[Continued from previous folder]

Section by Section Analysis

Section 2

Section 2 will preclude awards of attorney's fees against the United States or State or local government unless the party seeking the award clearly and substantially prevailed on the merits of the controversy. Section 2 further provides that awards of attorney's fees may be made only for work performed on activities or issues upon which the party prevails and only if the activities and issues were necessary to the resolution of the controversy. The provisions of Section 2 requiring that a party clearly and substantially prevail amend the Clean Air Act and other statutes in which the award of attorney's fees is not expressly limited to prevailing parties. Section 2 will disallow awards of attorney's fees, such as the award in Sierra Club v. Gorsuch, No. 79-1565 (D.C.Cir. Feb. 5, 1982), to a non-prevailing party. (In Sierra Club, the court awarded attorney's fees on the basis that the plaintiffs had "substantially contributed to the goals of the Clean Air Act.") Section 2 also establishes a uniform standard for determining a "prevailing party." The words "clearly and substantially" are meant to limit recovery of attorney's fees to parties who without question prevail on all significant aspects of the merits of the controversy. A party who fails to definitively prevail on the issues would not meet the section's threshold requirement that the party "clearly" prevail.

Although the prevailing party need not prevail on every issue, he must prevail on the significant issues of the case and obtain virtually all the relief sought in the complaint. Attorney's fees may not be awarded on an interim basis, such as for rulings on a temporary restraining order or a preliminary injunction. Such fees may be awarded only after a decision on the merits by a Court or entry of a final disposition by an agency in an administrative proceeding; or, at the discretion of the Court or administrative officer, until completion of all appeals and entry of a final judgment [See Section 5(e)]. If a party clearly and substantially prevails on the merits of the controversy, the Court or administrative officer may award attorney's fees only for work performed on activities or issues upon which the party prevails against the United States or State or local government, and only if the activities and issues were necessary to the resolution of the controversy. Thus, fees will not be made for prevailing on procedural or evidentiary rulings which are not adjudications of the merits of the controversy.

Section 2 does not modify existing case law providing that settlements may justify the award of attorney's fees. As the court stressed in Parker v. Mathews, 411 F. Supp. 1059 (D.D.C. 1976), the facts and circumstances surrounding a particular settlement must be carefully evaluated:

> ...whether to award attorney's fees where there has been a settlement of a Title VII lawsuit must be determined by a close scrutiny of the totality of the circumstances surrounding the settlement, focusing particularly on the necessity for bringing the action and whether the party is the successful party with respect to the central issue -- discrimination.

Id., at 1062-64.

The provisions of Section 2 do not preclude discussions between the parties of attorney's fees, or the waiver thereof, prior to the decision on the merits by a Court or the final disposition of an administrative proceeding. Nor does Section 2 prevent the government from discussing attorney's fees liability together with liability on the merits as part of a settlement agreement, or from including provisions for attorney's fees and other expenses in a settlement agreement.

Section 3

Section 3 establishes a maximum hourly rate for attorney fee awards against the United States and State and local governments under certain so called fee shifting statutes which authorize awards of attorney's fees. Awards will be limited to the lower of two amounts calculated as follows: (1) the actual direct cost of attorney's fees incurred by or on behalf of the party; or (2) an hourly rate which is the sum of (a) the highest hourly pay rate plus benefits payable to Federal government attorneys in the Civil Service, or, in controversies involving State or local governments, to State or municipal attorneys, plus (b) reasonable overhead expenses. Such overhead expenses, however, shall not exceed 50% of the total of the calculated hourly rate

plus benefits.* There shall be no multipliers. Where awards of attorney's fees are made on an hourly rate basis pursuant to subsection 3(a)(1), any award of fees for paralegals or law clerks must not exceed one-third of the hourly rate awarded for attorney's fees. Where attorney's fees are awarded on an actual cost basis pursuant to subsection 3(a)(2), awards to paralegals and law clerks will be on the basis of their actual direct costs. Awards under 5 U.S.C. 504(a)(1) and 28 U.S.C. 2412(d)(1)(A) and (d)(3) as provided by the Equal Access to Justice Act are exempted from this fee cap.

Section 4

Section 4 provides that in any litigation or administrative proceeding in which money is part of the final judgment or final agency order the United States, State or local government will be required to pay attorney's fees only to the extent that such attorney's fees (computed in accordance with Section 3) exceed 25% of the judgment or final agency order. Only the portion of attorney's fees which exceed 25% of such money award shall be payable under this section. The principle of this provision is that a prevailing party should pay his legal expenses from any monetary award he receives in the litigation or agency proceeding. Awards under 5 U.S.C. 504(a)(1) and 28 U.S.C. 2412(d)(1)(A) and (d)(3) as provided in the Equal Access to Justice Act are exempted from this provision, as are awards in cases where government "bad faith" is proven under 28 U.S.C. 2412(b).

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* Under the current pay scale for Federal government attorneys in the Civil Service, the calculated hourly rate plus 50% overhead under this formula is $53.16. This rate of $53.16 is calculated as follows:

Facts

- Highest annual salary payable to an attorney in the Senior Executive Service = $58,500
- Benefits to government employees pursuant to OMB Circular No. A-76, Cost Comparison Handbook:

Retirement and Disability Benefits	20.4%
Health and life insurance	3.7%
Other benefits	1.9%
Total	26.0%

- Number of hours in one work year = 2080

Calculation

$58,500 + [$58,500 (annual salary) x 26% (benefits)] = $73,710 per year

$73,710 + [$73,710 x 50% (overhead)] = $110,565 per year

$110,565/year ÷ 2080 hours/year = $53.16 per hour

Section 5

Subsection 5(a) establishes a jurisdictional requirement that a party seeking an award of attorney's fees and other expenses must file an application for such an award within 30 days of the decision on the merits by a Court or the entry of a final disposition by an agency in an administrative proceeding. Parties may not file an application for such award prior to a decision on the merits or entry of a final disposition or after the 30 day time limit. This requirement is responsive to the Supreme Court's recent recommendation that courts adopt procedural rules setting reasonable time limits for applications for attorney's fees awards. White v. New Hampshire Department of Employment Security, 50 U.S.L.W. 4255. Subsection 5(b) requires a party who seeks attorney's fees to file annual reports which must include all of the information required by subsection 5(a). Such annual reports shall not be considered "applications" for the purposes of subsection 5(a), and shall not be construed as a basis to permit discovery against the government. Rather, the annual reports are for the purpose of assuring orderly accounting, and recordkeeping which could be especially useful in multi-year litigation.

The application required under Subsection 5(a) must establish and include the following:

- The basis on which the award is sought, and the amount sought and an itemized statement under oath from the attorney or law firm representing the party setting forth the actual hours expended per day by each attorney and the specific tasks performed in behalf of the party. The application must also include a copy of any written fee agreement. The Court or administrative officer may require whatever information is necessary for the party to prove the actual direct cost of attorney's fees incurred by or on behalf of the party.

- A statement under oath by the party that the attorney's fees or other expenses sought are owed to the attorney, were determined on an arms length basis, and will be paid by the party to the extent not covered by the fee award. (This provision assures that there is a real fee arrangement. The problem here is that fee awards statutes create contingency fee funds for entrepreneurial attorneys. The only justification for fee awards is to compensate clients who had to bear the expense of litigation. Of course a contingency fee which is owed to the attorney by the client is an arms length arrangement for the purposes of this section; it should be understood that any fee award is subject to the requirements of section 4 of the bill which, except for certain sections of the Equal Access to Justice Act, limits fee awards in money judgment cases to the portion of the fee which exceeds 25% of the judgment.)

- Where the attorney's fees or other expenses had been previously paid or assumed and the party seeks reimbursement the statement under oath must establish that the fees or other expenses would not have been incurred but for the participation by the party in the subject litigation or administrative proceeding.

The party seeking the award has the burden of proof with respect to establishing entitlement and the amount of awards of attorney's fees and other expenses, and with respect to meeting the other requirements of section 5. This is intended to change the burden of proof on issues of substantial justification under the Equal Access to Justice Act.

Subsection 5(e) authorizes courts and administrative officers to hear and determine awards of attorney's fees or other expenses following a decision on the merits or final disposition of an agency administrative proceeding. This provision permits courts and administrative officers to decide attorney's fees questions within a reasonable time after a decision on the merits or entry of a final disposition of an agency administrative proceeding, so that there could be a simultaneous appeal of the merits and of the fee award. A quick decision on the fee award would be particularly appropriate where there was no disagreement over the calculation of the award or where the determination required complete familiarity with the record. This provision also avoids having cases go through the appellate process twice -- once on the merits, and later on the question of attorney's fees. The Supreme Court in White indicated its dislike of this result, stating that "district courts generally can avoid piecemeal appeals by promptly hearing and deciding claims for attorney's fees." Id. at 4258. This provision further avoids requiring courts of appeal to review the question of attorney's fees after the facts surrounding the fee award are relatively stale. On the other hand, subsection 5(e) permits courts and administrative officers in their discretion to defer determination of fee awards in appropriate cases, such as cases where the determination of attorney's fees would consume a great deal of time and the case was to be appealed. In no event, however, may a Court or administrative officer make such determinations prior to a decision on the merits by the Court or entry of a final disposition by the administrative officer. Subsection 5(e) requires the court or agency to stay the payment of any fee award until the final decision on appeal.

Subsection 5(f) specifically precludes awards of attorney's fees and expenses to a party that has employed salaried staff attorneys prior to the onset of a specific case except upon a showing that the staff attorney had been retained in express anticipation of the specific case and that staff employee levels would have been lower but for the anticipated need to deal with the specific case. This provision and subsection 5(a)(3) are intended to bar subsidization of the ordinary operating expenses of applicant parties. These provisions will preclude awards of attorney's fees and expenses

where the party cannot show in the specific case that the expenses were incurred only because of the litigation or administrative proceeding.

Subsection 5(c) disallows the award of attorney's fees and other expenses against the United States or under 42 U.S.C. 1988 if the party seeking the award has not made the factual showings required by, and met the procedural requirements of, Section 5. As noted above, the burden of proof is on the party seeking the award.

Section 6

Section 6 requires that any award of attorney's fees or other expenses against the United States or under 42 U.S.C. 1988 must bear a reasonable relation to the result achieved in the proceeding. This provision is primarily directed to preventing an anomalous result such as one where a court could award attorney's fees of $100,000 for a $30,000 judgment. This provision directs courts and agencies in considering whether to award the maximum award authorized under Section 3 of the bill or a lower amount, to consider the result achieved in the proceeding even though the attorneys had spent, in good faith, a great number of hours on the case.

In addition to preventing attorneys from receiving fee awards in multiples of the monetary relief granted to the client, this provision also directs courts and agencies to consider lower fee awards where equity relief granted to the party is nominal or of very little precedential value. On the other hand, if the monetary or equitable relief granted to the party is substantial, or if the result of the case has substantial precedential value, courts and agencies may award attorneys fees and other expenses at the maximum amounts authorized under Section 3 of the bill. This provision does not authorize in any way attorney's fees and other expenses to be awarded in excess of the amounts authorized in Section 3 of the bill.

Section 6 also directs a court or administrative officer not to award attorney's fees or other expenses if the court or administrative officer determines that special circumstances make such an award unjust. The provision is a "safety value" to help insure that the government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives courts and administrative officers broad discretion to deny awards where equitable considerations dictate awards should not be

made. The concept of "special circumstances" includes both equitable considerations relating to the factual */ context of the case and equitable considerations relating to the legal position of the government. Thus, where the government loses after asserting a novel or creative legal theory that is credible but untested, the court or administrative officer should give strong consideration to denying awards of attorney's fees or other expenses.

Section 7

Section 7 disallows awards of attorney's fees or other expenses against the United States or under 42 U.S.C. 1988 to any corporation, association, or organization or their grantees, or to any party represented by such an entity, whose primary purpose is to provide legal services and whose legal services in the controversy were funded in whole or part by a grant or appropriation by the United States, a State or municipality for the purpose of legal services. This provision prevents having taxpayers pay twice for the legal services provided by such entities. It also bars subsidization of operating expenses of such entities beyond the amounts provided in the grants or appropriations. Such entities may be awarded attorney's fees and other expenses against the United States or under 42 U.S.C. 1988 if the entity proves that the funds for the legal services provided in the controversy came entirely from funds other than funds from grants or appropriations by the United States, a State or municipality which were provided for the purposes of legal services.

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*/ For examples of special circumstances in which courts in civil rights suits have denied successful plaintiffs attorney fees, see Chastang v. Flynn & Emrich Co., 541 F.2d 1040 , 1045 (4th Cir. 1976) (awarding attorney fees against the retirement fund would penalize innocent participants in the plan); Naprstek v. City of Norwich, 433 F.Supp. 1369, 1370-71 (N.D.N.Y. 1977) (case brought principally as vehicle to generate fee award); Skehan v. Board of Trustees, 436 F. Supp. 657, 667 (M.D. PA. 1977) (award considered unjust because plaintiff in violation of "clean hands" doctrine); Bacica v. Board of Education, 451 F. Supp. 882, 889 (W.D. Pa. 1978) (court critical of plaintiff's counsel for failing to marshall evidence and make clear presentation of the facts).

Section 8

Section 8 directs a court or administrative officer to reduce awards of attorney's fees or other expenses against the United States or under 42 U.S.C. 1988, or to deny such awards in instances in which the court or administrative officer finds that the prevailing party unduly protracted the final resolution of the controversy.

Section 9

Section 9 provides that in any litigation or administrative proceeding concerning the issue of payment of attorney's fees or other expenses a court or administrative officer may not award attorney's fees or other expenses to a prevailing party for activities associated with the issue of attorney's fees or other expenses unless the court or administrative officer finds that the United States, State or local government was unreasonable in the position it took in court or before the administrative officer concerning the issue of attorney's fees. This provision concerns awards of attorney's fees or other expenses for the activities and time spent by a party's counsel in preparation for, and presentation of evidence in, hearings and preparation of papers filed with the court or agency concerning the issue of whether the party is entitled to an award of attorney's fees or other expenses and if so the amount of such awards. Such "fees on fees" may not be awarded by a court or administrative officer unless the party proves that the legal position taken by the United States, a State or local government in hearings and in other papers filed concerning the issue of attorney's fees awards was unreasonable. "Unreasonable" legal positions are limited to those which are captious, frivolous, indefensible, filed in bad faith, or filed where no genuine dispute exists.

Section 10

Subsection 10(a) would deny attorney's fees or other expenses to a party that has rejected a settlement offer which was as favorable to the party as the relief ultimately granted by the court or administrative officer. This provision would be beneficial to both parties in litigation or administrative proceedings. The provision would provide great incentive to the defendant United States, State or local government to offer reasonable settlements to the plaintiffs, resulting in a quick and fair resolution of the dispute

and a reduction of the backlog of cases in our courts. As mentioned in the analysis of section 2, the provisions of the bill are not intended to impede settlement, including settlement agreements which include provisions for attorney's fees and other expenses. The United States, States and local governments could also benefit if they offered a reasonable settlement because they could protect themselves against large fee awards which could result from lengthy litigation.

Currently a plaintiff will be held to be a prevailing party and entitled to recover fees even if the claim has been mooted if the Court finds that the suit was a "catalyst" for the change of policy which rendered the claim moot. Subsection 10(b) would clarify that the pendency of the litigation had to be a material factor in the government's decision to change its policy which moots the suit. This standard is in fact being applied currently by most courts. See e.g., Morrison v. Ayoob, 627 F.2d 669 (3d Cir. 1980), cert. denied, 449 U.S. 1102 (1981). Subsection 10(b) will insure that courts do not place strong emphasis on chronology -- that is, the fact that the plaintiffs case was pending when the government changed the policy which mooted the litigation -- as establishing that the suit was a catalyst for the government's action. Subsection 10(b) will allow governments to make planned changes and improvements in policy without fear that they will become liable for fees in a pending suit. Where suits do act as "catalysts" in pointing out policies which need to be changed and which the government does subsequently change as a result of the pendency of the litigation, awards of attorneys' fees may be made. Subsection 10(b) is needed to insure that planned improvements are not delayed in order to prevent an adverse judgment.

Section 11

Section 11 encourages, and will authorize, courts and agencies in adjudication to award attorney's fees against a plaintiff if the plaintiff's claim is frivolous, unreasonable, or groundless, or if the plaintiff continued to litigate or pursue the adjudication after it clearly became so, even though there was no subjective bad faith. Section 11 is intended to reduce frivolous lawsuits and adjudication and reduce court and agency time and money expended on groundless matters. Section 11 is intended to clarify that the standard enunciated by the Supreme Court in Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978), is to apply to prevailing defendants in claims against the

United States, States and local governments. The Christiansburg Garment standard will provide some deterrent to frivolous cases by forcing the plaintiffs to pay the government's attorney's fees if the suit was frivolous or groundless. Although the standard has been applied in civil rights fee statutes, and has been cited in some section 1988 cases, those who would file frivolous suits at taxpayers' expense do so at the risk of paying the government's attorney's fees.

Section 12

Section 12 will apply the maximum hourly rate provisions of section 3 to attorney's fees authorized to be awarded by statute to parties who intervene or participate in agency proceedings. [The term "agency proceeding" is defined in 5 U.S.C. 551(12).] Section 12 of the bill does not create any right to such an award other than as provided by existing statutes.

Section 12 also precludes awards of attorney's fees or other expenses to intervenors or participants in agency proceedings unless such awards are expressly authorized by statute. This prohibition follows and adopts the Fourth Circuit's ruling in Pacific Legal Foundation v. Goyan, 664 F.2d 1221 (4th Cir. 1981), which found that agencies have no implied or general authority to award attorney's fees in agency proceedings.

Section 13

Section 13 will preclude awards of attorney's fees or other expenses against the United States or State or local government to intervenors in litigation, adjudication or licensing unless the intervenor seeking the award clearly and substantially prevailed on the merits of the controversy. Furthermore, provides that awards of attorney's fees or other expenses may be made only for work performed on issues which are significantly new and different from those previously pending and only if the intervenor prevails and if the issues were necessary to the resolution of the controversy. Section 13 requires that awards of attorney's fees to intervenors be made only pursuant to the rates established by section 3 of the bill. Except for Section 2 of the bill, an intervenor in litigation, adjudication or licensing shall be considered a party for the purposes of the bill.

Section 14

Section 14 contains provisions directed to resolving a problem States and local governments have experienced under 42 U.S.C. 1988. Section 14 modifies the awarding of fees where the plaintiff prevails on a claim not covered under section 1988 but there is a pendent claim covered under section 1988 which the court does not decide.

Currently, when a plaintiff prevails on the basis of a claim which does not provide for attorney's fees but is joined to a claim which is covered under section 1988, the plaintiff often will recover fees for the entire suit despite the fact that the court did not reach the claim covered by section 1988 and despite the fact that the claim may have no merit. In these situations, the standard used to determine whether the section 1988 claim may be joined to a valid State claim, for example, is that it is not "obviously frivolous" or "wholly insubstantial". In these situations the courts, following the sound judicial rule that constitutional questions should not be decided if the case can be resolved on other grounds, will decide the case on the valid State claim.

Section 14 is intended to clarify that, despite a footnote in the House Report to the contrary, the Fees Act does not provide attorney's fees from the public treasury to creative attorneys in any suit against State or local governments regardless of whether it pertains to civil rights or not. One alternative for correcting this problem is to provide that no fees may be awarded unless the plaintiff specifically prevails on the claim covered by section 1988. But this approach would hamper judicial economy in situations in which there was in fact a valid State or Federal claim not covered under section 1988 and a valid section 1988 claim, because the plaintiff would be likely to bring two separate actions to insure he recovered fees he was entitled to, or the court would have to decide a constitutional claim which was not necessary for it to decide.

The change proposed in section 14 will direct the judge, in these situations, to make a determination as to whether it would have been rational to have brought the section 1988 claim as a separate suit. One court has denied fees in this situation, stating that, "this court sees no basis for awarding fees when the fee triggering statute plays no role but that allowing attorney fees." Tatro v. State of Texas, 516 F. Supp. 968, 984 (N.D. Tex. 1981). If the court determined that the claim covered under section 1988 had sufficient merit to have been reasonably brought as a separate suit, attorney's fees could be awarded even though the plaintiff prevailed on a non-1988 claim. The judge would not have to determine whether the plaintiff prevailed on the section 1988 claim, and the decision would not require extensive analysis in the vast majority of cases. While this amendment would require an additional determination by the court, it is more than justified by the two alternatives -- leaving the situation as it exists now or not allowing fees unless the court makes a final determination on the claim covered under section 1988. The latter course would

probably severely hamper judicial economy, while the former is too burdensome on State and local governments. This proposal should not burden the plaintiff since he simply has to determine whether he is joining the section 1988 claim because it has merit or because he is trying to use it to collect fees.

Section 15

Section 15 requires the Comptroller General of the United States to submit an annual report to the President and the Congress on the amount of fees and other expenses awarded against the United States in litigation and in administrative proceedings. Copies of these reports must be provided to the Attorney General of the United States and the Director of the Administrative Office of the United States Courts, the Chairman of the Administrative Conference of the United States and the Director of the Office of Management and Budget. Agencies will be required to keep records on attorney's fees awards. The Courts and agencies must provide to the Comptroller General information for the preparation of his report.

Section 16

Section 16 applies the provisions of the bill to any award of attorney's fees and other expenses made subsequent to the enactment of the bill. Except for the requirement for annual reports required by section 5(b) of the bill, the provisions of the bill apply to actions commenced and fees and expenses incurred prior to enactment. In litigation pending at the time of enactment of the bill, the annual reports must be filed within one year of such enactment.

Section 17

Section 17 provides that the criteria for the awards of attorney's fees and other expenses established by this bill do not supercede more restrictive criteria contained in other statutes for making such awards. The provisions of this bill establish minimum criteria to be applied for determining and awarding attorney's fees and other expenses in litigation and administrative proceedings against the United States and under 42 U.S.C. 1988. For example, 5 U.S.C. 7701(g)(1) provides that attorney's fees may be awarded if two criteria are met: (1) the party must have prevailed; and (2) the award of attorney's fee must be determined to be "warranted in the interest of Justice..." While the prevailing party criterion in 5 U.S.C. 7701(g)(1) is controlled by section 2 of the bill, the bill does not contain a provision modifying or controlling the second criterion in 5 U.S.C. 7701(g)(1) concerning "warranted in the interest of Justice." Under section 17, the second criterion

would remain in effect. Thus, awards of attorney's fees under 5 U.S.C. 7701(g)(1) must be made in compliance with provisions of this bill and the more restrictive provision "warranted in the interest of Justice."

Another example is found under the Equal Access to Justice Act. Under the newly enacted 28 U.S.C. 2412(d)(1), an otherwise eligible prevailing party is entitled to attorney fees and expenses from the United States "unless the Court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. 2412(d)(1)(A). While section 6 of the bill contains the "special circumstances" provision, the bill does not contain the "substantially justified" provision. The "substantially justified" provision under 28 U.S.C. 2412(d)(1)(A) is one of the additional "criteria or requirements...limiting entitlement to...awards of attorney's fees or other expenses" within the meaning of section 17 of the bill and as such remains in effect.

Section 18

Section 18 provides that nothing in this bill shall be interpreted to create any right to an award of attorney's fees or other expenses. Any right to such awards is created solely by the provisions of other laws. This bill, however, does apply to, and modify, all fee shifting statutes, including the Equal Access to Justice Act, Public Law 96-481, except (1) that the provisions of section 3 which establishes a fee cap do not apply to awards made under 5 U.S.C. 504(a)(1) and 28 U.S.C. 2412(d)(1)(A) and (d)(3); and (2) the provisions of section 4 which establishes a 25% trigger in monetary awards do not apply to awards made under 5 U.S.C. 504(a)(1), and 28 U.S.C. 2412(d)(1)(A) and (d)(3), or in cases where government "bad faith" is proven under 28 U.S.C. 2412(b).

Furthermore, it is emphasized that the bill affects only litigation or administrative proceedings in which the award of attorney's fees is entered against the United States (or under 42 U.S.C. 1988), as opposed to cases in which an award is authorized to be paid out of proceeds or damages assessed against the United States. For example, the bill does not authorize award of fees directly against the Government in cases under the Federal Tort Claims Act, 28 U.S.C. § 2671-2680, or in cases involving National Service Life Insurance or United States Government Life Insurance, under 38 U.S.C. § 784. In those cases attorney's fees are paid from the prevailing party's total award of damages or proceeds and are not a separate judgment or award entered against the Government.

Section 19

Section 19 provides for definitions.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 4, 1982

FOR: EDWIN L. HARPER

FROM: WILLIAM P. BARR WPB

SUBJECT: Comparable Worth Literature
(Ref. 085415)

I have been in touch with both the Equal Employment Advisory Council and the National Commission on Pay Equity.

You asked to see some literature published by these groups.

EEAC has provided me with the attached materials. I also have in my files the legal briefs that they have filed in key comparable worth cases, some of which are excellent.

NCPE said they would send some material, but I have not yet received any. When I do receive it, I will forward it to you.

DOCUMENT NO. 085415 PD

OFFICE OF POLICY DEVELOPMENT

STAFFING MEMORANDUM

DATE: 7/27/82 **ACTION/CONCURRENCE/COMMENT DUE BY:** 8/1/82

SUBJECT: Comparable worth: the equal pay issue of the '80's.

	ACTION	FYI		ACTION	FYI
HARPER	☐	☐	DRUG POLICY	☐	☐
PORTER	☐	☐	TURNER	☐	☐
BARR	☐	☐	D. LEONARD	☐	☐
BAUER	☐	☐	OFFICE OF POLICY INFORMATION		
BOGGS	☐	☐	GRAY	☐	☐
BRADLEY	☐	☐	HOPKINS	☐	☐
CARLESON	☐	☐	PROPERTY REVIEW BOARD	☐	☐
DENEND	☐	☐	OTHER	☐	☐
FAIRBANKS	☐	☐		☐	☐
FERRARA	☐	☐	_____	☐	☐
GUNN	☐	☐	_____	☐	☐
B. LEONARD	☐	☐	_____	☐	☐
MALOLEY	☐	☐	_____	☐	☐
MONTOYA	☐	☐	_____	☐	☐
SMITH	☐	☐	_____	☐	☐
✓ UHLMANN	X	☐	_____	☐	☐
ADMINISTRATION	☐	☐	_____	☐	☐

Remarks:

Are you or someone in OPL in touch with both Equal Employment Advisory Council and National Commission on Pay Equity? I'd like to see some literature from each group.

Please return this tracking sheet with your response.

Edwin L. Harper
Assistant to the President
for Policy Development
(x6515)

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 4, 1982

FOR: EDWIN L. HARPER

FROM: WILLIAM P. BARR

SUBJECT: Complaint Processing Resources
(Ref. 085424)

Mike Uhlmann and I think that Horowitz's proposal for consolidating complaint-processing resources in EEOC is on the right track. If Mel Bradley does not see a significant political downside, we recommend continuing along the lines suggested.

DOCUMENT NO. 085424 PD

OFFICE OF POLICY DEVELOPMENT

STAFFING MEMORANDUM

DATE: 7/29/82 ACTION/CONCURRENCE/COMMENT DUE BY: 8/3/82

SUBJECT: Complaint Processing Resources

	ACTION	FYI		ACTION	FYI
HARPER	☐	☐	DRUG POLICY	☐	☐
PORTER	☐	☐	TURNER	☐	☐
BARR	☐	☐	D. LEONARD	☐	☐
BAUER	☐	☐	OFFICE OF POLICY INFORMATION		
BOGGS	☐	☐	GRAY	☐	☐
BRADLEY	X	☐	HOPKINS	☐	☐
CARLESON	☐	☐	PROPERTY REVIEW BOARD	☐	☐
DENEND	☐	☐	OTHER	☐	☐
FAIRBANKS	☐	☐		☐	☐
FERRARA	☐	☐	_____	☐	☐
GUNN	☐	☐	_____	☐	☐
B. LEONARD	☐	☐	_____	☐	☐
MALOLEY	☐	☐	_____	☐	☐
MONTOYA	☐	☐	_____	☐	☐
SMITH	☐	☐	_____	☐	☐
✓ UHLMANN	X	☐	_____	☐	☐
ADMINISTRATION	☐	☐	_____	☐	☐

Remarks:

ADMINISTRATIVELY CONFIDENTIAL

Please comment on the attached.

Please return this tracking sheet with your response.

Edwin L. Harper
Assistant to the President
for Policy Development
(x6515)

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

July 23, 1982

MEMORANDUM FOR: Dave Stockman

FROM: Mike Horowitz MH

SUBJECT: Complaint Processing Resources

In the Civil Rights Weekly Activity Report for July 2, it was noted that, by using the resources saved through reforms in Federal complaint process, "it may be possible to strengthen EEOC and make a substantial dent in its notorious private sector backlog within existing resources". This responds to your request for a summary of the possibilities.

Background and issues.

--The attached resource summary details agencies' estimates of resources they will devote to processing complaints against themselves in FY 1983. Expenditure estimates are conservative, as, for the most, they include only direct salary expenses (and not space and other support costs).

--EEO counseling at most agencies (as at OMB) is performed on a part time basis. Therefore, any resource transfer would concentrate on resources devoted to processing formal complaints. This is largely performed by full time EEO staff, or by personnel with other skills readily usable by EEOC (e.g., investigators and attorneys).

--Agencies estimate that they will devote 1001 professional work years to complaint processing in FY 1983 (and, based on a ratio of 1 clerical to every 5 professional workyears, we estimate 200 clerical workyears). The EEOC estimates that it could perform this function with 639 professional FTE's (including supervisors) and 130 clerical FTE's.

--At the close of FY 1981, the EEOC had 3,412 permanent full time positions and an inventory of 37,700 private sector charges to be processed; at the President's requested level of 3,278 permanent full time positions in FY 1983, this inventory is projected to increase to 49,600 charges. In addition, Clarence Thomas's emphasis on "quality processing" will mean that charges that may in the past have been closed through quick "split the difference" settlements will proceed to decisions on their merits. This will reduce the number of complaints that can be closed with existing

resources, increasing the inventory. The predictable result will be charges that, under the President's budget and Thomas' stewardship, previous progress toward eliminating the notorious EEOC backlog has been reversed.

--Alternatives for transferring resources to EEOC pose potential difficulties. Transferring personnel would be most difficult logistically, and would be resisted by many involved. EEOC would be required to deal with personnel problems now dispersed among the agencies, and administrative problems such as grade structure. However, simply subtracting the necessary funding from agency budgets and transferring it to EEOC's would necessitate RIFs (affecting mostly minorities, women, or handicapped personnel) which could prove politically difficult. Both alternatives would require strong Administration support for OMB in all phases of the resource transfer process. Agencies would seek to hide or reprogram the resources involved. However, if insufficient resources were transferred, EEOC would be required to divert personnel from private sector complaints, increasing the backlog and other existing problems.

Conclusion. I recommend that all on-budget* agency processing resources (including personnel) be transferred to the EEOC, and that any resource "profit" achieved through more efficient processing be devoted to private sector workload (NOTE: given the personnel "headaches" EEOC is likely to inherit, any such "profit" would have to be earned). This would give the EEOC an opportunity to eliminate its private sector shortfall within existing resources; be a high-visibility but low cost Administration civil rights initiative; and provide a practical demonstration of the Administration's contention that increasing workloads can frequently be accommodated by using existing Federal resources more efficiently.

The consolidation and transfer option has been discussed at length in meetings that I have coordinated between representatives of EEOC, OIRA and our Civil Rights office. There is a clear consensus in favor of the option. Implementing the option will require EEOC to issue a new regulation, the issuance of an Executive Order and action by OMB to implement transfers of resources. Clarence Thomas is with us and should be able to move this matter through the full Commission, although some bargaining may be required regarding the number of FTE's to be assigned to EEOC (and the timetable for phasing the function in) as a condition of their acceptance of government-wide internal EEO processing. I am working on a draft Executive Order.

* Due to USPS's legal status, a different strategy (such as investigation of USPS's complaints by EEOC on a reimbursable basis) would be required.

If you agree with the general direction of things, I will begin an informal bargaining process with Thomas.

In the civil rights area nothing is ever certain, but the politics of this matter should not be overwhelming and publication of an NPRM by EEOC should be possible within a month.

DAS Decision:

1. Continue along the lines discussed in the memo._____

2. See me._____

cc: Joe Wright
Chris DeMuth

Resources currently devoted to Federal complaint processing and counseling. The following resource figures are derived from data submitted by agencies to OMB under circular A-11. They are believed to be conservative, as some components of DOD and the Legislative Branch with known heavy workloads in this area did not report.

Counseling:

	1981	1982	1983
Outlays (thousands):			
On-budget entities	18603.66	19013.85	19790.3
USPS	6030	6453	6905
Total	24633.66	25466.85	26695.3
Workyears (Professionals only):			
On-budget entities	684	682	693
USPS	202	202	212
Total	971	884	905

Processing of Formal Complaints

Outlays (thousands):			
On-budget entities	34033.86	36236.8	36764
USPS	4384	4777	5039
Total	38417.86	41013.8	41292
Workyears (Professionals only)			
On-budget entities	850.9	898.24	898.91
USPS	103	103	103
Total	953.9	1001.24	1001.91

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 4, 1982

FOR: BOB THOMPSON

FROM: WILLIAM P. BARR

SUBJECT: Tuition Tax Credit Letter to Senators

Per your request, attached is a draft of a Presidential letter to key Senators on the Senate Finance Committee pressing for action on the tuition tax credit bill.

cc: Ed Harper
Roger Porter
Gary Bauer

August 4, 1982

Dear Senator:

On , I transmitted to the Senate proposed legislation that would allow a tax credit for tuition paid by parents who send their children to private elementary and secondary schools. This proposal is one of my very top legislative priorities. This bill should be passed by Congress this session.

It is of great importance to the continued vitality and diversity of our society that parents have a meaningful choice between public education and the many forms of private education that are available. The rising costs of education are threatening to put private schools beyond the reach of many families who cannot afford the "double burden" of paying private school tuitions and the State and local taxes that support the public school system. We must also bear in mind that private schools carry a significant part of the burden of providing primary and secondary school education in this country. If it becomes financially impossible for many of the families now sending their children to private schools to continue to do so, the resulting increase in public school attendance will place large and unwelcome burdens on State and local taxpayers.

My proposal will help to preserve the ability of parents to choose between public and private schools. It does this in a fiscally responsible way. It also contains strong provisions that ensure that tax credits will not be used to promote racial discrimination.

I ask you to support this important legislation, to assist in moving it forward expeditiously, and to enact it into law this session of Congress.

BRIEFING PAPER ON TUITION TAX CREDITS

I. The Bill

On June 22, 1982, President transmitted his tuition tax credit proposal to the Congress.

The Bill:

- Covers elementary and secondary schools.
- Allows credits for 50% of tuition paid up to ceiling of $100 in 1983, $300 in 1984, and $500 in 1985.
- Starts phasing out the credit for taxpayers making $50,000 or more. The credit is completely eliminated for taxpayers making $75,000 or more.
- Contains a strong three-pronged anti-discrimination provisions:
  - -- a school must be a tax exempt organization under 501(c)(3);
  - -- a school must file annual statement under penalties of perjury that it does not discriminate;
  - -- the Attorney General is authorized, upon complaint of someone who has been discriminated against, to bring court actions to cut off credits.

The Bill, particularly the anti-discrimination provisions, were worked out in close consultation with all interested groups. It enjoys broad support among all elements of the coalition.

II. Administration Action to Gain Passage

The Administration is aggressively pushing the legislation.

The President has declared that it is one of his top five legislative priorities this session of Congress.

Senate Action:

- Senator Dole has introduced Bill.
- President has asked Senator Dole to move expeditiously.
- At Senate Finance Committee hearings last month, we sent up Secretaries Regan and Bell to show the importance of this bill.

- o President sent letter to Senator Dole and key Senators urging favorable action this session. (Copy attached.)

- o On August 9 (yesterday) President met with key Senators and Representatives. (See attached list.)

- o On August 9 (yesterday) Senate Finance Committee held initial mark-up session.

- o Strategy: have a Senate bill ready to tack onto House-passed revenue bill (other than tax bill).

House Action:

- o Representatives Gradison and Biaggi have introduced Bill. So far, about 25 co-sponsors.

- o President is sending letter to key House members.

- o President has met with Representative Rostenkowski and other key House members.

- o Coalition is starting drive to get more co-sponsors. We are trying to help.

We are holding regular legislative strategy meetings with people from coalition and people from Hill.

III. Possible Amendments and Our Position on Them

A. Refundability: Senate Finance Committee has made it clear that it would like to add a refundability provision.

We would prefer to go one step at a time. Refundability should be addressed after we have established the principle of tuition tax credits.

-- Refundability would add to "cost" of bill -- revenue losses would be 5% higher or more.

-- Administration is proposing regulations that would make Title I funds available to underprivileged private school students. This could moot the need for refundability. (These funds were theoretically available to private school students in the past but not in practice.)

-- Refundability could make our legal defense a little more difficult. We want to defend the Bill in large part as a tax equity measure. Refundability would cloud this argument.

B. Reduction of Credit: Some on Senate Finance Committee

are considering reducing the credits from a maximum of $500 to a maximum of $300.

We have not taken a position on this yet. Some coalition members say they would accept this to get the Bill passed this session.

C. Lower Eligibility Ceiling: Some on Senate Finance Committee are proposing lowering the phase-out for the wealthy to $40,000 to $60,000 instead of from $50,000 to $75,000.

We have not taken a position on this. However, many middle-class urban families are now two-income families, and we are concerned that if the ceiling is lowered too much, it will exclude many deserving families.

IV. Possible Questions:

A. Refundability: You should expect question on this. (See above discussion)

B. Prospects for Passage: There is a good chance we can get the Bill passed this session. It will be touch-and-go. Some Senators have suggested that, if the tax bill is defeated, this Bill is doomed. We are doing everything we can to move this Bill.

Yesterday a member of the Finance Committee staff said privately that the kind of quick action the President is managing to get on this legislation is "unprecedented".

C. Senator Chafee's Remarks: You should be aware that today's Washington Times reports Senator Chafee as saying that Senator Dole has confided in him that he is just going through the motions and intends to drag out the mark-up process until it is too late to get action on the Bill.

V. Attachments:

A. President's recent letter to Senator Dole.

B. Issue Update on Tuition Tax Credits.

C. Detailed Explanation of Bill's Anti-Discrimination Provisions.

D. Fact Sheet on Bill.

E. Copy of Bill, Transmittal Letter, and Explanation.

F. List of Senators and Representatives who met with President.

TUITION TAX CREDIT MEETING
WITH THE PRESIDENT

Senators: Baker
Packwood
Roth
D'Amato
Long
Dole
Moynihan (Invited, but could not attend.)

Congressmen: Michael
Conable
Gradison
Frenzle
Coughlin
Dougherty
Solomon
Livingston
Hyde
Gephardt
Russo
Biaggi

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 4, 1982

FOR: JUDY JOHNSTON

FROM: BILL BARR WPB

SUBJECT: Proclamation for Women's Equality Day
Ref. 065524

I strongly recommend making the indicated changes to the fourth paragraph of the proposed proclamation.

In the civil rights area, generally, there is an intense debate as to whether the government's policies should be directed at insuring equality of opportunity rather than directly mandating equality of condition. There should be no doubt that this Administration stands for equality of opportunity, and we should not use rhetoric in the proclamation which suggests otherwise.

cc: Ed Harper
Roger Porter

DOCUMENT NO. 065524 PD

OFFICE OF POLICY DEVELOPMENT

STAFFING MEMORANDUM

DATE: 8/2/82 **ACTION/CONCURRENCE/COMMENT DUE BY:** 8/9/82 COB

SUBJECT: Draft proclamation designating August 26, 1982 as Women's Equality Day

	ACTION	FYI		ACTION	FYI
HARPER	☐	X	DRUG POLICY	☐	☐
PORTER	☐	☐	TURNER	☐	☐
BARR	☐	☐	D. LEONARD	☐	☐
BAUER	☐	☐	OFFICE OF POLICY INFORMATION		
BOGGS	☐	☐	GRAY	☐	☐
BRADLEY	☐	☐	HOPKINS	☐	☐
CARLESON	☐	☐	PROPERTY REVIEW BOARD	☐	☐
DENEND	☐	☐	OTHER	☐	☐
FAIRBANKS	☐	☐		☐	☐
FERRARA	☐	☐	_____	☐	☐
GUNN	☐	☐	_____	☐	☐
B. LEONARD	☐	☐	_____	☐	☐
MALOLEY	☐	☐	_____	☐	☐
MONTOYA	☐	☐	_____	☐	☐
SMITH	☐	☐	_____	☐	☐
UHLMANN	☐	☐	_____	☐	☐
ADMINISTRATION	X	☐	_____	☐	☐

Remarks:

MIKE UHLMANN FOR ACTION

May I please have your comments by COB 8/9

cc: Roger Porter

Please return this tracking sheet with your response.

Edwin L. Harper
Assistant to the President
for Policy Development
(x6515)

Document No. 065524

WHITE HOUSE STAFFING MEMORANDUM

DATE: August 2, 1982 ACTION/CONCURRENCE/COMMENT DUE BY: ~~COB: August 9, 1982~~

SUBJECT: Draft proclamation designating August 26, 1982, as Women's Equality Day.

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	JAMES	☐	☐
MEESE	☐	☐	MURPHY	☐	☐
BAKER	☐	☐	ROLLINS	☑	☐
DEAVER	☐	☐	WILLIAMSON	☑	☐
STOCKMAN	☐	☐	WEIDENBAUM	☐	☐
~~HARPER~~	☑	☐	HICKEY	☐	☐
CLARK	☐	☐	ROSEBUSH	☐	☐
BRADY/SPEAKES	☐	☐	CEQ	☐	☐
CANZERI	☐	☐	OSTP	☐	☐
DOLE	☑	☐	USTR	☐	☐
FIELDING	☑	☐	ROGERS	☐	☐
DUBERSTEIN	☑	☐	_____	☐	☐
FULLER (*For Cabinet*)	☑	☐	_____	☐	☐
GERGEN	☐	☐	_____	☐	☐

Remarks:

Draft proclamation as noted above. The draft was prepared by the Office of Public Liaison. Please comment as you feel appropriate.

Thank you.

Dodie Livingston (x2941)
for
Richard G. Darman
Assistant to the President
and
Deputy to the Chief of Staff

OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

GENERAL COUNSEL

July 28, 1982

MEMORANDUM FOR: THE PRESIDENT

FROM: MICHAEL J. HOROWITZ
COUNSEL TO THE DIRECTOR

SUBJECT: WOMEN'S EQUALITY DAY, 1982

Enclosed for your consideration is a proposed proclamation which would designate August 26, 1982, as "Women's Equality Day."

The proposed prclamation was submitted to this office by Elizabeth Dole, and has been retyped as to format and to reflect a technical change.

The proposed proclamation has the approval of the Director of the Office of Management and Budget.

Enclosure

WOMEN'S EQUALITY DAY, 1982

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

On August 26, 1920, the 19th Amendment to the Constitution became law, granting women the right to vote. On this, the 62nd Anniversary of that historic day, we Americans can pause and take pride in the progress we have made toward the goal of equal opportunity.

We celebrate today the achievement of the past, but, even more, we celebrate a new beginning for a future in which all Americans will share equally in the rights and responsibilities of this land.

In the intervening years since 1920, women have faithfully carried out responsibilities at all levels of government, in every area of employment and education, and in the nurturing of families and children.

Today, more than ever, we honor women for their contribution in helping to make America great. Let us help pledge anew to dedicate our efforts to ~~create~~ ensure equality of opportunity for every citizen of the United States.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim August 26, 1982, as Women's Equality Day. I call upon every American to join me in this tribute.

IN WITNESS WHEREOF, I have hereunto set my hand this day of , in the year of our Lord nineteen hundred and eighty-two, and of the Independence of the United States of America the two hundred and seventh.

THE WHITE HOUSE

WASHINGTON

CABINET COUNCIL ON LEGAL POLICY

10:00 a.m.

August 5, 1982

Room 330 OEOB

AGENDA

1. Immigration Legislation (CM#210)

2. Bankruptcy Court Jurisdiction after Northern Pipeline Construction Co. v. Marathon Pipeline Co. (CM#283)

3. CCLP Working Group on Drug Supply Reduction (CM#224)

MINUTES
CABINET COUNCIL ON LEGAL POLICY

August 5, 1982
10:00 a.m., Room 330 OEOB

Attendees: See attached list.

1. Immigration Reform Legislation (CM #210)

As an informational item, David Hiller, Associate Deputy Attorney General, briefed the Council on the status of the pending immigration reform legislation (S.2222).

Mr. Hiller reported that the bill is on the Senate calendar and is among those items that the Senate leadership is trying to act on before the August recess. He indicated that the House's counterpart bill was out of subcommittee but that Chairman Rodino will await Senate action before taking the bill up in full committee.

Mr. Hiller reported on ongoing efforts to obtain the Administration's three amendments which the CCLP decided to pursue at its June 28, 1982, meeting.

a. Mr. Hiller was optimistic about our chances for achieving an amendment that would tighten the terms of legalization. He reported that, so far, 45 Senators would support this measure.

b. We are making less headway with an amendment that modifies language seeming to require a national ID system and provides for legislative veto. Mr. Hiller reported that Senator Simpson is actively resisting this change and that, to date, only 16 Senators have expressed support for such an amendment.

c. Senator Kennedy has introduced the Administration's amendment on the confidentiality of asylum hearings. Mr. Hiller thought adoption likely.

The Council questioned Mr. Hiller about the details of our legislative strategy and the outlook. Various ways of obtaining favorable consideration of our amendments and of moving the legislation along were also suggested and discussed.

2. Bankruptcy Court Jurisdiction

As an informational item, Assistant Attorney General Jonathan Rose briefed the Council on the Supreme Court's recent decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., a case in which the Court invalidated the broad grant of jurisdiction made to bankruptcy courts by the Bankruptcy Act of 1978.

Mr. Rose advised the Council that the court had stayed its order until October 4, 1982, but that, unless Congress has reconstituted the bankruptcy courts by that time, those courts will cease to function. The Attorney General expressed the hope that the Supreme Court would extend its stay if there was some visible sign of progress in the Congress.

Mr. Rose outlined the three main options being considered by the Department of Justice: (1) returning to the pre-1978 system with referees serving as adjuncts to the district court; (2) keeping the existing system but narrowing the courts' jurisdiction; and (3) elevating bankruptcy courts to Article III courts with over 200 new Article III judges.

Mr. Rose suggested that the situation may provide an opportunity to get Congress to address the needs of the judiciary generally and to consider pending proposals to increase district and circuit court judgeships.

Secretary Schweiker stated that he did not like the third option -- creating over 200 new Article III bankruptcy judges. Mr. Fielding pointed out that the newly-created Claims Court might run into the same problem as the bankruptcy court. Secretary Watt stressed the importance of a bill that would restrict venue in the District of Columbia in suits against the U.S.

3. Working Group on Drug Supply Reduction (CM #224)

Associate Attorney General Rudy Guiliani gave an update briefing on the CCLP Working Group on Drug Supply Reduction. He indicated that the Group's five task forces had prepared draft papers that will be ready for consideration by the Council shortly.

Mr. Guiliani reported on: (1) the progress of the South Florida Task Force; (2) the creation of Law Enforcement Coordination Committees; and (3) the involvement of the FBI in handling drug offenses.

There was discussion about the large drug harvest in California and the possibility of urging an aggressive eradication program in that State prior to November.

The Attorney General concluded the meeting by stressing the importance of getting the Administration's Crime Package to the Senate floor.

The meeting adjourned at 11:10 a.m.

CABINET COUNCIL ON LEGAL POLICY

August 5, 1982

PARTICIPANTS

The Attorney General, Chairman Pro Tempore

Secretary Watt
Secretary Donovan
Secretary Schweiker
Fred Fielding, Counsel to the President
Edwin Harper, Assistant to the President for Policy Development
Loren Smith, Chairman, Administrative Conference of the U.S.
Under Secretary Hovde
(Representing Secretary Pierce)
Admiral James Gracey, Commandant of the U.S. Coast Guard
(Representing Secretary Lewis)
Peter Wallison, General Counsel
(Representing Secretary Regan)
Sherman Unger, General Counsel
(Representing Secretary Baldrige)
R. Tenney Johnson, General Counsel
(Representing Secretary Edwards)
Diego Assencio, Assistant Secretary for Consular Affairs
(Representing Secretary Shultz)

William Barr, Acting Executive Secretary
Becky Norton Dunlop, Director, Office of Cabinet Affairs

For Presentation:

Jonathon Rose, Assistant Attorney General
Office of Legal Policy
Rudolph Giuliani, Associate Attorney General
David Hiller, Associate Deputy Attorney General

Additional Attendees:

Kenneth Cribb, Jr., Assistant Counsellor to the President
James Cicconi, Special Assistant to the President and Special Assistant to the Chief of Staff
Annelise Anderson, Associate Director, Office of Management and Budget
David Platt, Office of the Vice President
Richard Williams, White House Drug Office
Dan Leonard, White House Drug Office
Charlie Smith, Office of Planning and Evaluation
Michael Guhin, National Security Council
Alan Nelson, Immigration and Naturalization Service
Jim Medas, Office of Intergovernmental Affairs

Imminent Senate Action on Abortion

Senator Jesse Helms and others have persistently maneuvered and petitioned over the last 18 months to win an opportunity for the Senate to vote on an abortion bill. It now appears that desire will be fulfilled.

Senator Baker has agreed that when the Debt Limit Extension bill is brought up on August 16 Senator Jepsen will be recognized for the purpose of offering as a floor amendment S.2147 -- the Helms Human Life bill which establishes "personhood" for the unborn child.

Senator Helms may have difficulty getting cloture, although negotiations are underway to avoid a filibuster. If Helms fails to gain cloture, it is unclear whether Senator Hatfield will move to substitute one of his own anti-abortion measures for Helms'. Hatfield's proposals, which would effect a fund cut-off but not directly confront the "personhood" issue, enjoy only lukewarm support in the right-to-life movement.

It is expected that the right-to-life movement will close ranks behind the amendment, whatever form it takes, and unite in urging passage of it - since all of them want a major vote this year.

> Pressure is mounting within the right-to-life movement for you to become actively involved either to help obtain cloture or, if no filibuster occurs, to obtain final approval.

Office of Policy Development
August 6, 1982

Judge Torpedoes Major Deregulation Initiative

On July 22 a federal district court judge preliminarily enjoined implementation of new Department of Labor regulations under the Davis-Bacon Act. The new regulations halted by the judge are among the most important of the Administration's deregulation initiatives and would have resulted in estimated cost savings of $600 million annually.

The Davis-Bacon Act, enacted in 1931, requires payment of "prevailing wages" to workers on federally funded construction contracts. Formulas used under previous regulations to compute "prevailing wages" resulted in wages in excess of real market rates. The new regulations, approved by the Vice President's task force and promulgated in May, changed the method for determining prevailing wages to render more realistic rates, allowed greater use of lower-paid "helpers" on construction projects, and reduced paperwork requirements on contractors.

In May the AFL-CIO challenged the new regulations in the U.S. District Court of the District of Columbia. In a 17-page opinion, the district judge ruled that the AFL-CIO would most likely prevail on the merits, and he enjoined implementation of the new regulation pending completion of the suit. In effect, the judge ruled that when regulations have been in effect for a long time, they become like statutes themselves, and the Executive Branch cannot change them through the regulatory process but must resort to legislation.

> This ruling sets a pernicious precedent for your entire deregulation effort. The Justice Department and Labor Department are trying to clear the way for an expedited appeal.

Office of Policy Development
August 6, 1982