlying the surface estate owned by UIC in the Barrow gas fields and Walakpa gas discovery site, upon execution of an easement agreement with the North Slope Borough, satisfactory to the North Slope Borough, in consideration for the conveyance to UIC of such sand and gravel, providing for easements, for all purposes associated with operation, maintenance, development, production, generation, or transportation of energy, including the transmission of electricity, from the Barrow gas fields, the Walakpa discovery site, or from any other source of energy chosen by the North Slope Borough, to supply energy to Barrow, Wainwright, and Atkasook, and providing such easements when and where required as determined by the North Slope Borough during the life of such fields or other energy sources.

SEC. 4. (a) Section 102 of the Naval Petroleum Reserves Production Act of 1976 (42 U.S.C. 6502) is amended by adding "and the North Slope Borough" immediately after "Alaska Natives", by deleting "and" immediately after "responsibilities under this Act,", and by replacing the period following "Alaska Native Claims Settlement Act" with ", and (4) grant such rights-of-way to the North Slope Borough, under the provisions of title V of the Federal Land Policy and Management Act of 1976 or section 28 of the Mineral Leasing Act, as amended, as may be necessary to permit the North Slope Borough to provide energy supplies to villages on the North Slope."

(b) Section 104(e) of the Naval Petroleum Reserves Production Act of 1976 (42 U.S.C. 6504(e)) is repealed effective October 1, 1984.

SEC. 5. (a) In consideration for the relinquishment of rights that Arctic Slope Regional Corporation has under section 1431(o) of the Alaska National Interest Lands Conservation Act, Public Law 96-487, 94 Stat. 2371, 2541, to the subsurface resources in the Barrow gas fields and the Walakpa gas discovery site conveyed to the North Slope Borough and Ukpeagvik Inupiat Corporation pursuant to sections 2 and 3 of this Act, the Secretary of the Interior and Arctic Slope Regional Corporation are authorized to exchange lands and interests as set forth in the separate agreement between the Secretary and Arctic Slope Regional Corporation dated January 24, 1984 (hereinafter "the ASRC Agreement"), on file with the Senate Energy and Natural Resources Committee and the House Interior and Insular Affairs Committee. The specific terms, conditions, and covenants of the ASRC Agreement are hereby incorporated into this Act and ratified, as to the rights, duties, and obligations of the United States and Arctic Slope Regional Corporation and as to the rights and interests of the North Slope Borough, as a matter of Federal law.

(b) Notwithstanding the provisions of paragraph 4 of the ASRC Agreement, in lieu of the additional 69,120 acres of subsurface estate to be identified by ASRC pursuant to said paragraph 4, ASRC shall identify for conveyance or relinquishment to the United States, as appropriate, the 101,272 acres of subsurface estate beneath the surface estate of the lands described in subparagraphs 2 (a), (b) and (d) of the August 9, 1983 agreement between Arctic Slope Regional Corporation and the United States of America.

(c) To the extent that any provision or interpretation of the NSB Agreement is inconsistent with the provisions of this section or the ASRC Agreement, the provisions of this section and of the ASRC Agreement shall prevail.

(d) All of the lands, or interest therein, conveyed to and received by Arctic Slope Regional Corporation pursuant to this section or the ASRC Agreement and pursuant to the August 9, 1983 agreement between Arctic Slope Regional Corporation and the United States of America shall, in addition to other applicable authority, be deemed conveyed and received pursuant to exchanges under section 22(f) of the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, 1621(f)).

Speaker of the House of Representatives.

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

THE WHITE HOUSE

WASHINGTON

July 16, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Enrolled Bill H.R. 5713 -- Department of Housing and Urban Development/Independent Agencies Appropriation Bill, 1985

Richard Darman has asked for comments on the above-referenced enrolled bill as soon as possible. This is the appropriations bill for HUD, EPA, the VA, NASA, NSF, and other agencies. According to OMB, the total appropriated by the bill -- $56.5 billion -- is generally consistent with the Administration's economic program. Our office is of course in no position to comment upon the funding levels in the bill, but my review of the bill has disclosed four unconstitutional legislative veto provisions. *See* pp. 13, 14 (two), 19. The unconstitutional sections provide that funding may exceed specified levels only with the approval of the Committees on Appropriations.

This bill was not routed to Justice by OMB for comment. I alerted Larry Sims of OLC to the problem, and also advised Darman's office that our comments would be delayed until we heard back from Justice. Sims advised that he agreed that the provisions in question were unconstitutional under *Chadha*, and reported that Justice would be forwarding signing statement language as soon as possible. The attached memorandum for Darman notes that Justice will be submitting such a statement.

Attachment

THE WHITE HOUSE

WASHINGTON

July 16, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Enrolled Bill H.R. 5713 -- Department of Housing and Urban Development/Independent Agencies Appropriation Bill, 1985

Counsel's Office has reviewed the above-referenced enrolled bill. The bill contains four unconstitutional legislative veto provisions (pp. 13, 14 (two), and 19). These provisions permit funding beyond specified levels only with the approval of the Committees on Appropriations, a clear violation of the Supreme Court's decision in Immigration and Naturalization Service v. Chadha. I have advised the Department of Justice of this problem, and that Department will be submitting proposed signing statement language as soon as possible. Since the presence of unconstitutional legislative vetoes in appropriations bills seems to be a recurring problem even after Chadha, I recommend that a signing statement be issued.

FFF:JGR:aea 7/16/84
cc: FFFielding/JGRoberts/Subj/Chron