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DOC NO	Doc Type	Document Description	No of Pages	Doc Date	Restrictions	
1	MEMO	ROBERTS TO FIELDING RE REGINALD BRINKMANN (PARTIAL)	1	5/17/1984	B6	779
2	NOTE	TO ROBERTS RE REGINALD BRINKMANN (PARTIAL)	1	5/15/1984	B6	780
3	MEMO	ROBERTS TO FRED FIELDING (PARTIAL)	3	5/18/1984	B6	1258

Freedom of Information Act - [5 U.S.C. 552(b)]

B-1 National security classified information [(b)(1) of the FOIA]
B-2 Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
B-3 Release would violate a Federal statute [(b)(3) of the FOIA]
B-4 Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
B-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
B-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
B-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

THE WHITE HOUSE

WASHINGTON

May 11, 1984

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS JGR

SUBJECT: District of Columbia Nonpartisan Elections

Steve Rhodes has asked C.A. Howlett and you to consider his friend Willie Leftwich's proposal that elections in the District be held on a nonpartisan basis. Leftwich argues that this is the only way that Republicans would have a chance to be elected to any local government posts.

Leftwich is probably correct, but requiring that District elections be nonpartisan would require amendment of the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. 93-198, 87 Stat. 774 (1973)(the so-called "Home Rule Act"). With one exception, the Home Rule Act clearly contemplates partisan elections in the District. Pursuant to § 421(b) of the Act, "the Mayor... shall be elected on a partisan basis...." Section 401(a) provides that "the members of the Council shall be elected by the registered qualified electors of the District." Although elections for the Council are not explicitly established as partisan, as in the case of elections for Mayor, the Home Rule Act does provide that a political party may nominate a number of candidates for the at large Council seats equal to no more than one less than the number of at large vacancies, § 401(b)(2). This clearly indicates that the elections are to be partisan affairs, with a role for the political parties. See also § 401(d)(3)(no more than three of the four at large Council seats may be held by members of the same political party). The one exception to the partisan nature of District elections concerns the D.C. Board of Elections. Pursuant to § 495 of the Act, the eleven members of this Board are elected "on a nonpartisan basis."

I see no way of convincing either the D.C. Council or the Congress to go along with a plan to increase Republican chances in local District elections by making them non-partisan. There certainly is no way given the current controversy over D.C. affairs engendered by the Chadha decision and our position on the D.C. Chadha bill. Left-wich's good idea has no chance of becoming anything more than a good idea.

THE WHITE HOUSE

WASHINGTON

May 11, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Proposed Presidential Remarks: Ceremony to Launch Drunk Driving Campaign (5/11 - 12:00 draft)

Richard Darman has asked that we send any comments on the above-referenced remarks directly to Ben Elliott by 4:00 p.m. today. These are the remarks the President is to deliver at the ceremony on the South Lawn honoring Michael Jackson. The remarks begin with two messages the President has supposedly been asked to deliver to Michael. The first is a message of love "from about 100 of our women who work in the White House." According to the President, "they all said their name is Billie Jean." Cognoscenti will recognize the allusion to a character in one of Mr. Jackson's more popular ballads, a young lass who claims -- falsely, according to the oft-repeated refrain of the singer -- that the singer is the father of her illegitimate child. This may be someone's idea of Presidential humor, but it certainly is not mine.

The second supposed message to be conveyed by the President is from the citizens of the District, urging Michael to include Washington on his much-ballyhooed upcoming concert tour. The question of precisely where Michael and his accomplices will perform on this tour has been the subject of refined commercial planning and considerable controversy. Millions of dollars hinge on the decisions. Washington has reportedly been ruled out because it does not boast a domed stadium capable of holding the crowds envisioned by promoter Don King. I do not think the President should inject himself into the dispute, even jocularly.

In the remainder of the remarks the President discusses the work of the Presidential Commission on Drunk Driving and launches the new public service campaign to publicize the dangers of drunk driving. The remarks praise Jackson for lending his music to the public service messages to be aired during the campaign, and conclude with the presentation of the Presidential award to Jackson.

The attached memorandum for Elliott objects to the introductory "messages" from the President. This is somewhat like criticizing the quality rather than the fact of Nero's fiddling while Rome burned, but I still think we should try to maintain some standards.

Attachment

THE WHITE HOUSE

WASHINGTON

May 11, 1984

MEMORANDUM FOR BEN ELLIOTT
DEPUTY ASSISTANT TO THE PRESIDENT
DIRECTOR, PRESIDENTIAL SPEECHWRITING OFFICE

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Proposed Presidential Remarks:
Ceremony to Launch Drunk Driving
Campaign (5/11 - 12:00 draft)

Counsel's Office has reviewed the above-referenced proposed remarks. I object to the second and third paragraphs of the proposed remarks. In the second paragraph, the reference to "Billie Jean" strikes me as unfortunate, given the subject matter of that particular song. With respect to the third paragraph, precisely where the Jacksons will perform on their tour has of course been the subject of refined commercial planning and considerable controversy. Millions of dollars hinge on the decision, and I do not think the President should enter into the dispute, even jocularly.

cc: Richard G. Darman

FFF:JGR:aea 5/11/84
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 14, 1984

MEMORANDUM FOR CONSTANCE J. HORNER
ASSOCIATE DIRECTOR, ECONOMICS AND GOVERNMENT
OFFICE OF MANAGEMENT AND BUDGET

FROM: RICHARD A. HAUSER RAH
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: S. 905

Counsel's Office is strenuously opposed to any bill that would purport to establish the Archivist as an independent entity not completely subject to the direction and control of the President. As an initial matter, the Administration should oppose any legislation transferring authority from the Presidency to politically unaccountable independent agencies. The fact that the Archivist handles Presidential and Executive Branch documents, however, makes the need to resist such legislation even stronger. Insulating the Archivist from Presidential control would raise the most serious constitutional concerns, detrimentally affect the position of the Administration in the extremely delicate ongoing dispute concerning the processing and disposition of the Nixon White House files, and throw into question the handling of this Administration's Presidential records.

The constitutionality of the Presidential Recordings and Materials Preservation Act, note following 44 U.S.C. § 2107 (the so-called "Nixon Records Act"), was upheld by the Supreme Court in Nixon v. Administrator of General Services, 433 U.S. 425 (1977), precisely because the Archivist was subject to Presidential control. Former President Nixon challenged the Act, which gave custody and control of the Nixon White House papers to the Archivist, on numerous grounds, most prominently separation of powers and executive privilege. The Court rejected these arguments and upheld the Act because:

> the control over the materials remains in the Executive Branch. The Administrator of General Services, who must promulgate and administer the regulations that are the keystone of the statutory scheme, is himself an official of the Executive Branch, appointed by the President. The career archivists appointed to do the initial screening for the purpose of selecting out and returning to appellant his private and personal papers similarly are Executive Branch employees. Id., at 441.

Later the Court again emphasized that "it is clearly less intrusive to place custody and screening of the materials within the Executive Branch itself than to have Congress or some outside agency perform the screening function" and "[t]he Executive Branch remains in full control of the Presidential materials."

As Nixon v. Administrator of General Services makes clear, establishing the Archivist as independent of Presidential control would raise serious separation of powers and executive privilege concerns, given the fact that Presidential records become the custody of the Archivist. This is true not only under the Nixon Records Act, which prompted the Court's decision, but also under the Presidential Records Act of 1978, which applies to this and all subsequent administrations. See 44 U.S.C. § 2203(f). Insulation of the Archivist from complete Presidential control would precipitate a constitutional crisis concerning the disposition of Presidential records under the Presidential Records Act, since the Executive would be unwilling to compromise the privileged status of certain documents by turning them over to an entity not totally subject to Executive control.

It is not immediately clear what S. 905 envisions with respect to the status of the Archivist. The stated purpose of the bill is to "establish an independent National Archives and Records Administration." A new 44 U.S.C. § 2103 added by the bill would establish "an independent establishment in the executive branch of the Government to be known as the National Archives and Records Administration." Although "in the executive branch" it is not clear whether the agency would be fully accountable to the President, since the Archivist is to be appointed for a ten-year term without regard to political affiliations.

THE WHITE HOUSE

WASHINGTON

May 14, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Draft DOJ Report on S.J. Res. 135, "Proposing an Amendment to the Constitution of the United States for the Establishment of a Legislative Veto"

OMB has asked for our views by close of business May 15 on a draft Department of Justice report opposing S.J. Res. 135, a proposed constitutional amendment to overturn the Chadha decision. The report notes that the Chadha decision was based on constitutional provisions reflecting the Framers' concern with separation of powers. It was not the result of technicalities that need to be corrected but rather a corollary of the basic structure of our Government.

Chadha struck down legislative vetoes because they contravened the bicameralism requirement and the presentment clause. As the Justice report notes, the bicameralism requirement was consciously devised to provide a check to flawed legislation that might pass one House. By the same token, the presentment clause was added to the Constitution to provide a check against legislative encroachments on the power of the Executive, and to insert the Executive -- the only official (other than the Vice President) elected by all the people -- into the legislative process. The Justice report concludes by rejecting many of the policy arguments in favor of legislative veto, including the argument that such vetoes serve to make agency action more politically accountable. The Justice report argues that the underlying problem is vague delegation by Congress, a problem not effectively cured by retention of veto authority.

I have no objection to the proposed report. On page 10, line 42, the report states that "Congress can adopt resolutions expressing views, which may not be legally binding upon the Executive Branch...." It is unclear whether "may" is used in the permissive sense or to express likelihood. Only the former is correct, since concurrent resolutions are never binding on the President, yet readers could well suppose the latter was intended. I would change "may not be" to "are not."

THE WHITE HOUSE

WASHINGTON

May 14, 1984

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Draft DOJ Report on S.J. Res. 135, "Proposing an Amendment to the Constitution of the United States for the Establishment of a Legislative Veto"

Counsel's Office has reviewed the above-referenced draft report, and finds no objection to it from a legal perspective. On page 10, line 42, however, I recommend changing "may not be" to "are not." As now written it is unclear whether "may" is used in the permissive sense or to express a likelihood. Only the former is correct in this context, since resolutions expressing the views of Congress are never binding on the President.

FFF:JGR:aea 5/14/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 15, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Proposed Treasury Report on D.C. Chadha

OMB has asked for our views by noon today on a proposed Treasury report on the D.C. Chadha issue. You will recall that Treasury wanted to testify during the hearings before Senator Mathias's subcommittee on this issue, but that the testimony was pulled and a Treasury representative was made available at the hearings solely to answer technical questions. The reason for this was the view, shared by our office and Justice, that Treasury's only interest was that the issue be resolved, in order that the district could issue bonds, while the issue before the subcommittee was how the issue was to be resolved. Treasury thinks the instant report is necessary to clarify the answers to technical questions asked at the hearing.

The proposed report discusses the District's short- and long-term borrowing arrangements with Treasury, and the fact that the D.C. Chadha issue is the only obstacle to the District's successful entry into the bond market. On page 3, the report discusses the District's bond counsel opinion, and Treasury's "understanding" that resolution of the Chadha problem would require either a Supreme Court ruling or the adition of a severability clause to the Home Rule Act. This language must be changed. The Chadha cloud can be removed in other ways, for example, by passing the Administration's proposed bill or, for that matter, the District's proposed bill. Focusing on an "understanding" of what bond counsel requires that does not include the Administration's proposal obviously undermines the chances of enacting that proposal. Bond counsel did not include the Administration proposal as a means of removing the Chadha cloud simply because it was not before it. I recommend deleting the last two sentences of the second paragraph on page 3, and the entire third paragraph. I have no other objections.

Attachment

THE WHITE HOUSE

WASHINGTON

May 15, 1984

MEMORANDUM FOR JANET M. FOX
LEGISLATIVE ANALYST
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Proposed Treasury Report on D.C. Chadha

Counsel's Office has reviewed the above-referenced proposed report. We recommend deleting the last two sentences of the second paragraph on page 3, and the entire third paragraph on the same page. This language suggests that the only two ways to remove the Chadha cloud is through a Supreme Court decision or the addition of a severability clause to the Home Rule Act. This is of course untrue. Another way to remove the cloud would be to enact the Administration's proposed legislation. Nor is it correct to contend that the offending language is an accurate reflection of the view of bond counsel. I am not aware that bond counsel has considered and rejected the Administration proposal as a means of resolving the Chadha problem. Treasury's "understanding" that bond counsel insists upon either a Supreme Court ruling or the addition of a severability clause makes the mistake of assuming that these two ways of resolving the problem are the only ways of resolving the problem. Reiterating such an "understanding" has the effect of undermining the Administration's proposed bill, which of course does much more than simply add a severability clause to the Home Rule Act.

FFF:JGR:aea 5/15/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 15, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Enrolled Resolution S.J. Res. 220
National Arts with the Handicapped Week

Richard Darman has asked for comments on the above-referenced enrolled resolution by close of business Wednesday, May 16. This resolution, which passed both Houses by voice vote, designates the week beginning May 20 as "National Arts With the Handicapped Week." The week marks the tenth anniversary of the establishment of a committee, affiliated with the Kennedy Center, concerned with enriching the lives of the handicapped through involvement with the arts.

OMB, Education, and NEA recommend approval. I have reviewed the memorandum for the President prepared by OMB Assistant Director for Legislative Reference James M. Frey, and the resolution itself, and have no objections.

Attachment

THE WHITE HOUSE

WASHINGTON

May 15, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Enrolled Resolution S.J. Res. 220
National Arts with the Handicapped Week

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

FFF:JGR:aea 5/15/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 16, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: H.R. 4176 -- Boundary Confirmation of the Southern Ute Indian Reservation

Richard Darman has asked for comments on the above-referenced enrolled bill by 5:00 p.m. Thursday, May 17. This bill is intended to remove the considerable confusion that has arisen over the status of land within the Southern Ute Indian Reservation in Southwestern Colorado, and the accompanying confusion concerning legal jurisdiction. The bill would fix the boundaries of the reservation, define "Indian trust land" within the reservation, and then specify which authority has jurisdiction over Indians and non-Indians on such land. Indian territorial jurisdiction over non-Indians is limited to trust land, and non-Indians on trust land are subject to Federal enclave law pursuant to 18 U.S.C. § 1152 only on such trust land. The bill would also permit the State of Colorado to exercise criminal and civil jurisdiction over incorporated towns within the reservation.

OMB and Interior recommend approval, Justice has no objection, and Agriculture defers to Interior. Agriculture unsuccessfully attempted to have a provision added to the bill specifying that the bill did not affect the San Juan National Forest; but language to this effect was included in the pertinent committee reports. 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

May 16, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: H.R. 4176 -- Boundary Confirmation of the Southern Ute Indian Reservation

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

FFF:JGR:aea 5/16/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 16, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Proposed OMB Response to Senator Hatfield Regarding S. 905/National Archives and Records Service

Counsel's Office objects to the proposed letter from Director Stockman to Senator Hatfield concerning S. 905. That letter announces Administration support for S. 905, described in the letter as "a bill that would separate the National Archives and Records Service (NARS) from the General Services Administration (GSA), and would rename the agency the National Archives and Records Administration." In fact, the bill would do far more.

Of particular concern to this office is the fact that the bill could be interpreted to grant the Archivist an undetermined degree of independence from Presidential control. Under the bill the Archivist would head "an independent establishment in the executive branch." Although this establishment would be "in the executive branch," the Archivist would be appointed for a ten-year term, "without regard to political affiliations and solely on the basis of the professional qualifications required to perform the duties and responsibilities of the office of Archivist." In view of the provision for a ten-year term, the emphasis on professional qualifications and explicit rejection of political affiliation, and the general purpose of the bill to set up the Archivist as an independent entity concerned solely with historical and research functions, it is unclear whether the Archivist would be subject to removal by the President. Arguments can be made that the President would still directly control the Archivist, and could remove him, but it cannot be asserted with any confidence that those arguments would prevail.

If the Archivist were to secure a degree of independence from the Chief Executive under S. 905, serious constitutional questions would be raised concerning the handling and disposition of Presidential records by the Archivist. The Presidential Records Act of 1978, which controls the records of this and all subsequent administrations, specifies that the Archivist is to assume control of Presidential records.

If the Archivist is not clearly and completely subject to Presidential direction and control, however, serious executive privilege questions would be raised concerning such a transfer of the most sensitive Executive branch records.

This point was clearly recognized by the Supreme Court in Nixon v. Administrator of General Services, 433 U.S. 425 (1977). In that decision the Supreme Court upheld the mandatory transfer of Nixon White House files to the custody of the Administrator of General Services, rejecting serious separation of powers and executive privilege arguments on the ground that the "Executive Branch remains in full control of the Presidential materials." Id., at 444. Were that not the case -- and it could well not be the case under S. 905 -- the whole Presidential records scheme would be thrown into confusion. This confusion would extend not only to the handling of this Administration's records but also to the ongoing dispute over the handling of the Nixon White House files.

I would emphasize that the fact that S. 905 provides that the new archival agency will be "in the executive branch" is not dispositive of our concerns. You may recall that the Civil Rights Commission removal case, which the Administration lost at the injunction stage (before it became moot), concerned an agency "in the executive branch." See 42 U.S.C. § 1975. The issue is the degree of independence of the Archivist from Presidential control and, as noted, several factors suggest the bill may grant some independence to the Archivist. The gamble that the courts may eventually rule that the Archivist is subject to removal and fully subject to Presidential control under S. 905 is one we can ill afford to take.

Even if the foregoing constitutional analysis embodies an excess of caution, it should be noted that, as a policy matter, it will be more difficult for the President to control the Archivist should S. 905 pass. The bill increases the stature of the Archivist and generally surrounds him with an aura of professional detachment. Executive branch officials must on occasion direct the withholding of documents the Archivist, from an historical and research perspective, wishes to make public. It would be far preferable to be able to implement the President's wishes in such cases through something other than a direct order to the Archivist -- for example, as in the present scheme, through a directive from the Administrator of General Services.

FFF:JGR:aea 5/16/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 16, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Proposed OMB Response to Senator Hatfield Regarding S. 905/National Archives and Records Service

Richard Darman has asked for comments by close of business today on OMB's proposed letter to Senator Hatfield, announcing support for S. 905. This is the bill we discussed at Tuesday's staff meeting, which I think could grant the Archivist some independence from Presidential control, with all the momentous constitutional consequences that would entail. I should point out that the Office of Legal Counsel, per Larry Simms, disagrees with me. Simms asserts that he is "100 percent certain" that the Archivist would be removable under S. 905. This is the first time in my Government service that I have been accused of being more cautious than OLC, but I think, as elaborated in the attached draft for Darman, that the danger is there and should be avoided.

Attachment

THE WHITE HOUSE

WASHINGTON

May 16, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Proposed OMB Response to Senator Hatfield Regarding S. 905/National Archives and Records Service

Counsel's Office objects to the proposed letter from Director Stockman to Senator Hatfield concerning S. 905. That letter announces Administration support for S. 905, described in the letter as "a bill that would separate the National Archives and Records Service (NARS) from the General Services Administration (GSA), and would rename the agency the National Archives and Records Administration." In fact, the bill would do far more.

Of particular concern to this office is the fact that the bill could be interpreted to grant the Archivist an undetermined degree of independence from Presidential control. Under the bill the Archivist would head "an independent establishment in the executive branch." Although this establishment would be "in the executive branch," the Archivist would be appointed for a ten-year term, "without regard to political affiliations and solely on the basis of the professional qualifications required to perform the duties and responsibilities of the office of Archivist." In view of the provision for a ten-year term, the emphasis on professional qualifications and explicit rejection of political affiliation, and the general purpose of the bill to set up the Archivist as an independent entity concerned solely with historical and research functions, it is unclear whether the Archivist would be subject to removal by the President. Arguments can be made that the President would still directly control the Archivist, and could remove him, but it cannot be asserted with any confidence that those arguments would prevail.

If the Archivist were to secure a degree of independence from the Chief Executive under S. 905, serious constitutional questions would be raised concerning the handling and disposition of Presidential records by the Archivist. The Presidential Records Act of 1978, which controls the records of this and all subsequent administrations, specifies that the Archivist is to assume control of Presidential records.

If the Archivist is not clearly and completely subject to Presidential direction and control, however, serious executive privilege questions would be raised concerning such a transfer of the most sensitive Executive branch records.

This point was clearly recognized by the Supreme Court in Nixon v. Administrator of General Services, 433 U.S. 425 (1977). In that decision the Supreme Court upheld the mandatory transfer of Nixon White House files to the custody of the Administrator of General Services, rejecting serious separation of powers and executive privilege arguments on the ground that the "Executive Branch remains in full control of the Presidential materials." Id., at 444. Were that not the case -- and it could well not be the case under S. 905 -- the whole Presidential records scheme would be thrown into confusion. This confusion would extend not only to the handling of this Administration's records but also to the ongoing dispute over the handling of the Nixon White House files.

I would emphasize that the fact that S. 905 provides that the new archival agency will be "in the executive branch" is not dispositive of our concerns. You may recall that the Civil Rights Commission removal case, which the Administration lost at the injunction stage (before it became moot), concerned an agency "in the executive branch." See 42 U.S.C. § 1975. The issue is the degree of independence of the Archivist from Presidential control and, as noted, several factors suggest the bill may grant some independence to the Archivist. The gamble that the courts may eventually rule that the Archivist is subject to removal and fully subject to Presidential control under S. 905 is one we can ill afford to take.

Even if the foregoing constitutional analysis embodies an excess of caution, it should be noted that, as a policy matter, it will be more difficult for the President to control the Archivist should S. 905 pass. The bill increases the stature of the Archivist and generally surrounds him with an aura of professional detachment. Executive branch officials must on occasion direct the withholding of documents the Archivist, from an historical and research perspective, wishes to make public. It would be far preferable to be able to implement the President's wishes in such cases through something other than a direct order to the Archivist -- for example, as in the present scheme, through a directive from the Administrator of General Services.

FFF:JGR:aea 5/16/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 16, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Cabinet Council on Legal Policy With the President, Thursday, May 17, 1984, 2:00 p.m., Cabinet Room -- Federal Law Enforcement Guidelines

We have reviewed briefing papers for the "Federal Law Enforcement Guidelines" topic to be discussed at tomorrow's Cabinet Council on Legal Policy meeting. Some Administration officials have been concerned about the proliferation of grants of law enforcement authority to agencies other than the Justice and Treasury Departments. According to the attached materials, it is difficult to resist such grants, because the agencies want them and the pertinent Congressional committees also want to expand the powers of the agencies they oversee. Nonetheless, there are serious problems with such grants of law enforcement authority, including lack of Government-wide coordination, variations in training and expertise, potential misuse of sensitive investigative techniques, and so forth. A working group was established last year to develop guidelines on grants of law enforcement authority to agencies, and the proposed guidelines are now ready for Cabinet Council review.

The guidelines are very stringent, and if adopted would represent a general Administration commitment not to grant law enforcement authority to agencies other than Justice and Treasury. Such authority would be resisted unless necessary for an agency to perform an essential function within its jurisdiction. The agency must show that the need cannot be met by other agencies with such authority, and the agency must have adequate internal safeguards. The guidelines generally provide that agencies should not be authorized to permit employees to carry firearms, seek and execute search warrants, make warrantless arrests, serve legal process, administer oaths, or use covert techniques.

I have no objection to the approach of these guidelines. The guidelines will doubtless be viewed as an effort by Justice and Treasury to protect their "turf," but it is true that the proliferation of criminal law enforcement authority throughout the Government is a dangerous trend that should be halted if not reversed. Activities such as arrest and search are the most intrusive a government performs, and as

a general matter it seems desirable to limit authority to perform such activities to one agency, an agency that can be expert in the area, sensitive to the various rights involved, and clearly accountable for the law enforcement mission. Commerce, Agriculture, Interior, and so forth are not likely to be sufficiently sensitive to the activities of small numbers of their employees authorized to enforce criminal laws under their particular jurisdiction. That is the principal mission of the Department of Justice, and within that agency that mission accordingly receives the attention it deserves.

THE WHITE HOUSE

WASHINGTON

May 16, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Draft Proclamation/National Arts With the Handicapped Week -- May 20, 1984

Dodie Livingston has asked for our views by 10:00 a.m. May 17 on the above-referenced draft proclamation. The proclamation, authorized and requested by S.J. Res. 220, proclaims the week beginning May 20 as "National Arts With the Handicapped Week," and emphasizes the important role played by the arts in improving life for the handicapped. The proclamation also commemorates the tenth anniversary of the Kennedy Center's National Committee Arts with the Handicapped, an organization devoted to increasing participation by the handicapped in the arts.

The proclamation was drafted by the National Endowment for the Arts, and has been approved by OMB. I have no objections.

Attachment

THE WHITE HOUSE

WASHINGTON

May 16, 1984

MEMORANDUM FOR DODIE LIVINGSTON
SPECIAL ASSISTANT TO THE PRESIDENT
DIRECTOR, SPECIAL PRESIDENTIAL MESSAGES

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Draft Proclamation/National Arts With the Handicapped Week -- May 20, 1984

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

FFF:JGR:aea 5/16/84
cc: FFFielding/JGRoberts/Subj/Chron

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Collection Name
Roberts, John

Withdrawer
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DOC NO	Document Type / Document Description	No of pages	Doc Date	Restrictions	
2	NOTE TO ROBERTS RE REGINALD BRINKMANN	1	5/15/1984	B6	780

Freedom of Information Act - [5 U.S.C. 552(b)]

B-1 National security classified information [(b)(1) of the FOIA]
B-2 Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
B-3 Release would violate a Federal statute [(b)(3) of the FOIA]
B-4 Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
B-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
B-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
B-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
B-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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THE WHITE HOUSE

WASHINGTON

May 18, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Commodore Skinner's Misuse of the Seal of the President (Round 3)

You have just received a ship-to-shore letter from Commodore Skinner, dated May 3, in further response to your original letter of April 19. You wrote Skinner on April 19 (Tab A), objecting to his misuse of the Seal of the President on "Presidential Yacht memorabilia" in violation of 18 U.S.C. § 713 and the regulations promulgated in Executive Order 11649. Your letter also expressed concern about the possible impression of governmental sponsorship or approval conveyed by Skinner's brochure advertising his charter services. You asked for a reply from Skinner detailing the steps he would take to comply with the law governing use of the Seal and to correct the false impression of association with the Government conveyed by his brochure.

On April 30 we received an interim reply from Skinner dated April 27 (Tab B), in which Skinner asked whether the rules on use of the Seal applied to The Presidential Yacht Trust. We responded promptly by letter dated May 3 (Tab C), advising Skinner that the rules applied fully to The Presidential Yacht Trust, although we would be willing to consider granting permission to use the Seal in an historically accurate fashion on restored Presidential yachts themselves. Your letter noted that you looked forward to Skinner's further reply to your letter of April 19.

In his latest letter, Skinner first states that he is willing to include in future revisions of his brochure a statement to the effect that his company is not associated with or endorsed by any governmental entity. Skinner asks if there is any problem with calling his company "Presidential Yacht Charters, Inc.," and advertising "Presidential Cruises." So long as there is a disclaimer of the sort Skinner is now willing to include in his brochures, I see no problem with the nomenclature. Without such a disclaimer, as noted in your original letter of April 19, there is the possibility of conveying the false impression.

[redacted] 1B6

According to Skinner, (1) his eagle is the eagle from the Great Seal, not the Presidential Seal, (2) he uses eight stars above the eagle rather than 13, (3) he uses only the "puff balls" [technically, "cloud puffs"] from the Presidential Seal, not the "flag poles" [technically, "rays"], and (4) his ring around the Seal says "Honey-Fitz Presidential Yacht," not "Seal of the President of the United States."

Skinner is flat wrong on point one. Skinner's eagle is the eagle as it appears on the Seal of the President, not the Great Seal. The shield is curved, not flattened; the "e pluribus unum" banner is in one part directly above the bird's head, not in two parts, on either side of the head. With respect to point two, there are nine stars directly above the eagle's head in the Presidential Seal, and eight in the identical place in Skinner's seal. Skinner also omits the four additional stars elsewhere on the Presidential Seal, to the right of the eagle's head. I hardly think this serves to distinguish his seal from the Presidential Seal, nor does the absence of "rays" from Skinner's seal and the fact that Skinner's seal says "Honey-Fitz Presidential Yacht" rather than "Seal of the President of the United States" do so.

Here one picture is worth a thousand words. I defy any reasonable person to put Skinner's seal and the Presidential Seal side-by-side and contend that the former is not substantially identical to the latter. In any event, Skinner's hair-splitting is irrelevant. As pointed out in our earlier correspondence, 18 U.S.C. § 713 applies to "any substantial part" of the Seal of the President. Deleting the "rays" and a few of the stars from the Seal hardly suffices to remove the reproduction from the coverage of the statute.

Skinner states that if you still think his seal resembles the Presidential Seal, he will change it. He asks you to detail specifically what parts of his seal are objectionable, and also that he be permitted to use up his current supply. Finally, Skinner complains that individuals representing themselves as officials of The Presidential Yacht Trust are misusing the Presidential Seal.

As noted, I find Skinner's effort to distinguish his seal from the Presidential Seal totally unpersuasive and legally irrelevant. I do not think we should grant him permission to use up his stock. [redacted] 1B6

[redacted] (b)6

I do not think we should accept Skinner's invitation to tell him specifically what parts of his seal are objectionable. We can express a willingness to review any new versions he cares to submit.

[redacted] (b)6

I await your guidance on how to approach this latest development.

Attachment

THE WHITE HOUSE

WASHINGTON

May 18, 1984

Dear Commodore Skinner:

This is written in response to your letter of May 3, received in this office on May 15. (I assume that by now you have received my letter of May 3, written in response to yours of April 27.)

I appreciate your expressed willingness to include a disclaimer on future revisions of your brochure, noting that your company is not in any way associated with or endorsed by any government entity. Assuming that such a disclaimer appears on your company's materials, I have no objection to the name of the company, "Presidential Yacht Charters, Inc.," or to describing the services you offer as "Presidential Cruises." The problem otherwise presented by this name and description can be cured by an appropriate disclaimer.

I must advise you that I am not persuaded by your efforts to distinguish the seal appearing on your "Presidential Yacht memorabilia" from the statutorily protected Seal of the President. It is not true that the eagle on your seal is the eagle from the Great Seal of the United States. There are several discernible differences between the eagle on the Seal of the President and that on the Great Seal; the eagle on your seal is rather clearly taken from the former. The other differences you cite are rather trivial given the substantial similarity of the seal on your memorabilia to the Seal of the President. It is totally untrue to assert that "the only real part of the Presidential Seal that I used is the cluster of white 'puff balls' specifically without the flag poles." The design and placement of the eagle, olive branch and arrows, shield, banner in the eagle's beak, and circle of stars, in addition to what you refer to as the "puff balls," are taken directly from the Seal of the President. Given this use of substantial parts of the Seal, the fact that you omitted the background rays and a few of the internal stars can hardly be considered significant. I would remind you, as I noted in my original letter, that the pertinent statute applies to use of "any substantial part" of the Seal of the President. 18 U.S.C. § 713.

You have asked me to identify specifically which parts of your seal are objectionable. As noted, your seal as presently designed is almost an exact replica of the Seal of

the President. Obviously, there are innumerable options for changing your seal so that it would not run afoul of 18 U.S.C. § 713 by incorporating substantial parts of the Seal of the President. Indeed, a seal could be designed that includes none of the elements of the Seal of the President. This office would be happy to review and offer advice concerning any new versions of your seal you may care to submit.

In response to your request, I cannot authorize you to use up your supply of items violating 18 U.S.C. § 713. That statute is a criminal statute and it would be inappropriate for me to authorize its continued violation. With respect to your report of misuse of the Seal by other individuals, please be assured that this office will review the matter and take whatever action may be appropriate.

Sincerely,

Fred F. Fielding
Counsel to the President

Commodore Ed Skinner
Presidential Yacht Charters, Inc.
Box 32241
Washington, D.C. 20007

FFF:JGR:aea 5/18/84
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 21, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: DEA Testimony

We have been provided with copies of two separate statements DEA Acting Deputy Administrator John C. Lawn proposes to deliver, one before the Task Force on International Narcotics Control of the House Foreign Affairs Committee on May 24 and the other before the House Select Committee on Narcotics Abuse and Control on May 22. The May 24 statement concerns recent developments in Colombia. Lawn discusses the assassination of Justice Minister Rodrigo Lara-Bonilla by drug traffickers, and the subsequent vigorous actions taken by the Colombian government against the traffickers. Lawn also reviews the highly-publicized successful raid by the Colombians of a major cocaine processing facility on March 10, concurs with the views expressed by Colombian officials that Cuban authorities facilitate the movement of narcotics throughout the region, and outlines the demonstrated links between various terrorist groups active in Colombia and narcotics trafficking.

The May 22 testimony is a general review of DEA's activities. The testimony reviews the progress of the assignment of concurrent drug jurisdiction to the FBI, and provides arrest, conviction, and seizure statistics. Lawn touches briefly upon the paraquat controversy, noting that an environmental impact statement for such spraying -- required by a court order -- is being prepared. He then reviews the various cooperative activities in which DEA is involved, including the South Florida Task Force, the Organized Crime Drug Enforcement Task Forces, and various cooperative arrangements with local law enforcement authorities. The testimony also outlines DEA's international drug control initiatives, and concludes by urging the House to pass the Administration's Comprehensive Crime Control Act of 1983, which contains numerous provisions directed at narcotics traffickers.

I have no objection to the prepared testimony. With respect to the May 22 general review of DEA activities, however, Lawn should be prepared to deal with questions concerning the unfortunately publicized memorandum from Bud Mullen criticizing the Administration's National Narcotic Border Interdiction System (see attached article).

THE WHITE HOUSE

WASHINGTON

May 21, 1984

MEMORANDUM FOR GREGORY JONES
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Statement of John C. Lawn Concerning Federal Narcotics Enforcement and Interdiction Efforts on May 22, 1984

Counsel's Office has reviewed the above-referenced testimony, and finds no objection to it from a legal perspective. The witness, however, should be prepared to respond to questions concerning the unfortunately publicized critique of the National Narcotic Border Interdiction System by DEA Administrator Mullen.

FFF:JGR:aea 5/21/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 21, 1984

MEMORANDUM FOR GREGORY JONES
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Statement of John C. Lawn on Recent Developments in Colombian Narcotics Control Efforts on May 24, 1984

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

FFF:JGR:aea 5/21/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 21, 1984

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS JGR

SUBJECT: H.R. 5019

Our views on the draft GSA report on H.R. 5019 are due at OMB today. You will recall that H.R. 5019 would, six months after enactment, revoke the authority of GSA to issue regulations under the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107n (the "Nixon Records Act"), unless Congress approved the continued exercise of that authority before the expiration of the six months. As you know, we have alerted OLC to this bill, and that office is preparing Justice's comments on the draft GSA report. Mark Rotenberg advised me that the bill was part of an omnibus response by Congressman Levitas to the Chadha decision. According to Rotenberg, Levitas has introduced similar bills to revoke any Executive authority that prior to Chadha was subject to legislative veto.

The GSA report opposes H.R. 5019, on the ground that it would jeopardize and delay processing and opening of the Nixon files. That much is unobjectionable, but I recommend deleting from the report passages extolling the care with which the files were reviewed pursuant to regulations which were the product of "long and deliberate refinement and legal negotiation." Both Justice and our office have serious concerns about the regulations. The theme of the penultimate paragraph of the report is that the regulations should not be subject to tampering, since the Archivist would then be required to reprocess the files, resulting in delay. In view of the flaws in the regulations, however, it may be advisable from the Government's perspective for such reprocessing under different regulations to take place. The changes suggested in the attached memorandum for OMB would remove language suggesting that any alteration in the regulations or concomitant further review of the documents would necessarily be bad.

I also suggest a slight change in the second paragraph. The second sentence holds open the possibility of Congress enacting regulations should this bill pass. The bill,

however, speaks only of Congressional action affirming the authority of GSA, and we should not gratuitously invite Congress to provide the regulations governing processing and access to the Nixon files.

Attachment

THE WHITE HOUSE

WASHINGTON

May 21, 1984

MEMORANDUM FOR GREGORY JONES
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: RICHARD A. HAUSER
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: H.R. 5019

Counsel's Office has reviewed the proposed General Services Administration (GSA) report on H.R. 5019. We agree that the Administration should oppose this bill, but we have several recommended changes to the GSA report.

In the second sentence of the second paragraph, we would delete "enact regulations, or otherwise." The bill provides only that Congress may enact legislation approving the Administrator's authority under Section 104, not that Congress may itself enact the regulations in question. While Congress probably does have that authority as a general matter, it is not provided "[u]nder the bill." Further, since the exercise of such authority by Congress would doubtless be unfortunate, we should not gratuitously suggest the possibility. (The comma after "authority" can also be deleted when this change is made.)

We recommend significant revision of the third paragraph. The point of the paragraph as written appears to be that the files have already been reviewed under an acceptable set of regulations, and the regulations should not be altered since that would require additional archival work. It is not clear, however, that the regulations struck down because of the legislative veto provision are ideal from the Government's perspective. As noted in the report, GSA is considering how to respond to the decision invalidating those regulations. This report should not pre-judge that issue by suggesting that any change in the regulations would have deleterious consequences.

The third paragraph could read as follows:

> The regulations under which government archivists have been reviewing the Nixon materials were recently invalidated by the United States District Court for the District of Columbia, because of the legislative veto provision in the Presidential

Recordings and Materials Preservation Act. GSA is now considering how to replace these regulations in the least disruptive manner. If Congress were to terminate the Administrator's authority to issue regulations, public access to the Nixon Presidential materials would be delayed indefinitely.

RAH:JGR:aea 5/21/84
cc: FFFielding/RAHauser/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 21, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Testimony by Oliver Revell Concerning Narcotics Abuse and Control -- May 22, 1984 (FBI Testimony for Rangel Hearing)

We have been provided with a copy of testimony FBI Assistant Director Oliver B. Revell proposes to deliver on May 22 before the House Select Committee on Narcotics Abuse and Control. The testimony reviews the role of the Bureau in the national drug law enforcement effort. Revell begins by discussing the assignment of concurrent jurisdiction in drug cases to the FBI, and the new FBI/DEA relationship. He goes into some detail concerning the relationship at the working level, emphasizing that the FBI focuses on drug cases with organized crime, public corruption, or sophisticated financial aspects. Revell points to the large increase in Title III wiretaps in drug cases, due in large measure to the FBI's new role in such cases. The testimony goes on to discuss the Bureau's contributions to the Organized Crime Drug Enforcement Task Forces and the National Narcotic Border Interdiction System. The prepared statement concludes with a discussion of three large-scale drug cases developed by the FBI.

I have reviewed the testimony and have no objections.

Attachment

THE WHITE HOUSE

WASHINGTON

May 21, 1984

MEMORANDUM FOR ADRIAN CURTIS
BUDGET EXAMINER
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Testimony by Oliver Revell Concerning Narcotics Abuse and Control -- May 22, 1984 (FBI Testimony for Rangel Hearing)

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