THE WHITE HOUSE

WASHINGTON

August 27, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Enrolled Bill S. 2436 -- Public Broadcasting Amendments Act of 1984

Richard Darman has asked for comments on the above-referenced enrolled bill as soon as possible. This bill would authorize appropriations for the Corporation for Public Broadcasting (CPB) and a grant program of the National Telecommunications and Information Administration, both at levels far beyond Administration requests. The bill would also repeal 47 U.S.C. § 396(k), which requires public broadcasters who pay taxes on earned income unrelated to broadcasting to refund to CPB an amount equal to the taxes paid. The bill contains no other provisions beyond the setting of the funding levels.

OMB and Commerce recommend a veto. The draft disapproval statement recognizes the contributions of public broadcasting but objects to the levels in the bill as incompatible with the clear and urgent need to reduce Federal spending. The statement notes that legislation providing for Federal funding at realistic and reasonable levels would be "appropriate and welcome."

Assuming the recommendations to veto this bill are accepted, the question arises whether to use a pocket veto or a return veto. The use of the pocket veto during an intrasession adjournment of Congress was addressed in the attached memorandum prepared for you by Deputy Assistant Attorney General Robert Shanks on July 10, 1984. That memorandum noted that while use of the pocket veto during an intrasession adjournment would be contrary to Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), the Government is presently arguing in Barnes v. Kline, No. 84-5155 (D.C. Cir., filed May 18, 1984) that use of the pocket veto is appropriate during any adjournment lasting longer than three days. The Shanks memorandum concluded that during intrasession adjournments of longer than three days the President should, if he desires to disapprove a bill, send it to the originating House with his objections as well as a statement to the effect that he is doing so only to comply technically with Kennedy v. Sampson and not because of any doubts concerning the availability of the pocket veto.

I have raised this matter with Shanks and he has confirmed that the advice in the July 10 memorandum is applicable to this case. The attached memorandum for Darman for your review and signature alerts Darman to the pocket veto problem and suggests appropriate revision of the draft message of disapproval.

cc: Richard A. Hauser
Peter J. Rusthoven

THE WHITE HOUSE

WASHINGTON

August 27, 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 S. 2436 -- Public Broadcasting Amendments Act of 1984

Counsel's Office has reviewed the above-referenced enrolled bill. If the President decides to disapprove this bill, as recommended by the Office of Management and Budget and the Department of Commerce, the proposed message of disapproval should be revised to preserve the argument that the "pocket veto" is available during this adjournment of Congress. It is unclear whether use of the pocket veto is appropriate during an intrasession adjournment of Congress. Case law in the District of Columbia suggests that it is not, Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), but the Department of Justice is presently arguing in court that the pocket veto is available during any adjournment of Congress lasting longer than three days. Barnes v. Kline, No. 84-5155 (D.C. Cir., filed May 18, 1984).

In light of the uncertainty surrounding this issue, the Department of Justice has recommended that the President send the instant bill back to the Senate with his objections as well as a statement that he is doing so only to comply technically with Kennedy v. Sampson and not because of any doubts concerning the availability of the pocket veto. The following language should be substituted for the first sentence of the draft message of disapproval:

> Since the adjournment of the Congress has prevented my return of S. 2436 within the meaning of Article I, section 7, clause 2 of the Constitution, my withholding of approval from the bill precludes its becoming a law. Notwithstanding what I believe to be my constitutional power regarding the use of the "pocket veto" during an adjournment of Congress, however, I am sending S. 2436 to the Senate with my objections, consistent with the Court of Appeals decision in Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974).

FFF:JGR:aea 8/27/84
cc: FFFielding/RAHauser/JGRoberts/PJRusthoven/Subj/Chron

THE WHITE HOUSE

WASHINGTON

August 27, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Enrolled Bill S. 2436 -- Public Broadcasting Amendments Act of 1984

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FFF:JGR:aea 8/27/84
cc: FFFielding/RAHauser/JGRoberts/PJRusthoven/Subj/Chron

ID # 216854 CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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

XGR

Name of Correspondent: Richard Durman

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

Subject: Enrolled Bill S. 2436 - Public Broadcasting Amendments Act of 1984

ROUTE TO:

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CU HOU	ORIGINATOR	84 10 8 23			/ /
	Referral Note:				
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	Referral Note:				
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ACTION

DISPOSITION

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

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

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

Comments: _____

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

5/81

Document No. 216854SS

WHITE HOUSE STAFFING MEMORANDUM

DATE: 8/23/84 ACTION/CONCURRENCE/COMMENT DUE BY: 8/27 - 9:00 a.m.

SUBJECT: ENROLLED BILL S. 2436 - PUBLIC BROADCASTING AMENDMENTS ACT OF 1984

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

REMARKS:

May we have your comments on the attached enrolled Bill by 9:00 a.m. Monday, August 27. Thank you.

Approval _____

Disapproval _____ If recommending disapproval, please comment on the attached suggested veto message.

RESPONSE:

Richard G. Darman
Assistant to the President
Ext. 2702

1984 AUG 23 P11 3:13

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

1984 AUG 23 PM 1:19

AUG 23 1984

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill S. 2436 - Public Broadcasting Amendments Act of 1984
Sponsors - Sen. Goldwater (R) Arizona and 56 others

Last Day for Action

August 29, 1984 - Wednesday

Purpose

To authorize appropriations for (1) the Corporation for Public Broadcasting and (2) the facilities grant program of the National Telecommunications and Information Administration.

Agency Recommendations

Office of Management and Budget	Disapproval (Veto message attached)
Department of Commerce	Disapproval (Veto message attached)
Department of the Treasury	No objection (Informally)

Discussion

-- Authorization of appropriations for the Corporation for Public Broadcasting

Funds for public broadcasting are both authorized to be appropriated and appropriated two years in advance of the normal government timetable, in order to increase the ability of the public broadcasting system to plan for the future, as well as to facilitate the production of programs requiring long lead times.

The recent authorization and appropriation history of Federal funds for the Corporation for Public Broadcasting (CPB) is as follows:

Authorizations in Millions of Dollars

	Current Law	Enrolled Bill S. 2436	Administration's Proposals
1984	145		110 a)
1985	153		100 a)
1986	162		100 a)
1987		238	100
1988		253	85
1989		270	70

a) March 1981 revisions to Carter budget

Appropriations for 1984-1986 -- $137.5 for 1984, $150.5 million for 1985, and $159.5 million for 1986 -- are only slightly below the authorized levels. (These figures include supplemental appropriations contained in H.R. 6040, the Second Supplemental Appropriations Act, 1984, which is enrolled and awaiting your action.) Although 1987 funds have not yet been appropriated, the Labor-Health and Human Services-Education appropriations bill for 1985, H.R. 6028, as passed by the House, contains no funds for CPB only because of the lack of authorization. As reported in the Senate, however, the bill contains $238 million, the amount that would be authorized by this enrolled bill.

-- Facilities grant program of the National Telecommunications and Information Administration

The facilities grant program of Commerce's National Telecommunications and Information Administration (NTIA) was originally intended to provide public broadcasting stations with "seed money" to acquire new equipment.

The authorization level for the program for 1984 is $12 million; $11.88 million was appropriated. The Administration's 1985 budget requested no funds for the program on the grounds that the original aim of the program had been achieved. The enrolled bill, however, would authorize appropriations for the facilities grant program of $50 million for 1985, $53 million for 1986, and $56 million for 1987. H.R. 5712, the Commerce-Justice-State-Judiciary appropriations bill for 1985, which is enrolled, contains $24 million for the program for 1985.

-- Other amendments

The enrolled bill would amend the Communications Act of 1934 in three additional ways. First, the bill would delete an existing requirement that at least 75% of funds distributed under the facilities grant program go for construction of new broadcast stations. According to the report of the House Committee on Energy and Commerce, more of this money is needed to repair or replace equipment at existing stations. Second, CPB's authority to fund certain research, technical, and training activities would be clarified. Finally, the bill would repeal the so-called "unrelated business income tax penalty," which requires public broadcasters who pay taxes on income earned from activities unrelated to broadcasting (e.g., leasing of excess satellite distribution capacity for paging purposes) to refund to CPB an amount equal to the tax paid. Public broadcasters have argued that this is an unfair system of double taxation.

-- Agency views

The Department of Commerce recommends disapproval of the enrolled bill. In its enclosed views letter, Commerce indicates that the CPB authorization levels in S. 2436 "grossly exceed those recommended by the Administration" and states that such expenditure levels "cannot be justified in this climate of fiscal austerity." Commerce makes a similar argument with respect to the facilities grant program.

Commerce notes that during the House debate on this legislation, Congressman Oxley offered an amendment that received 176 votes that would have reduced the increases in the CPB and facilities grants authorizations to levels considerably below the increases contained in the enrolled bill. Commerce believes that the probability of a veto override of this bill would be materially reduced if the Administration indicated a willingness to accept authorization levels on the order of those included in the Oxley amendment. The Department's enclosed draft veto message alludes to such a willingness.

-- Recommendation

This Administration has consistently but unsuccessfully sought to reduce Federal support for CPB and to close out NTIA's facilities grant program. We have repeatedly expressed our very strong opposition to the appropriation authorization levels in this bill. I sent letters to the Senate Committee on Commerce, Science, and Technology and the House Committee on Energy and Commerce on April 30, 1984, and May 8, 1984, respectively, stating that enactment of this legislation would "not be in accord with the program of the President." In addition, the Administration sent clear veto signals on the bill both when it was before the House Rules Committee and when it was under consideration on the floor.

In my view, the massive increases in funding for CPB that the enrolled bill contemplates, as well as the continuation of the facilities grant program, cannot be justified as a sound use of the taxpayers' money. Particularly in a time of severe fiscal constraint, programs of this nature can and should be phased down and terminated, not continued and expanded. Extraordinary increases -- involving, in this case, authorization levels that are triple the Administration's request -- are especially objectionable.

I should also note something that supporters of increased funds for CPB seldom acknowledge: that Federal financial support for CPB amounts to little more than a subsidy for a service whose primary beneficiaries are a small number of relatively affluent viewers and listeners who constitute the bulk of the audience of public broadcasting stations. A typical public radio station,

for example, generally attracts less than a 1% market share for any given program. Of these listeners, most are rather better off than the community-at-large. Public television stations attract a larger, but still very small, audience that is somewhat broader-based than the public radio audience. In these circumstances, acquiesence in large increases in taxpayer support of CPB, as we try to hold the line on unnecessary Federal subsidies elsewhere, strikes me as exceedingly unwise.

With respect to NTIA's facilities grant program, the original purpose of the program, to assist public broadcasting stations acquire new equipment, has been achieved. For that reason, further Federal assistance in this area is neither necessary nor appropriate.

Moreover, to the extent that the enrolled bill would change the emphasis of the grant program from the acquisition of new equipment to the repair and replacement of existing equipment, it represents a highly questionable departure from previous policy. It has been argued in the past that alternative funding arrangements were not available to new public broadcast stations, and that NTIA seed money for equipment was necessary to get a new station going and on the air. Once a station is on the air and operating, however, I am convinced that it can reasonably be expected to develop new, non-Federal funding sources -- private, corporate, educational, or the like -- that it can draw on for financial support for equipment and related items. If the station cannot develop these kinds of sources, I suggest that it might be appropriate to assign its license to an entity that can.

Regarding the lineup in Congress on this legislation: it passed the Senate by voice vote, where it had broad support, particularly by Senators Goldwater, Packwood, and Hollings. H.R. 5541, the House counterpart to S. 2436, passed the House by 302-91, while the Oxley amendment, noted earlier, that would have reduced the bill's authorization levels was defeated by a vote of 176-217. (This amendment would have reduced the authorization levels for CPB from $238 million to $186 million for 1987; $253 million to $214 million for 1988; and $270 million to $246 million for 1989. The reductions for the facilities grant program would have been from $50 million to $14 million for 1985; $53 million to $16 million for 1986; and $56 million to $18 million for 1987.) A Dannemeyer amendment cutting the authorization levels more deeply lost by a larger margin, 95-298.

The vote on the Oxley amendment, however, is a solid indication of considerable support in Congress for lower funding levels for CPB and of the possibility that a veto could be sustained. Indeed, in a recent letter to me, Congressmen Michel, Broyhill, and Frenzel urge disapproval of this bill and express optimism that a veto would be upheld; they also say that they believe there is little political risk in a veto, and even that could be

minimized if Congress, after the veto, passed new legislation with the authorization levels proposed by Representative Oxley.

I concur in the recommendation of the Commerce Department and am convinced that disapproval of the enrolled bill is warranted. A draft veto message is attached for your consideration. It is virtually identical to Commerce's draft message, but it has been edited in a few minor respects.

David A. Stockman
Director

Enclosures

TO THE SENATE OF THE UNITED STATES:

I am returning herewith without my approval S. 2436, the "Public Broadcasting Amendments Act of 1984."

This Act would authorize appropriations of $238 million, $253 million, and $270 million, respectively, for fiscal years 1987, 1988, and 1989 for the Corporation for Public Broadcasting. It would also authorize appropriations of $50 million, $53 million, and $56 million for the Public Telecommunications Facilities Program administered by the Department of Commerce for fiscal years 1985, 1986, and 1987.

Public broadcasting constitutes an important national resource and contributes significantly to the diversity of news, information, and entertainment choices available to the American public. Under S. 2436, however, Federal subsidies to public broadcasting could increase by up to 47 percent between fiscal years 1986 and 1987. This is a level some 238 percent above what I have recommended. Spending on new public broadcasting facilities in 1985 would be authorized at levels more than four times this year's appropriation. When all of the demands on the Federal budget are taken into account, increases in spending on public broadcasting of the magnitude contemplated by this legislation cannot be justified. They are incompatible with the clear and urgent need to reduce Federal spending.

Legislation which provides for Federal support of public broadcasting at realistic and reasonable levels, and which provides public broadcasters with the means and incentives to explore alternative revenue sources, would be both appropriate and welcome. If, however, we are to succeed in reducing Federal spending -- as we must -- massive increases in subsidy payments, such as those contemplated by S. 2436, cannot be justified.

Accordingly, I am disapproving S. 2436.

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 Communications Act of 1934 to extend certain authorizations of appropriations contained in such Act, 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 "Public Broadcasting Amendments Act of 1984".

AUTHORIZATION OF APPROPRIATIONS FOR PUBLIC TELECOMMUNICATIONS FACILITIES

SEC. 2. Section 391 of the Communications Act of 1934 (47 U.S.C. 391) is amended—

(1) by striking out "and" after "1983," and

(2) by inserting after "1984," the following: "$50,000,000 for fiscal year 1985, $53,000,000 for fiscal year 1986, and $56,000,000 for fiscal year 1987,".

AUTHORIZATION OF APPROPRIATIONS FOR PUBLIC BROADCASTING

SEC. 3. (a) Section 396(k)(1)(C) of the Communications Act of 1934 (47 U.S.C. 396(k)(1)(C)) is amended—

(1) by striking out "and 1986" and inserting in lieu thereof "1986, 1987, 1988, and 1989";

(2) by striking out "and" after "1985,"; and

(3) by inserting before the period at the end thereof the following: ", $238,000,000 for fiscal year 1987, $253,000,000 for fiscal year 1988, and $270,000,000 for fiscal year 1989".

(b) Section 396(k)(3)(A)(i)(II) of such Act (47 U.S.C. 396(k)(3)(A)(i)(II)) is amended by striking out "research, training, technical assistance, engineering, instructional support, payment of interest on indebtedness,".

CRITERIA FOR APPROVAL AND EXPENDITURES BY SECRETARY OF COMMERCE

SEC. 4. Section 393 of the Communications Act of 1934 (47 U.S.C. 393) is amended by striking out subsection (c) and by redesignating subsection (d) as subsection (c).

REPEAL OF THE UNRELATED BUSINESS INCOME TAX PENALTY

SEC. 5. Section 396(k) of the Communications Act of 1934 (47 U.S.C. 396(k)) is amended by striking out paragraph (8) and by redesignating paragraphs (9) and (10) as paragraphs (8) and (9), respectively.

Speaker of the House of Representatives.

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

U.S. Department of Justice
Office of Legal Counsel

July 10, 1984

TO: Mr. Peter J. Rusthoven
Associate Counsel to
the President

FROM: Robert B. Shanks RBS
Deputy Assistant Attorney
General
Office of Legal Counsel

- - -

The attached is for your information.

U.S. Department of Justice
Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

JUL 10 1984

MEMORANDUM FOR FRED F. FIELDING
COUNSEL TO THE PRESIDENT

Re: Use of the "Pocket Veto" During Intrasession Adjournments

This supplements our memorandum to you of December 19, 1983, concerning the use of the "pocket veto" during an intersession adjournment of Congress. In that memorandum, we reaffirmed the prior consistent advice of this Office that disapproval of a bill by presidential inaction, that is, by a pocket veto, is the appropriate method of disapproval after a sine die intersession adjournment of the Congress where the end of the President's constitutional period for approving or disapproving the bill falls during the adjournment. We considered the particular resolutions by which the House and Senate adjourned on November 18, 1983, and agreed to reconvene on January 23, 1984, and concluded that neither the designation of an agent to receive messages from the President nor the provision for the possible recall of Members affected the appropriateness of the pocket veto.

On Friday, June 29, 1984, both Houses of Congress adjourned during the second session of the 98th Congress and agreed to reconvene on July 23, 1984. H. Con. Res. 334, 98th Cong., 2d Sess., 130 Cong. Rec. S8978, H7533 (daily ed. June 29, 1984). The question which we now consider is whether the pocket veto is the appropriate method for disapproval of bills presented during the current three-week intrasession adjournment. We conclude that, consistent with the position currently being taken by the Department in litigation, the pocket veto is the appropriate method of disapproval. We caution, however, that this position is inconsistent with a decision of the United States Court of Appeals for the District of Columbia Circuit and would be likely to generate a challenge in court by the Congress. We have therefore attached suggested language for inclusion in a statement of the President's objections, should he elect to act in technical compliance with that decision and send a bill to its originating House with his objections.

I

BACKGROUND

Our memorandum of December 19, 1983, described in detail the constitutional provision relating to presidential vetoes, U.S. Const. Art. I, § 7, cl. 2, pursuant to which the President may use the pocket veto at a time ten days (Sundays excepted) after a bill has been presented to him if "the Congress by their Adjournment prevent its Return." 1/ As that memorandum explained, the practical difference between the return veto and the pocket veto is that Congress has no opportunity to override the latter. We will not here repeat our discussion in the earlier memorandum of the history and the scope of the pocket veto power, but we will instead limit our discussion to the appropriateness of the pocket veto during this intrasession adjournment. For a more detailed description of the Pocket Veto Clause, we would refer you to our December 19, 1983, memorandum.

1/ Article I, § 7, cl. 2 of the Constitution provides:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve it he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. . . . If any bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

(Emphasis added.) The underscored phrase is commonly referred to as the "Pocket Veto Clause" because it empowers the President to prevent a bill from becoming law simply by placing it in his pocket, that is, without returning it with his objections.

II

THE CASE LAW

As noted in our December 19, 1983, memorandum, use of the return veto during a brief, intrasession recess of one House of Congress was upheld in Wright v. United States, 302 U.S. 583 (1938). The Supreme Court stated that "Congress" had not adjourned, within the meaning of the Pocket Veto Clause, in circumstances in which only one House, the Senate, had recessed for three days while the House of Representatives was in session. The Court relied in part upon Article I, section 5, clause 4 of the Constitution, which provides that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days . . . ." Accordingly, the Court held that the return veto was the appropriate form of disapproval even though the particular bill had originated in the Senate and, pursuant to Article I, section 7, clause 2 of the Constitution, was required to be returned to that House. See note 1, supra. The Court rejected both legal and practical arguments that the Senate's recess had "prevented" the President from returning the bill:

> In returning the bill to the Senate by delivery to its Secretary during the recess there was no violation of any express requirement of the Constitution. . . .
>
> Nor was there any practical difficulty in making the return of a bill during a recess. The organization of the Senate continued and was intact. The Secretary of the Senate was functioning and was able to receive, and did receive, the bill. . . . There is no greater difficulty in returning a bill to one of the two Houses when it is in a recess during the session of Congress than in presenting a bill to the President by sending it to the White House in his temporary absence.

302 U.S. at 589-90. The Court expressly refused to conjecture whether an intrasession adjournment by one House of more than three days, for which the consent of the other House is required pursuant to Article I, section 5, clause 4, would prevent the return of a bill and thereby trigger the Pocket Veto Clause. Id. at 598.

More recently, the issue of the use of a pocket veto during an intrasession adjournment of both Houses of Congress was considered in Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974). In that case, which involved an adjournment of six days by one House and five days by the other, the court of appeals concluded that "intrasession adjournments of Congress have virtually never occasioned interruptions of the magnitude considered in the Pocket Veto Case, [279 U.S. 655 (1929),]" and that "[m]odern methods of communication" made the return veto appropriate. 511 F.2d at 441. The court held that "an intrasession adjournment of Congress does not prevent the President from returning a bill which he disapproves so long as appropriate arrangements are made for the receipt of presidential messages during the adjournment." Id. at 437.

In Kennedy v. Jones, 412 F. Supp. 353 (D.D.C. 1976), the Government settled a challenge to the President's pocket veto of two bills, one during an intersession adjournment and the other during an intrasession election adjournment of thirty days, by a consent judgment. On the day that judgment was entered, President Ford announced that he would use the return veto rather than the pocket veto during intrasession and intersession recesses and adjournments of the Congress, provided that Congress designated an authorized agent to receive returned vetoes. The Department has taken the position that this announcement was limited to President Ford's actions and that it did not bind, nor could it have bound, future Presidents. 2/

On November 18, 1983, the last day of the first session of the 98th Congress, H.R. 4042, 98th Cong., 1st Sess. (1983), was presented to the President. This bill would have continued through fiscal year 1984, or until Congress enacted new legislation, the requirements of existing law for continued military aid to El Salvador, pursuant to which the President would have been required to make a semi-annual certification that human rights conditions in that country were progressing. The President did not sign H.R. 4042 and did not return it to the

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2/ This Office reached this conclusion in our memorandum of December 19, 1983, at pp. 8-9. The brief on appeal to the District of Columbia Circuit in Barnes v. Kline, No. 84-5155, which is discussed infra in text, contains similar statements. See id. at 27.

House of Representatives with a veto message. On November 30, 1983, the White House issued a statement which announced that the President was withholding his approval from H.R. 4042 and explained his reasons for doing so. 19 Weekly Comp. Pres. Doc. 1627 (Nov. 30, 1983). H.R. 4042 has not been published as a law of the United States.

On January 4, 1984, thirty-three individual Members of the House of Representatives filed suit against the Administrator of the General Services Administration and the Executive Clerk of the White House because of their failure to publish H.R. 4042 as a law. Plaintiffs have alleged that the President's failure to return the bill allowed the bill to become law without his signature because the pocket veto power is not available during an intersession adjournment. The Senate and the bipartisan elected leadership of the House of Representatives intervened in support of the plaintiffs. Plaintiffs and the intervenors sought a declaratory judgment that the bill had become law and that the defendants were required to publish it. Plaintiffs also asked for an injunction or a writ of mandamus directing the defendants to effect publication.

The district court dismissed the complaint, stating that the case was "identical" to the question presented in the Pocket Veto Case, supra, which held that the Pocket Veto Clause was applicable when Congress was in an intersession adjournment. See Barnes v. Carmen, 582 F. Supp. 163, 167 (D.D.C. 1984). The district court also rejected the plaintiffs' argument that the subsequent decisions in Wright and Kennedy v. Sampson "have so attenuated Pocket Veto as to deprive it of controlling force." Id. Of particular importance to the use of the pocket veto during an intrasession adjournment is that the court distinguished both Wright and Kennedy v. Sampson on the ground that they were expressly limited to the facts of those cases, that is, intrasession vetoes. 582 F. Supp. at 167-68. Accordingly, the court held that "neither Wright nor Kennedy v. Sampson give it license to depart from the only case directly in point, Pocket Veto. Unless and until the Supreme Court reconsiders the rule of that case, the Court must, as must all lower federal courts, follow it." 582 F. Supp. at 168.

The Barnes case was argued to the Court of Appeals for the District of Columbia Circuit on June 4, 1984 (with Acting Administrator Kline of the General Services Administration substituted as a defendant). No decision has been reached in the appeal.

III

DISCUSSION

This Office has previously identified distinctions in the the use of the pocket veto during intersession and intrasession adjournments. In a memorandum of February 10, 1982, for Deputy Counsel to the President Richard A. Hauser from Assistant Attorney General Olson, we concluded, for example, that the "historical practice . . . strongly supports the pocket veto during final and intersession adjournments, but is inconclusive for intrasession adjournments." Id. at 3.

That memorandum also identified the interests served by the pocket veto -- mutuality, prompt reconsideration, and public certainty -- and examined these interests in an attempt to identify the contours of the pocket veto power. We indicated that, in some circumstances, these interests were differently served by intersession and intrasession pocket vetoes. For example, the memorandum can be read to conclude that use of the pocket veto to serve the President's interest in mutuality is required during an intrasession adjournment only if "Congress failed to provide any effective means by which the President may return a bill during the adjournment." Id. at 11. The memorandum also concluded that the interest in prompt reconsideration was difficult to quantify and that between the extremes of the five-month adjournment at issue in the Pocket Veto Case and the three-day and five-day adjournments at issue in Wright and Kennedy v. Sampson, respectively, lay "a broad area of uncertainty, in which the argument favoring the validity of a pocket veto becomes stronger as the period of adjournment increases." Id. At times, we noted, the interest in mutuality would reinforce the interest in prompt reconsideration; at other times, it would conflict. Finally, we identified two separate components, factual and legal, of the interest in public certainty. The factual component could be satisfied by the "[m]odern methods of communication" referred to in Kennedy v. Sampson, while the legal component required a bright line rule. In this respect, the interest in prompt reconsideration, measured along a continuum of increasing strength over time, was in tension with the legal need for public certainty.

Applying these factors, the memorandum concluded that the pocket veto was appropriate during intersession adjournments, but that its use during an intrasession adjournment would be "directly contrary to the language in Kennedy and inconsistent with at least the spirit of Wright. The interests underlying

the pocket veto provision do not clearly resolve the question whether pocket vetoes are appropriate during intrasession adjournments." Id. at 16. We specifically noted that use of the pocket veto should not be precluded within a session of Congress, for there was room to argue that Kennedy v. Sampson was erroneous and that the broad dicta in Wright should not be followed. Nevertheless, we predicted that such an argument would face an uphill battle in the courts. We therefore advised that the President should not exercise the pocket veto during an intrasession adjournment unless he was willing to face an almost inevitable legal challenge in which he might not be successful, at least in the lower courts. 3/

The brief filed in the court of appeals on behalf of the United States in Barnes v. Kline, No. 84-5155 (D.C. Cir., filed May 18, 1984), points out that the applicability of the Pocket Veto Clause to intersession adjournments is a sufficient basis upon which to decide that case. The brief nevertheless makes the broader argument that a pocket veto of H.R. 4042 was appropriate because the adjournment during which it was vetoed was longer than three days. The brief thus advances a theory for use of the pocket veto power that does not depend upon a distinction between intersession and intrasession adjournments, which, as both parties in Barnes concede, is nowhere mentioned in the Constitution in connection with the Pocket Veto Clause. Rather, the brief draws another line which is equally bright and which has the added advantage of providing the only rational constitutional basis for distinguishing "adjournments," when the pocket veto is appropriate, from "recesses," when it is not.

The distinction stems from the Supreme Court's characterization in Wright of Article I, section 5, clause 4 as "the constitutional permission" granted to each House to adjourn for not more than three days without the consent of the other. See Wright, supra, 302 U.S. at 598. The Wright Court termed these particular adjournments "recesses," a term which has

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3/ In a supplemental memorandum of November 15, 1982, for Deputy Counsel to the President Hauser from Assistant Attorney General Olson, we again stated our conclusion that the pocket veto was the appropriate method of disapproval during both intersession and extended intrasession adjournments. We again advised, however, that the case law suggested caution in exercising that power during at least intrasession adjournments until more favorable court decisions had been obtained.

parliamentary significance for Congress, but no constitutional significance. Consistent with this distinction, the Court then held that a "recess . . . while Congress is in session" does not prevent a return veto. Id. Because the Court relied on this "constitutional permission" to distinguish "recesses" from adjournments under the Pocket Veto Clause, the brief maintains that only a recess within the constitutionally prescribed three-day limit is outside the Pocket Veto Clause. The Department has thus argued that the analysis in Wright leads to the conclusion that the Pocket Veto Clause applies to all adjournments in excess of three days. As the brief notes, the majority in Wright expressly declined to "conjecture" about the result if "Congress" has not adjourned its session but one House has adjourned for more than three days, 302 U.S. at 598, but Justice Stone's separate concurring opinion concluded that the Court had in fact "intimat[ed]" that a return of the bill is prevented within the meaning of the Pocket Veto Clause by an adjournment of more than three days. Id. at 601-02.

Fully explained, under the theory advanced in the Department's brief, "Congress" is "adjourned" within the meaning of the Pocket Veto Clause whenever the adjournment is longer than three days, even if the adjournment is limited to one House, because either a one-House or a two-House adjournment of longer than three days requires action by the "Congress." In other words, if both Houses are adjourned, the adjournment is "by the Congress," under the analysis of the Court in Wright, whether the adjournment is intersession or intrasession. If only one House is adjourned, but the adjournment is for more than three days, the adjournment of that House still results in an adjournment "by the Congress" within the meaning of the Pocket Veto Clause because Article I, section 5, clause 4 of the Constitution requires at least the consent of the other House to an adjournment of longer than three days. See generally Brief in Barnes at 49-57.

The Brief in Barnes further argues that the decision by the court of appeals in Kennedy v. Sampson was based on a misreading of Wright. The "fundamental error" in Sampson, according to the brief, was that court's failure to recognize that the Supreme Court in Wright had considered two separate issues: whether a return was legally prevented within the meaning of the Pocket Veto Clause and whether a return was practically impossible. By confusing these issues, the court in Sampson ignored the basis for the Supreme Court's holding in Wright -- the fact that there was no "adjournment" by Congress within the meaning of that term as used in the Constitution -- and instead incorrectly relied on the lack of any physical impossibility preventing the President's return of the bill.

There are, however, certain obvious limitations to reliance on the distinction between "recesses" and "adjournments" as the constitutional basis for the exercise of the pocket veto during this current intrasession adjournment. First, of course, the veto would be inconsistent with the decision in Kennedy v. Sampson, which is currently the law of this circuit. 4/

Second, it is important to remember (notwithstanding our argument in Barnes that a constitutional distinction should be recognized between recesses of less than three days, by one or both Houses, on the one hand, and adjournments of longer than three days, by one or both Houses, on the other) that the district court's opinion in Barnes nevertheless appears to rely heavily on the distinction, which seems to exist under prior cases, between intersession and intrasession adjournments. For example, the district court in Barnes dismissed the complaint because it found that the case was identical to the Pocket Veto Case, concerning an intersession adjournment, and distinguishable from Wright and Kennedy v. Sampson, which concerned intrasession adjournments. Thus, notwithstanding that the result of the district court's decision in Barnes was to uphold the President's exercise of the pocket veto power, the decision probably should not be read as recognizing a pocket veto power broad enough to include intrasession, as well as intersession, adjournments. Rather, the decision serves to emphasize the difference under current law between intersession and intrasession adjournments. 5/

4/ As noted, the brief in Barnes argues that Kennedy v. Sampson was incorrectly decided. If the court of appeals reverses the district court in that case, and the case goes on to further proceedings, either in the court of appeals en banc or in the Supreme Court, the Department will argue that Sampson should be overruled. Nevertheless, it is the law at this time.

5/ A number of these distinctions have been previously noted by this Department. For example, the Brief in Barnes in the court of appeals emphasizes a number of ways in which the exercise of the pocket veto during an intersession adjournment is based upon different -- and more convincing -- constitutional considerations, including the difference in historical practice and the introduction in Congress of legislation directed solely against the use of the pocket veto during intersession adjournments. These factors are cited as support

(footnote continued on next page)

Finally, given Congress's eagerness to challenge the President's exercise of the pocket veto during the intersession adjournment of the 98th Congress, a procedure that was clearly supported by the Pocket Veto Case, there is a very high probability that Congress would challenge the exercise of the pocket veto during this intrasession adjournment, when the use of the pocket veto is less clearly established by history and legal precedent.

IV

RECOMMENDATION

Given the pendency of the appeal in Barnes, and the law in this circuit that the pocket veto cannot be exercised during an intrasession adjournment, we would counsel against the use of the pocket veto at this time during an intrasession adjournment. We would advise instead that if the President wishes to disapprove a bill presented to him during this intrasession adjournment, he should send the bill to its originating House with a message which contains his objections, as well as an explanation that he is doing so merely to comply technically with the decision of the court of appeals in Kennedy v. Sampson, and not because of any doubts concerning the availability of the pocket veto during an intrasession adjournment. He should state his conviction that the bill will fail to become law merely because he is withholding his approval, inasmuch as the Congress has prevented its return by their adjournment. We have attached suggested language for this purpose.

5/ (continued)
for the proposition that the pocket veto power is available during intersession adjournments, but they might also be perceived to support the conclusion that the pocket veto power is not appropriate during intrasession adjournments. Similarly, prior memoranda of this Office have construed the purpose of the provision in House Rule III-5 for receipt of presidential messages as facilitating, if possible, the use of the return veto during intrasession adjournments and thereby discouraging the use of the pocket veto at that time. We concluded that the Rule was not intended to, and did not, require the use of the return veto during intersession adjournments. The implication may be present, therefore, that the use of the pocket veto during intrasession adjournments presents a different legal situation from intersession adjournments.

We do not believe that such a course would amount to an unfavorable admission regarding the scope of the pocket veto power or that it would have any adverse precedential consequences in the future. When the law in this area is clarified -- hopefully, after the decision in the Barnes case -- it should then be possible to exercise the pocket veto during intrasession adjournments without this precautionary step. We believe that a court would be unlikely to view a return veto accompanied by the disclaimer described above as anything other than an attempt by the President to act in technical compliance with Kennedy v. Sampson while, at the same time, preserving his constitutional power.

Robert B. Shanks
Deputy Assistant Attorney General
Office of Legal Counsel

Attachment --

Suggested language for presidential statement concerning disapproval

cc: Richard K. Willard
Acting Assistant Attorney General
Civil Division

ATTACHMENT

Suggested Language For Presidential Statement
Concerning Disapproval

Since the adjournment of the Congress has prevented my return of H.R. ____ within the meaning of Article I, section 7, clause 2 of the Constitution, my withholding of approval from the bill precludes its becoming a law. Notwithstanding what I believe to be my constitutional power regarding the use of the "pocket veto" during an adjournment of Congress, however, I am sending H.R. ____ to the Clerk of the House of Representatives with my objections, consistent with the court of appeals' decision in Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974).

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release August 27, 1984

STATEMENT BY THE PRESIDENT

I have today signed H.R. 5890, which establishes a temporary commission to encourage and advise on appropriate observances of the first legal holiday commemorating the birth of Martin Luther King, Jr., which will occur on January 20, 1986.

The Commission can make a significant contribution by assisting governmental and private organizations in arranging for appropriate ceremonies to honor this great and distinguished man.

I have been advised by the Attorney General that, in view of the requirements of the Appointments and the Incompatibility Clauses of the Constitution, a majority of the Members of the Commission, and therefore the Commission itself, may perform only ceremonial and advisory functions.

# # # #

THE WHITE HOUSE

WASHINGTON

August 27, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Enrolled Bill H.R. 4214 -- Mineral Resources Research Institutes

Richard Darman has asked for comments on the above-referenced enrolled bill by noon today. This bill, consistently opposed by the Administration, would extend for five years Federal matching funding for 31 mineral institutes, typically established at universities. The affected agencies do not recommend a veto, since funding levels are low and the President's February 1984 veto of a similar water research institutes bill was easily overriden.

The bill does, however, contain a troublesome provision that Justice recommends addressing in a signing statement. The Surface Mining Control and Reclamation Act of 1977, which created the mineral institutes program extended by this bill, also established a Committee on Mining and Mineral Resources Research ("the Committee"). The membership of the Committee includes two private individuals who serve ex officio -- the President of the National Academy of Sciences and the President of the National Academy of Engineering. Under the 1977 Act, the responsibilities of the Committee were purely advisory, so the fact that these two individuals were not appointed by the President or an executive branch official presented no constitutional concerns. The instant bill would, however, expand the responsibility of the Committee, to include determining the eligibility of a college or university to participate in the mineral institutes program. Section 10(a).

Justice has advised, and I agree, that the Committee's new responsibility must be considered advisory rather than final if the bill is to survive scrutiny under the Appointments Clause, as interpreted in Buckley v. Valeo, 424 U.S. 1 (1976). The proposed signing statement makes this point.

I have reviewed the memorandum for the President prepared by OMB Director David Stockman, the bill itself, and the draft signing statement, and have no objections.

Attachment

THE WHITE HOUSE

WASHINGTON

August 27, 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. 4214 -- Mineral Resources Research Institutes

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

FFF:JGR:aea 8/27/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

August 27, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Enrolled Bill H.R. 4214 -- Mineral Resources Research Institutes

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

FFF:JGR:aea 8/27/84
cc: FFFielding/JGRoberts/Subj/Chron

ID # 216814 CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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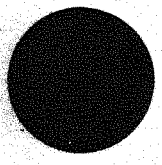

Name of Correspondent: Richard Damman

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

Subject: Enrolled Bill HR 4214 - Mineral Resources Research Institutes

ROUTE TO: | **ACTION** | **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUTHOL	ORIGINATOR	84 08 22			/ /
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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:
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Document No. 216814SS

WHITE HOUSE STAFFING MEMORANDUM

DATE: 8/22 ACTION/CONCURRENCE/COMMENT DUE BY: 8/27 - NOON

SUBJECT: ENROLLED BILL H.R. 4214 - MINERAL RESOURCES RESEARCH INSTITUTES

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

REMARKS:

May we have your comments on the attached Bill and suggested signing statement by noon Monday, August 27. Thank you.

RESPONSE:

1984 AUG 22 PM 5:04

Richard G. Darman
Assistant to the President
Ext. 2702

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET 1984 AUG 22 PM 2:50
WASHINGTON, D.C. 20503

AUG 22 1984

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H. R. 4214 - Mineral Resources Research Institutes
Sponsors - Rep. McNulty (D) Arizona and 10 others

Last Day for Action

August 31, 1984 - Friday

Purpose

Extends for five-years the authorization of appropriations for the Department of the Interior's mineral research institute program, which expires on September 30, 1984.

Agency Recommendations

Office of Management and Budget	Approval (Signing statement attached)
Department of the Interior	No objection
National Science Foundation	Defers to Interior
Department of Justice	Cites concerns (Signing statement attached)

Discussion

Background

The Surface Mining Control and Reclamation Act 1977 established a State mining and mineral resources research program in the Department of the Interior. Under the program, Interior makes one-to-one matching grants to 31 mineral institutes to stimulate research and train scientists in mining and metallurgy. The authorization of appropriations for the program expires September 30, 1984.

Substantial changes have occured in the mineral industry since the inception of the program, reducing the demand for newly trained mining engineers and extractive metallurgists. Moreover, the mineral institutes aided by the program are all components of large, viable educational institutions, which derive a large portion of their financial support from State revenues and other

non-Federal sources. The Administration has, therefore, consistently recommended no funding for this program, arguing that it is time the States and the private sector assume these responsibilities. Nevertheless, Congress has continued to appropriate funds for the program. An amount of $9.4 million was appropriated for 1984. The Senate-reported version of the 1985 Interior appropriations bill includes $9.65 million for this purpose.

The Enrolled Bill

The enrolled bill, which passed both Houses by voice vote, would:

-- authorize appropriations to the Secretary of the Interior adequate to provide each State institute with $300,000 in fiscal year 1985, and $400,000 annually for fiscal years 1986 through 1989 (with 31 institutes, this would amount to $9.3 million in fiscal year 1985 and $12.4 million annually for 1986 through 1989, for a total of $58.9 million);

-- increase the ratio of matching funds the States must contribute to the institutes from one-to-one to 1.5-to-1 for fiscal years 1985 and 1986, and 2-to-1 for fiscal years 1987 through 1989;

-- authorize appropriations to the Secretary of the Interior of $10 million in fiscal year 1985, increasing $1 million each year through fiscal year 1989 (for a total of $60 million), for specific research and demonstration projects;

-- authorize annual appropriations of $1 million for fiscal year 1985 and succeeding years to the Secretary for publishing results of the program and other administrative costs;

-- require the Secretary to establish a center for cataloging research in all mining and mineral resources fields;

-- require the President to clarify and coordinate Federal mining and mineral resources research "by such means as he deems appropriate;"

-- expand the membership of the Committee on Mining and Mineral Resources Research established under the 1977 Act from 9 to 12 members, including six members chosen by the Secretary--two university administrators involved with the program, two individuals from the mining industry, a working miner, and a representative of the conservation

community (Current membership consists of three officers of the Executive branch, four individuals chosen by the Secretary of the Interior, the President of the National Academy of Sciences, and the President of the National Academy of Engineering); and

-- require the Committee, which currently serves a purely advisory role, to determine the eligibility of new institutes to participate in the program using specified criteria, which could be interpreted as an Executive branch function, as discussed below.

Executive Branch Position

On behalf of the Administration, the Interior Department testified and reported in opposition to both H.R. 4214 and its Senate companion bill, S. 2186 (Warner (R) VA and 33 others) before the House Committee on Interior and Insular Affairs and the Senate Committee on Energy and Natural Resources in February and March of this year. Moreover, in February I sent a letter to Senator McClure strongly opposing S. 2186, and in a Statement of Administration Policy we expressed opposition to H.R. 4214. The reasons for Administration opposition were:

-- the current institutes are well-established and able to support themselves with funding from their States and the private sector;

-- each institute is associated with a major college or university funded primarily by non-Federal sources;

-- the institutes will continue to receive grants and contracts under other ongoing Federal research programs;

-- several changes have occurred in the mining industry since the inception of the program in 1978, including a reduced demand for technical personnel; and

-- it would be inadvisable to expand the role of the Committee on Mining and Mineral Resources Research to include inappropriate duties going beyond those of an advisory nature.

Congressional Views

During House floor debate on H.R. 4214, Representatives Lujan (R-New Mexico), McNulty (D-Arizona), Emerson (R-Missouri), McCain (R-Arizona), Vucanovich (R-Nevada), Richardson (D-New Mexico) and Daschle (D-South Dakota) persuaded their colleagues that the bill is necessary to reverse the growing dependence of the United States on foreign supplies of essential minerals. In addition, supporters in both Houses pointed to a decrease in total authorizations for the program and the increased State matching requirements as signals to the States and private industry that both will have to assume greater responsibility for continuation of the program.

Agency Views

The Department of the Interior has no objection to your approval of the bill, given the overwhelming congressional support for this legislation and the improved matching and the institutes' more specific eligibility requirements.

The Department of Justice advises that the sections of the bill dealing with the Committee on Mining and Mineral Resources Research "raise important and fundamental constitutional issues." Justice notes the bill's provisions which require the Committee to determine eligibility for Federal funds might be held to be unconstitutional unless interpreted to require the Committee to make eligibility recommendations to the Secretary of the Interior for final determination. The Senate Report on the bill supports this interpretation, and Justice recommends that, should you decide to approve this bill, you issue a signing statement "recognizing the need for the bill to be construed carefully to avoid these constitutional problems." ✓

Conclusion

I concur in Interior's assessment that given the overwhelming congressional support for this program there is nothing to be gained from attempting to veto this legislation. In this regard I note that the issues raised by this measure are directly parallel to those posed by S. 684, the Water Resources Act of 1984. That bill extended a five-year appropriation authorization for a program of grants to State water research institutes for which the Administration has sought unsuccessfully for three years to end Federal funding in favor of State and private sector support. You vetoed S. 684 on February 21, 1984, but the Senate overrode the veto by 87-12 on March 21, 1984, and the House overrode by 309-81 the next day. ✓

Moreover, appropriations for this program have historically been far below the amounts authorized. In fiscal year 1984, as noted above, appropriations were $9.4 million, compared to an authorization of over $37 million. The 1985 appropriation will be about the same as for 1984. While the elimination of all funding for the program is a desirable but probably unattainable goal in the short run, appropriations are likely to remain at a modest level and considerably less than the authorized amounts. Accordingly, I recommend that you approve the enrolled bill.

Attached for your consideration is a revision of Justice's signing statement regarding the constitutional concerns raised by the bill. We modified Justice's draft statement to (1) delete favorable comments on the substantive provisions of the enrolled bill and (2) reflect the fact that it is the statutory assignment of arguably Executive duties to a committee that already includes members chosen by private organizations, rather than vesting new appointment authority in such organizations, that raises constitutional concerns.

David A. Stockman
Director

Enclosures

STATEMENT BY THE PRESIDENT

I have today signed H.R. 4214, a bill to establish a State Mining and Mineral Resources Research Institute program, and for other purposes.

As its title suggests, the bill would reauthorize the Department of the Interior's program for funding State mining and mineral resources research institutes. In order to assist in the operation of this program, the bill also continues the Committee on Mining and Mineral Resources Research, which was originally established in 1977 under the Surface Mining Control and Reclamation Act to advise the Secretary of the Interior on matters relating to mining and mineral resources research. H.R. 4214 would require the Committee to assist in the determination of organizations eligible for funding under this Act.

I am concerned that since two of the current Committee's members were appointed by private organizations, the requirement to assist in determining eligibility for Federal funds could raise fundamental constitutional questions. The Attorney General has advised me that this vesting of authority to assist in the determination of eligibility for Federal funds in a Committee that includes members appointed by private organizations could constitute a violation of the Appointments Clause, Article II, Sec. 2, cl. 2, unless the responsibilities of the Committee are given a careful narrowing construction. The Supreme Court has

decided that 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). For this reason, I am signing the bill based on my understanding that this Committee, which includes members appointed by private organizations, would only perform advisory functions.

The research goals which this bill seeks to further must be carried out consistent with the Constitution. Accordingly, I have directed the Secretary of the Interior to seek the advice of the Attorney General in implementing this Act to ensure that it does not transgress constitutional limitations.

Finally, I must reiterate my concerns that the mineral institute program is no longer an appropriate use of Federal funds, given changes in the mineral industry since the program's inception in 1977 that have reduced the demand for technical personnel. My Administration will continue to propose reductions in Federal funds for the program, in the belief that it should be funded primarily by State and private sources.

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 establish a State Mining and Mineral Resources Research Institute program, and for other purposes.

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

AUTHORIZATION OF STATE ALLOTMENTS TO INSTITUTES

SECTION 1. (a)(1) There are authorized to be appropriated to the Secretary of the Interior (hereafter in this Act referred to as the "Secretary") funds adequate to provide for each participating State $300,000 for the fiscal year ending September 30, 1985, and $400,000 to each participating State for each fiscal year thereafter for a total of five years, to assist the States in carrying on the work of a competent and qualified mining and mineral resources research institute or center (hereafter in this Act referred to as the "institute") at one public college or university in the State which meets the eligibility criteria established in section 10.

(2)(A) Funds appropriated under this section shall be made available for grants to be matched on a basis of no less than one and one-half non-Federal dollars for each Federal dollar during the fiscal years ending September 30, 1985, and September 30, 1986, and no less than two non-Federal dollars for each Federal dollar during the fiscal years ending September 30, 1987, September 30, 1988, and September 30, 1989.

(B) If there is more than one such eligible college or university in a State, funds appropriated under this Act shall, in the absence of a designation to the contrary by act of the legislature of the State, be granted to one such college or university designated by the Governor of the State.

(C) Where a State does not have a public college or university eligible under section 10, the Committee on Mining and Mineral Resources Research established in section 9 (hereafter in this Act referred to as the "Committee") may allocate the State's allotment to one private college or university which it determines to be eligible under such section.

(b) It shall be the duty of each institute to plan and conduct, or arrange for a component or components of the college or university with which it is affiliated to conduct research, investigations, demonstrations, and experiments of either, or both, a basic or practical nature in relation to mining and mineral resources, and to provide for the training of mineral engineers and scientists through such research, investigations, demonstrations, and experiments. The subject of such research, investigation, demonstration, experiment, and training may include exploration; extraction; processing; development; production of mineral resources; mining and mineral technology; supply and demand for minerals; conservation and best use of available supplies of minerals; the economic, legal, social, engineering, recreational, biological, geographic, ecological, and other as-

pects of mining, mineral resources, and mineral reclamation. Such research, investigation, demonstration, experiment, and training shall consider the interrelationship with the natural environment, the varying conditions and needs of the respective States, and mining and mineral resources research projects being conducted by agencies of the Federal and State governments and other institutes.

RESEARCH FUNDS TO INSTITUTES

SEC. 2. (a) There is authorized to be appropriated to the Secretary $10,000,000 for the fiscal year ending September 30, 1985. This amount shall be increased by $1,000,000 for each fiscal year thereafter for four additional years, which shall remain available until expended. Such funds when appropriated shall be made available to institutes to meet the necessary expenses for purposes of—

(1) specific mineral research and demonstration projects of broad application, which could not otherwise be undertaken, including the expenses of planning and coordinating regional mining and mineral resources research projects by two or more institutes; and

(2) research into any aspects of mining and mineral resources problems related to the mission of the Department of the Interior, which are deemed by the Committee to be desirable and are not otherwise being studied.

(b) Each application for funds under subsection (a) of this section shall state, among other things, the nature of the project to be undertaken; the period during which it will be pursued; the qualifications of the personnel who will direct and conduct it; the estimated costs; the importance of the project to the Nation, region, or State concerned; its relation to other known research projects theretofore pursued or being pursued; the extent to which the proposed project will provide opportunity for the training of mining and mineral engineers and scientists; and the extent of participation by nongovernmental sources in the project.

(c) The Committee shall review all such funding applications and recommend to the Secretary the use of the institutes, insofar as practicable, to perform special research. Recommendations shall be made without regard to the race, religion, or sex of the personnel who will conduct and direct the research, and on the basis of the facilities available in relation to the particular needs of the research project; special geographic, geologic, or climatic conditions within the immediate vicinity of the institute; any other special requirements of the research project; and the extent to which such project will provide an opportunity for training individuals as mineral engineers and scientists. The Committee shall recommend to the Secretary the designation and utilization of such portions of the funds authorized to be appropriated by this section as it deems appropriate for the purpose of providing scholarships, graduate fellowships, and postdoctoral fellowships.

(d) No funds shall be made available under subsection (a) of this section except for a project approved by the Secretary and all funds shall be made available upon the basis of merit of the project, the need for the knowledge which it is expected to produce when completed, and the opportunity it provides for the training of individuals as mineral engineers and scientists.

(e) No funds made available under this section shall be applied to the acquisition by purchase or lease of any land or interests therein,

or the rental, purchase, construction, preservation, or repair of any building.

FUNDING CRITERIA

SEC. 3. (a) Funds available to institutes under sections 1 and 2 of this Act shall be paid at such times and in such amounts during each fiscal year as determined by the Secretary, and upon vouchers approved by him. Each institute shall—

(1) set forth its plan to provide for the training of individuals as mineral engineers and scientists under a curriculum appropriate to the field of mineral resources and mineral engineering and related fields;

(2) set forth policies and procedures which assure that Federal funds made available under this Act for any fiscal year will supplement and, to the extent practicable, increase the level of funds that would, in the absence of such Federal funds, be made available for purposes of this Act, and in no case supplant such funds; and

(3) have an officer appointed by its governing authority who shall receive and account for all funds paid under the provisions of this Act and shall make an annual report to the Secretary on or before the first day of September of each year, on work accomplished and the status of projects underway, together with a detailed statement of the amounts received under any provisions of this Act during the preceding fiscal year, and of its disbursements on schedules prescribed by the Secretary.

If any of the funds received by the authorized receiving officer of any institute under the provisions of this Act shall by any action or contingency be found by the Secretary to have been improperly diminished, lost, or misapplied, such funds shall be replaced by the State concerned and until so replaced no subsequent appropriation shall be allotted or paid to any institute of such State.

(b) The institutes are authorized and encouraged to plan and conduct programs under this Act in cooperation with each other and with such other agencies and individuals as may contribute to the solution of the mining and mineral resources problems involved. Moneys appropriated pursuant to this Act shall be available for paying the necessary expenses of planning, coordinating, and conducting such cooperative research.

DUTIES OF THE SECRETARY

SEC. 4. (a) The Secretary shall administer this Act and, after full consultation with other interested Federal agencies, shall prescribe such rules and regulations as may be necessary to carry out its provisions. The Secretary shall furnish such advice and assistance as will best promote the purposes of this Act, shall participate in coordinating research initiated under this Act by the institutes, shall indicate to them such lines of inquiry that seem most important, and shall encourage and assist in the establishment and maintenance of cooperation by and between the institutes and between them and other research organizations, the United States Department of the Interior, and other Federal establishments.

(b) On or before the first day of July in each year beginning after the date of enactment of this Act, the Secretary shall ascertain

whether the requirements of section 3(a) have been met as to each institute and State.

(c) The Secretary shall make an annual report to the Congress of the receipts, expenditures, and work of the institutes in all States under the provisions of this Act. The Secretary's report shall indicate whether any portion of an appropriation available for allotment to any State has been withheld and, if so, the reason therefor.

AUTONOMY

SEC. 5. Nothing in this Act shall be construed to impair or modify the legal relationship existing between any of the colleges or universities under whose direction an institute is established and the government of the State in which it is located, and nothing in this Act shall in any way be construed to authorize Federal control or direction of education at any college or university.

MISCELLANEOUS PROVISIONS

SEC. 6. (a) The Secretary shall obtain the continuing advice and cooperation of all agencies of the Federal Government concerned with mining and mineral resources, of State and local governments, and of private institutions and individuals to assure that the programs authorized by this Act will supplement and not be redundant with respect to established mining and minerals research programs, and to stimulate research in otherwise neglected areas, and to contribute to a comprehensive nationwide program of mining and minerals research, with due regard for the protection and conservation of the environment. The Secretary shall make generally available information and reports on projects completed, in progress, or planned under the provisions of this Act, in addition to any direct publication of information by the institutes themselves.

(b) Nothing in this Act is intended to give or shall be construed as giving the Secretary any authority over mining and mineral resources research conducted by any [illegible] ment, or as repealing or diminishing existing authorities or responsibilities of any agency of the Federal Government to plan and conduct, contract for, or assist in research in its area of responsibility and concern with regard to mining and mineral resources.

(c) No research, demonstration, or experiment shall be carried out under this Act by an institute financed by grants under this Act, unless all uses, products, processes, patents, and other developments resulting therefrom, with such exception or limitation, if any, as the Secretary may find necessary in the public interest, are made available promptly to the general public. Patentable inventions shall be governed by the provisions of Public Law 96-517. Nothing contained in this section shall deprive the owner of any background patent relating to any such activities of any rights which that owner may have under that patent.

(d) There are authorized to be appropriated after September 30, 1984, such sums as are necessary for the printing and publishing of the results of activities carried out by institutes under this Act and for administrative planning and direction, but such appropriations shall not exceed $1,000,000 in any single fiscal year.

CENTER FOR CATALOGING

SEC. 7. The Secretary shall establish a center for cataloging current and projected scientific research in all fields of mining and mineral resources. Each Federal agency doing mining and mineral resources research shall cooperate by providing the cataloging center with information on work underway or scheduled by it. The cataloging center shall classify and maintain for public use a catalog of mining and mineral resources research and investigation projects in progress or scheduled by all Federal agencies and by such non-Federal agencies of government, colleges, universities, private institutions, firms, and individuals as may make such information available.

INTERAGENCY COOPERATION

SEC. 8. The President shall, by such means as he deems appropriate, clarify agency responsibility for Federal mining and mineral resources research and provide for interagency coordination of such research, including the research authorized by this Act. Such coordination shall include—

(1) continuing review of the adequacy of the Government-wide program in mining and mineral resources research;

(2) identification and elimination of duplication and overlap between agency programs;

(3) identification of technical needs in various mining and mineral resources research categories;

(4) recommendations with respect to allocation of technical effort among Federal agencies;

(5) review of technical manpower needs, and findings concerning management policies to improve the quality of the Government-wide research effort; and

(6) actions to facilitate interagency communication at management levels.

SEC. 9. (a) The Secretary [illegible] Mineral Resources Research composed of—

(1) the Assistant Secretary of the Interior responsible for minerals and mining research, or his delegate;

(2) the Director, Bureau of Mines, or his delegate;

(3) the Director, United States Geological Survey, or his delegate;

(4) the Director of the National Science Foundation, or his delegate;

(5) the President, National Academy of Sciences, or his delegate;

(6) the President, National Academy of Engineering, or his delegate; and

(7) not more than six other persons who are knowledgeable in the fields of mining and mineral resources research, including two university administrators involved in the conduct of programs authorized by section 301 of the Surface Mining Control and Reclamation Act of 1977, two representatives from the mining industry, a working miner, and a representative from the conservation community. In making these six appointments, the Secretary shall consult with interested groups.

(b) The Committee shall consult with, and make recommendations to, the Secretary on all matters relating to mining and mineral resources research and the determinations that are required to be made under this Act. The Secretary shall consult with, and consider recommendations of, such Committee in such matters.

(c) Committee members, other than officers or employees of Federal, State, or local governments, shall be, for each day (including traveltime) during which they are performing Committee business, paid at a rate fixed by the Secretary but not excess of the daily equivalent of the maximum rate of pay for grade GS-18 of the General Schedule under section 5332 of title 5 of the United States Code, and shall be fully reimbursed for travel, subsistence, and related expenses.

(d) The Committee shall be jointly chaired by the Assistant Secretary of the Interior responsible for minerals and mining and a person to be elected by the Committee from among the members referred to in paragraphs (5), (6), and (7) of subsection (a) of this section.

(e) The Committee shall develop a national plan for research in mining and mineral resources, considering ongoing efforts in the universities, the Federal Government, and the private sector, and shall formulate and recommend a program to implement the plan utilizing resources provided for under this Act. The Committee shall submit such plan to the Secretary, the President, and the Congress on or before March 1, 1986, and shall update the plan annually thereafter.

(f) Section 10 of the Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Committee.

ELIGIBILITY CRITERIA

SEC. 10. (a) The Committee shall determine the eligibility of a college or university to participate as a mining and mineral resources research institute under this Act using criteria which include—

(1) the presence of a substantial program of graduate instruction and research in mining or mineral extraction or closely related fields which has a demonstrated history of achievement;

(2) evidence of institutional commitment for the purposes of this Act;

(3) evidence that such institution has or can obtain significant industrial cooperation in activities within the scope of this Act; and

(4) the presence of an engineering program in mining or minerals extraction that is accredited by the Accreditation Board for Engineering and Technology, or evidence of equivalent institutional capability as determined by the Committee.

(b) Notwithstanding the provisions of subsection (a), those colleges or universities which, on the date of enactment of this Act, have a mining or mineral resources research institute program which has been found to be eligible pursuant to title III of the Surface Mining Control and Reclamation Act of 1977 (91 Stat. 445) shall continue to be eligible pursuant to this Act for a period of four fiscal years beginning October 1, 1984.

Speaker of the House of Representatives.

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

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release August 29 , 1984

STATEMENT BY THE PRESIDENT

I have today signed H.R. 4214, a bill to establish a State Mining and Mineral Resources Research Institute program, and for other purposes.

As its title suggests, the bill would reauthorize the Department of the Interior's program for funding State mining and mineral resources research institutes. In order to assist in the operation of this program, the bill also continues the Committee on Mining and Mineral Resources Research, which was originally established in 1977 under the Surface Mining Control and Reclamation Act to advise the Secretary of the Interior on matters relating to mining and mineral resources research. H.R. 4214 would require the Committee to assist in the determination of organizations eligible for funding under this Act.

I am concerned that since two of the current Committee's members were appointed by private organizations, the requirement to assist in determining eligibility for Federal funds could raise fundamental constitutional questions. The Attorney General has advised me that this vesting of authority to assist in the determination of eligibility for Federal funds in a Committee that includes members appointed by private organizations could constitute a violation of the Appointments Clause, Article II, Sec. 2, cl. 2, unless the responsibilities of the Committee are given a careful narrowing construction. The Supreme Court has decided that 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). For this reason, I am signing the bill based on my understanding that this Committee, which includes members appointed by private organizations, would only perform advisory functions.

The research goals which this bill seeks to further must be carried out consistent with the Constitution. Accordingly, I have directed the Secretary of the Interior to seek the advice of the Attorney General in implementing this Act to ensure that it does not transgress constitutional limitations.

Finally, I must reiterate my concerns that the mineral institute program is no longer an appropriate use of Federal funds, given changes in the mineral industry since the program's inception in 1977 that have reduced the demand for technical personnel. My Administration will continue to propose reductions in Federal funds for the program, in the belief that it should be funded primarily by State and private sources.

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