MEMORANDUM

THE WHITE HOUSE

WASHINGTON

October 7, 1982

FOR: EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN

SUBJECT: Pending Title IX Case: Iron Arrow Honor Society v. Schweiker

I. The Issue

The Iron Arrow case concerns the limits of coverage of Title IX, which forbids gender discrimination "under any education program or activity receiving federal financial assistance."

Some interest groups would, of course, like to define "program or activity" as widely as possible to include an entire educational institution that receives federal financial assistance for any of its programs or activities. But the Supreme Court ruled last Term that Title IX is "program-specific," stating that "Congress failed to adopt proposals that would have prohibited all discriminatory practices in an institution that receives federal funds." North Haven Board of Education v. Bell (1982). The Court concluded that Title IX affects only discriminatory practices in those programs or activities which actually receive financial assistance from the federal government.

Thus "the fundamental issue" identified in Elizabeth's memo -- whether the Department of Education is authorized under Title IX to investigate a program or activity of an educational institution if the specific program or activity does not receive federal funds -- has already been answered, at least in a preliminary way, by the Supreme Court.

The court has yet to clarify exactly what "program or activity" means, but the North Haven case indicates that "program or activity" does not mean the whole institution.

II. The Administration's Position

After the North Haven decision came down in May of this year, Justice revised its position to accord with this decision, holding that Title IX applies only to those specific programs or activities, within an educational institution, that receive federal financial assistance.

In the University of Richmond case, the district court held that a university's athletic program was not covered under Title IX where the university received federal funding for construction of a library and students participated in federal assistance programs, but no federal financial assistance went to the athletic program. Since the district court's decision followed logically from the program-specific language of North Haven, Justice did not appeal.

In opposing Justice's position, both the Department of Education's Office of Civil Rights and the Civil Rights Commission argue that a college should be regarded as a single integrated "program" for purposes of Title IX. They wish to follow the Third Circuit's Grove City opinion, which stated that "program" does not mean "separate, discrete, and distinct components of an integrated educational institution."

Justice, on the other hand, takes a consistent position that the North Haven case bars this type of "institutional" approach and requires a "program-specific" approach. Justice continues to support the basic holding of Grove City, that Pell grants to students constitute federal financial assistance to the college. But Justice does not believe that receipt of Pell grants necessarily subjects every program and activity of the college to Title IX coverage. If Grove City is appealed to the Supreme Court, Justice will argue that the Court need not decide the exact definition of "program or activity," because that issue is not necessary to resolving the basic Pell grant question presented in Grove City. In other words, Justice will argue that the Third Circuit's language in Grove City endorsing the institutional approach is merely dictum, not necessary to the decision of the case.

Further, concerning the Third Circuit's recent holding in favor of the institutional approach in the Temple University case, Justice believes this holding is wrong. It remains unclear whether the Temple case or the Grove City case will be appealed to the Supreme Court.

In summary, the Administration's position is that the Richmond decision should not be appealed because it is consistent with the Supreme Court's program-specific approach announced last Term in North Haven; Third Circuit decisions to the contrary are not to be followed because they are inconsistent with North Haven. This conflict of federal decisions will, of course, ultimately have to be resolved by the Supreme Court.

III. The Iron Arrow Case

In light of the Administration's position on the Richmond case, and the basis of that position found in the North Haven opinion, we should not give false hope to those who want us to apply Title IX to the Iron Arrow situation. It is far more difficult, and more dangerous, to attempt to apply Title IX to the Iron Arrow case than to the Richmond case.

The "Iron Arrow Honor Society" is further removed from being a program or activity receiving federal financial assistance than is the athletics department of the University of Richmond. Iron Arrow is not an entity of the University of Florida; it is a group of students which receives only indirect benefits from the university: university recognition, limited secretarial service, use of meeting rooms.

The Iron Arrow group is threatened with application of Title IX only because HHS has drawn up a sweeping regulation to enforce Title IX, prohibiting federally assisted institutions from "providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees."

This regulation not only prohibits all discriminatory actions by the entire institution -- contrary to North Haven -- it also prevents the institution from allowing meetings or giving other assistance for any group that makes sex-based distinctions, even though the group is in no way a program or activity receiving federal assistance.

If the regulation were upheld and widely enforced, it would have sweeping and severe effects. Many bona fide student and community groups make sex-based distinctions. Some do so out of long-standing religious convictions, such as Catholics and Orthodox Jews who require male clergy. Is the federal government going to try to penalize colleges for sponsoring or allowing such groups on campus? Are we going to try to banish an all-female feminist group from some other federally assisted college? Or an all-male or all-female singing group? The North Haven program-specific approach is a good way to allow such pluralistic student and community groups to exist. Applying the HHS regulation as written would offend those elements of the public which do not see anything invidious about many kinds of single-sex groups. (You will recall the flap that ensued under Joe Califano when HEW tried to enforce an analogous regulation to prohibit father-son or mother-daughter gatherings.)

Justice, therefore, has a good point in not wishing to enforce this regulation against the Iron Arrow society.

IV. Policy Recommendation

We have already suffered criticism for failing to appeal the Richmond case, though apparently only from groups that are most unlikely to support the President under any circumstances. (Our correspondents in the Lawyers' Committee for Civil Rights Under Law, for instance, are not likely to become favorably disposed toward us if we bend on this issue.)

If we stay on our current course, we are not likely to encounter any criticism we have not already faced. A change of course, however, would not only create new enemies, but would cost whatever respect we have among those groups that pressure us into bending.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

October 7, 1982

FOR: T. KENNETH CRIBB

FROM: WILLIAM P. BARR WPB

Attached is a copy of Ed Meese's 15 June speech on judicial reform before the Free Congress Research and Education Foundation. The Foundation would like to use it as a chapter in a new book they are putting together on "Criminal Justice Reform: A Blueprint."

If Mr. Meese approves, we can work with Pat McGuigan at the Foundation in footnoting and adapting the speech.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

October 8, 1982

FOR: ROGER B. PORTER

FROM: MICHAEL M. UHLMANN

SUBJECT: EEOC: Local Police Retirement Practices

EEOC enforcement of the Age Discrimination in Employment Act (ADEA) against state governments raises recurring issues that need to be addressed and resolved consistent with our federalism principles. Unfortunately, the time is not ripe for a reassessment of this issue now, since the Solicitor General argued the Wyoming case before the Supreme Court Tuesday and took a position contrary to federalism.

We should await the Supreme Court's decision, and then resolve how to enforce this Act consistent with federalism principles, to the maximum extent appropriate under the Supreme Court's decision.

In 1976, the Supreme Court ruled in National League of Cities v. Usery that the Tenth Amendment prevents the federal government, under color of the Commerce Clause, from intruding upon a state in matters which go to the heart of a state's existence as a separate governmental entity. Considerable disagreement exists as to what the full range of such matters might be, but from Usery we know that the feds may not impose minimum wage standards upon state and local government employees.

The ruling in Usery would not apply, clearly, where the federal standard is constitutionally derived, as in the case of race. The EEOC memo is quite correct in suggesting that the states are not free to pursue whatever race-based policies they wish. But the memo too easily assumes that age criteria for law enforcement officers stand on the same footing as race criteria. The ADEA is merely a statute. Absent some compelling language in its legislative history, or until such time as Congress or the Court states that discrimination on account of age is within the ambit of Fourteenth Amendment protections, it seems to me that the competing policy criteria articulated in Usery ought to prevail. If setting age criteria for police officers is not part of a state's inherent attribute of sovereignty, it is hard to say what is.

Since, however, the Solicitor's position in the Wyoming case has already been set, I recommend that we wait until the court rules before formally reassessing what Administration policy ought to be.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

October 13, 1982

FOR: EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN

SUBJECT: Background on Crime Bills for ELH's CEO Meeting

The Violent Crime and Drug Enforcement Improvement Act of 1982 was introduced in May. In that bill, the Administration proposed measures which would:

- o make it more difficult for dangerous defendants to be released prior to trial or during appeals;
- o increase penalties for drug trafficking and prevent criminals from retaining assets and proceeds used in or derived from criminal activity;
- o reform the federal sentencing system by abolishing parole and requiring judges to operate within sentencing guidelines to assure greater likelihood of punishment;
- o facilitate transfer of federal surplus property to states for use as correctional facilities;
- o provide for increased protection of victims and witnesses in the criminal justice process. (The President earlier this year also created a Task Force on Victims of Crime, which will make further specific recommendations in late 1982 or early 1983.)

In September, the Administration introduced the Criminal Justice Reform Act of 1982. This bill would:

- o define and limit the insanity defense;
- o reform the exclusionary rule so that evidence seized by police acting in good faith will not be suppressed;
- o set rules for federal review of state criminal proceedings to reduce delay and duplication, and to seek greater finality in the criminal justice process.

Bill No. 1 passed the Senate and is a candidate for a major effort in the Lame Duck Session. If we cannot piggy-back Bill No. 2 during the Lame Duck, it will have to await the 98th Congress.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

October 13, 1982

FOR: EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN

SUBJECT: Status of Bankruptcy Court Legislation

Justice has been trying to forge a compromise among the diverse factions on the Hill. The package is still rough at the edges, but Justice believes that a consensus can be created along the following lines:

- Create a Bankruptcy Division within each federal district court.

- Create 227 Article III bankruptcy judges, distributed throughout the nation as the anticipated needs of the district courts may require.

- In addition to their bankruptcy duties, these judges would be free to accept extraneous assignments from the Chief Judge of the district courts.

- A package of amendments to substantive bankruptpcy law, of which the most important deal with:

  -- grain elevators (in effect permitting farmers to extract their commodities in case an elevator company threatens to go under);

  -- shopping center lessees (in case the center itself threatens to go under);

  -- requiring those with likelihood of future earnings to file a schedule of repayments as a condition of getting bankrupt status (strongly pushed by the consumer credit folks).

Beyond these features, which we either support or can live with, diverse representatives of the people on the Hill are trying to add Christmas ornaments, some or all of which are likely to cause us problems -- e.g., a re-do of the bill vetoed by the President last year that would grant special relief to the creditors of W. T. Grant.

The critical question during the lame duck session will be how many of these obnoxious pills we will have to swallow as a condition for getting what we do want.

FYI, the Supreme Court granted an extension of the October 4 deadline until December 24, a date pregnant with possibilities for Christmas cheer of the sort that has given us a $170 billion deficit.

THE WHITE HOUSE

WASHINGTON

October 13, 1982

MEMORANDUM FOR EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN

SUBJECT: Update on Firefighters Issue

The FY82 budget had about $20 million for firefighting programs -- $8 million for the Fire Academy at Emmitsburg, Maryland; $8 million for the U.S. Fire Administration (under FEMA); and $4 million of "flow through" to the Commerce Department for safety standard testing, etc.

For FY83 the Administration proposed to zero-out the Fire Administration (thus saving $8 million). Guiffrida appealed this cut to the Budget Review Committee and lost. The cut caused a great storm on the Hill, and Congress saved the Fire Administration and put back $4 million in the budget for it.

We plan to spend the $4 million on the following programs in FY83:

- o firefighter health and safety studies;
- o continue national fire data system;
- o help states with arson information data system; and
- o home safety studies.

In the meeting you will be having, the main concern of the firefighter representatives will probably be to make sure that the Administration will not try again to cut the Fire Administration in FY84. Guiffrida feels that any cut would "not be worth the hassle" and has vowed to go to the President if OMB goes after the Fire Administration again. Stockman has not indicated his intentions.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

October 14, 1982

FOR: EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN

SUBJECT: Recommended Meeting with Anti-Pornography Coalition

We have just received a copy of a request that Elizabeth Dole is considering for a Presidential meeting with leaders of the anti-pornography coalition before the elections. Red Caveney has indicated that they would like your concurrence before forwarding the proposal.

This would be an excellent way to follow up on the very successful July 27 meeting, as outlined in Elizabeth's memo. The President should get public credit for the Attorney General's October 4 letter concerning enforcement of the federal anti-pornography laws.

In anticipation that a meeting of the sort suggested by Elizabeth will take place, we are preparing a draft presidential statement (with talking points). We can have that in your hands tomorrow.

FYI, in addition to groups which traditionally oppose pornography on moral grounds, it should be noted that feminist leaders have been in the forefront of anti-pornography efforts -- quite properly, because it is so particularly degrading to women.

THE WHITE HOUSE

WASHINGTON

SCHEDULE PROPOSAL

OCTOBER 12, 1982

TO: WILLIAM K. SADLEIR, DIRECTOR
PRESIDENTIAL APPOINTMENTS AND SCHEDULING

FROM: ELIZABETH H. DOLE

REQUEST: Meeting with leaders of anti-pornography coaliton.

PURPOSE: To announce crackdown on pornography traffic by more vigorous enforcement of current Federal law.

BACKGROUND: At the suggestion of Joseph Coors, a heavyweight coalition led by Father Morton Hill of Morality in Media met July 27, 1982, in the OEOB Indian Treaty Room with representatives of White House offices, Justice, Postal Service, and Customs Service to discuss enforcement of anti-pornography laws. The coalition showed how policies set at Justice under Carter have weakened enforcement of most Federal anti-pornography laws. Subsequent meetings of Assistant Attorney General Jonathan Rose with coalition representatives have resulted in a "get tougher" letter October 4 from Attorney General Smith to all U. S. attorneys. The time is ripe for a Presidential meeting with the coalition to announce specific steps being taken. A wide range of religious, civic, conservative, and women's groups will be very enthusiastic. Word will quickly spread through the religious broadcasters to millions not yet as politically active as they were in 1980.

PREVIOUS PARTICIPATION: None

DATE: Before Elections, the sooner the better.

LOCATION: State Dining Room

PARTICIPANTS: Attorney General, Director of Customs, Postmaster General, Interested Senior Staff, and attached list of coalition.

OUTLINE OF EVENTS: President arrives. President announces steps being taken, including letter sent at his request to U. S. Attorneys by Attorney General.

REMARKS REQUIRED: Brief remarks.

MEDIA COVERAGE: Full media coverage.

RECOMMENDED BY: Elizabeth H. Dole

PROJECT OFFICER: Morton C. Blackwell

Office of the Attorney General
Washington, D.C. 20530

October 4, 1982

MEMORANDUM

TO: All United States Attorneys

FROM: William French Smith WFS
Attorney General

SUBJECT: Enforcement of Anti-Pornography Laws

President Reagan has recently stated his alarm and concern over the spread of pornography, and his determination to ensure that we effectively enforce the federal laws against trafficking in pornography. Pornography is indeed a growing problem, but it is a problem before which law enforcement officials are not helpless, as demonstrated by the success of the Department's MIPORN operation. Accordingly, I would like to take this opportunity to clarify the Department's enforcement policy in pornography cases, and to encourage their prosecution.

The U.S. Attorneys' Manual states: "Prosecutive priority should be given to cases involving large-scale distributors who realize substantial income from multi-state operations and cases in which there is evidence of involvement by known organized crime figures," and "[s]pecial priority should be given to cases involving the use of minors engaging in sexually explicit conduct . . . ." § 9-75.140 (emphasis added). This passage also states that prosecution of those cases not in one of the three priority areas may nonetheless have a deterrent effect and be appropriate when especially offensive material or numerous citizen complaints are involved. Id.

The Manual also states, of course, that the "Federal role in prosecuting obscenity cases is to focus upon the major producers and interstate distributors of pornography while leaving to local jurisdictions the responsibility of dealing with local exhibitions and sales." § 9-75.130. But this section goes on to recognize that the U.S. Attorney in an area may often have greater expertise and more money than his local counterpart, and that "[i]n these circumstances the United States may provide assistance through prosecutive efforts not falling precisely within the above guidelines."

Thus, where large volume dealers, organized crime, or child pornography is involved, the U.S. Attorney should aggressively prosecute. Even in other cases, he may prosecute where pornography is a significant problem in an area, and should certainly lend any necessary assistance where local efforts are being made. While the impact of pornography may be primarily "local," its successful prosecution calls increasingly for interstate efforts and coordination which only federal officials may be able to provide. Similarly, where the district's Law Enforcement Coordinating Committee identifies pornography as an area requiring federal support, our assistance to local enforcement efforts may and should be provided, even if the dealers are not in the three "priority" categories.

While pornography is not a problem that can be solved by federal efforts alone, it is a matter of prime concern and we must enforce vigorously the existing federal anti-pornography laws, particularly in the priority areas discussed above and in those communities where it has been identified as a major law enforcement problem.

THE WHITE HOUSE

WASHINGTON

October 14, 1982

MEMORANDUM FOR EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN

SUBJECT: Response to Letter from Senator Hatfield on Draft Registration

Attached is a proposed response to Senator Hatfield, which I believe sets forth the President's policy on this issue in persuasive terms. I have left the letter undated, pending a judgement call by you or Ken Duberstein on who should sign it. I suggest it is worthy of a Presidential signature. Steve Galebach has been in touch with Hatfield's staff on a continuing basis concerning this letter.

THE WHITE HOUSE

WASHINGTON

Dear Mark:

Thank you very much for sending your thoughts and recommendations against our draft registration program. My staff has looked closely into the issues you raise.

Our entire approach in this program is to get young men registered, not to prosecute them. I certainly regret the failure of some men to obey a binding legal requirement enacted by the Congress. While prosecution is a last resort, of course it cannot be ruled out when we are talking about compliance with a valid law.

Before our policy on draft registration was set, we conducted an extensive review by the Military Manpower Task Force. This review convinced me that draft registration will shorten mobilization time, and a shortened time needed for mobilization will increase the credibility of our deterrent to potential aggressors, thus aiding our ability to maintain world peace.

You know that I favor a volunteer military, out of confidence that the sense of civic duty of our citizens is more than ample to meet the nation's needs in any crisis brought upon us by hostile powers. I must face the possibility, though, unlikely as you and I may believe it to be, that a crisis could come upon us in such a way that a draft would be the only way to provide an adequate defense. I considered many factors, including those mentioned in your letter, and many others, and concluded that the most responsible course is to have registration in place, and then to do everything in my power to ensure that a draft does not ever become necessary.

That decision has now been made, and I remain confident it is the correct one.

I very much appreciate your solicitude for the conscientious objectors and am glad you are meeting with them. Our country has a long and healthy tradition of respecting the conscience of pacifists who take such a position out of sincere religious or moral conviction. I believe strongly in continuing this longstanding policy.

Sincere pacifist beliefs, however, are not infringed by the draft registration program. Every young man who registers will be given an opportunity to claim conscientious objector status in the event that a draft becomes necessary. If there are any conscientious objectors who believe that by registering they waive or compromise their legal right to avoid military service that is against their conscience, they should be assured absolutely to the contrary.

Thank you again for sharing your views with me. With warmest regards.

Sincerely,

Ronald Reagan

Senator Mark O. Hatfield
United States Senate
Washington, D.C. 20510

Copy

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

NDOW

☐ O - OUTGOING
☐ H - INTERNAL
● I - INCOMING
Date Correspondence Received (YY/MM/DD) 82 08 06

Name of Correspondent: Mark N. Hatlen

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

Subject: In favor of draft registration and the draft [illegible]

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

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Ltr Dwft	ORIGINATOR	82 08 06	KD	A	82 08 10
DD John	Referral Note:				
	DS	82 08 11			/ /
	Referral Note:				
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ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

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

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

Comments: _____

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

5/81

August 10, 1982

Dear Senator Hatfield:

This is to acknowledge and thank you for your August 2 letter urging the President to reconsider his position on the draft registration issue.

Your letter has been brought to the President's attention, and I am also taking the liberty of sharing your comments with the appropriate policy advisers. Please know that the points you have raised will receive careful study and review.

With best wishes,

Sincerely,

Kenneth M. Duberstein
Assistant to the President

The Honorable Mark O. Hatfield
United States Senate
Washington, D.C. 20510

KMD:CMP:nap

cc: w/copy of inc, Judy Johnston -- ATTN: MIKE ULLMAN -- for DRAFT response

WH RECORDS MANAGEMENT WILL RETAIN ORIGINAL INCOMING

MARK O. HATFIELD
OREGON

United States Senate

WASHINGTON, D.C.

August 2, 1982 092991

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

As I read of prosecution proceedings against the large number of those who did not register for the draft and meet with numerous conscientious objectors concerned with this policy, I feel compelled to appeal to you once again. An unfortunate and unnecessary divisiveness is emerging in the nation over this issue. As you know, there are now over 700,000 non-registrants. The federal prosecution system cannot possibly absorb this burden. As such, it will, by necessity, entail selective targeting of individuals and exclude the vast majority of offenders. One of my principal fears is that this policy will increasingly divert attention from the positive contributions made by your Administration.

Recently I instructed my staff to request a copy of the report by the Military Manpower Task Force on Draft Registration. According to Mr. Meese and Secretary Weinburger, the report was the principal basis upon which you made your decision to continue President Carter's draft registration program. Unfortunately, although the Selective Service did offer to brief me on its content, they chose not to share it with me. A copy of this report has since come to me through other sources. I have read it carefully. Mr. President, in all candor, I am puzzled to see that one who has held the philosophically solid and long-standing view on this issue that you have, could have been persuaded otherwise by this brief.

Two basic points serve as the foundation for this perception. First, you stated in a letter to me dated May 5, 1980, that draft registration would save a "scant" seven days and indicated that such saving was meaningless. Yet the report outlines a number of post-mobilization options which would entail only a slightly greater loss of mobilization time. One option entails absolutely no mobilization time loss. Another would take only two weeks longer than registration. I am further reminded of a statement you made in 1979 when Selective Service was in "deep standby" without the current computerization capability. You indicated that if registration saved even 20 days, the cost was not justifiable. Mr. President, I have used such statements extensively in my efforts to argue against draft registration and the draft.

Secondly, in the statement outlining the rationale behind your decision to continue the Carter program you state that "in a healthy just society, men and women will serve their country freely given proper encouragement, incentives and respect....This generation of Americans shares the sense of patriotism and responsibility that past generations have always shown." Yet the report clearly states that if the number of volunteers in a future national emergency approximates past mobilization efforts, registration will save no time whatsoever.

Mr. President, I urge you to reconsider your position on the basis of this balanced report. While it also contains points which favor the continuation of registration, I find them less than convincing when compared to the points in opposition.

This appeal is issued in the hope that you will reverse this decision before further unfortunate consequences are felt. As always, you can feel free to turn to me for any and all assistance. Your consideration of my thoughts is greatly appreciated.

Sincerely,

Mark O. Hatfield
United States Senator

MOH/rrc

THE WHITE HOUSE

WASHINGTON

October 14, 1982

MEMORANDUM FOR EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN

SUBJECT: Bob Jones Tax Exemption/Racial Discrimination Case (Reference 090842)

Steve Galebach reports the following observations from the oral argument in this case before the Supreme Court on Tuesday, October 12.

The briefs filed on our side were well-crafted, a good match for the massively researched amicus brief filed against us by William Coleman. Brad Reynolds and the attorneys for Bob Jones and Goldsboro Schools made a strong legal argument that existing tax law does not allow the IRS to impose its notions of federal public policy to cut off tax exempt status for racially discriminatory schools. If the Court looks seriously at the law of this case, rather than just the politics, we should win.

The Washington Post coverage was more favorable to our position than one might have expected. The Post reporter went out of his way to acknowledge the reputation of Bob Jones's counsel, William Ball, as a leading constitutional litigator who opposes racial discrimination but who took this case out of concern for the legal aspects and the religious liberty implications. The reporter did not try to cast our side as apologists for racism.

Further, it was evident at the argument that the Justices are sensitive to the dangerous implications of upholding IRS power in this case. Justice O'Connor asked Coleman if his logic would not apply equally against churches that discriminate on the basis of race. Coleman had no real answer.

Justice Powell asked why other compelling federal policies would not militate equally against tax exemption for certain groups, such as those dealing with sex discrimination. Coleman answered that race discrimination is a category apart, which is true, but his argument provided little comfort to those who fear that IRS and the courts could extend any broad concept of public policy to encompass more than just racial discrimination.

Recommendation

We should be ready with two basic alternative courses of action, depending on which way the Bob Jones case is decided:

- If the Court decides in favor of our position, we must be ready with a statute such as the one we proposed in January; we could probably now improve on that wording in light of our experience with the Tuition Tax Credit bill, in designing an anti-discrimination provision acceptable to a broad liberal-conservative spectrum.

- If the Supreme Court decides against our position, we should be ready to take immediate action to guarantee that the IRS not be able to apply its own public policy notions to churches as well as schools, or to deviations from other federal policies beyond anti-racial discrimination. There are two steps that could be very effective in this regard, and that could be pursued simultaneously:

  -- introducing a statute saying that tax exempt status under 501(c)3 is barred only for schools that discriminate on the basis of race; and

  -- having the IRS publish a notice of proposed rulemaking, requesting opinions of interested parties on what types of institutions should be barred from tax exempt status by federal policy, and which federal policies should be enforced to deny tax exempt status. If the comments so warranted, the IRS could then publish a final rule stating that only educational institutions are affected, and only the federal policy against racial discrimination is so compelling as to apply to bar tax exempt status.

DOCUMENT NO. 090847 PD

OFFICE OF POLICY DEVELOPMENT

STAFFING MEMORANDUM

DATE: 8/30/82 **ACTION/CONCURRENCE/COMMENT DUE BY:** 9/5/82

SUBJECT: Goldsboro Christian Schools, Inc. vs. U.S.

Bob Jones University vs. U.S.

	ACTION	FYI		ACTION	FYI
HARPER	☐	☐	DRUG POLICY	☐	☐
PORTER	☐	☐	TURNER	☐	☐
BARR	☐	☐	D. LEONARD	☐	☐
BOGGS	☐	☐	OFFICE OF POLICY INFORMATION		
BRADLEY	☐	☐	HOPKINS	☐	☐
CARLESON	☐	☐	COBB	☐	☐
DENEND	☐	☐	PROPERTY REVIEW BOARD	☐	☐
FAIRBANKS	☐	☐	OTHER		
FERRARA	☐	☐	_____	☐	☐
GALEBACH	☐	☐	_____	☐	☐
GARFINKEL	☐	☐	_____	☐	☐
GUNN	☐	☐	_____	☐	☐
B. LEONARD	☐	☐	_____	☐	☐
LI	☐	☐	_____	☐	☐
MONTOYA	☐	☐	_____	☐	☐
SMITH	☐	☐	_____	☐	☐
✓ UHLMANN	☒	☐	_____	☐	☐
ADMINISTRATION	☐	☐	_____	☐	☐

REMARKS:

Please comments on the attached.

Please return this tracking sheet with your response

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

OP-ED ON CRIME BILL

Your September 17 editorial attacking the President's new anti-crime bill was seriously misleading.

The editorial stated that the bill would "basically abolish the insanity defense." In fact, the bill would treat the insanity issue as part of the determination of whether the defendant had the requisite state of mind for the offense. Under this approach, insanity would be a defense if, for example, the defendant were so deluded that he did not know he was shooting at a human being. But if the defendant knew he was shooting at a human being, he could still be found guilty, even if he were acting out of an irrational belief. A defendant's mental disorder would remain relevant in mitigation of punishment and in determining whether a defendant would be treated punitively or therapeutically after conviction.

Our bill would largely eliminate the unseemly spectacles fostered by the current insanity defense -- the degradation of trials into swearing matches between opposing psychiatrists, and favoritism toward defendants who can afford an impressive array of expert witnesses. Our approach has been endorsed by numerous legal scholars, bar associations and psychiatrists.

The editorial's criticism of our proposed reform of the exclusionary rule is likewise unfounded.

The exclusionary rule is a judge-made rule that bars the use of evidence against a criminal defendant if the evidence was obtained by the police in an improper manner. The courts have sought to justify this rule as a deterrent to police misconduct; however, an increasing number of judges and scholars are challenging it. They point out that the rule does nothing to punish the policeman who has acted improperly; that it punishes innocent citizens who are victimized by the criminals who are set free; and that the real beneficiaries of the rule are guilty criminals who are set free no matter how heinous their crime.

If the deterrent argument has any validity at all, it is only in cases in which the police have consciously misbehaved. The rule has no deterrent effect where a police officer honestly and reasonably believes that his search is proper. Clearly, the interests of justice are not served by freeing a known criminal because a police officer makes an innocent mistake in interpreting the complex, frequently ill-defined and ever-changing law governing searches and seizures.

The Administration's bill would restore the exclusionary rule to its proper role by restricting its application to those cases where it would in fact act as a deterrent. Under the proposal, the rule would not be invoked where the police have obtained evidence in the reasonable, good faith belief that their acts were lawful. A number of federal courts have already adopted this position, and the Administration bill would make it uniform throughout the federal system.

The editorial also criticizes the Administration's proposed reforms of habeas corpus procedures, claiming that our bill would "take away the process by which a defendant can seek to have a conviction overturned," a process which "protects those persons who may in fact be truly innocent . . . or who may have been given excessively harsh sentences." These claims are totally false.

The writ of habeas corpus is a means whereby the constitutional propriety of state criminal proceedings can be reviewed in federal court, over and above the many layers of review provided in state courts and direct review of state judgments in the Supreme Court. Traditionally, the writ was understood to be an extraordinary remedy. In recent years, however, this once extraordinary remedy has been converted into a routine means for seeking continual review of state convictions, often on frivolous grounds. So used, it distorts the proper relationship between federal and state government, undermines the need for finality of judgment in criminal proceedings, and introduces needless duplication of effort and endless opportunities to second-guess state court judges and juries.

The Administration bill is designed to limit unjustified federal review of state convictions by (1) barring review of a claim not properly raised in state proceedings, unless the state failed to provide an opportunity to raise the claim consistent with federal law; (2) establishing a one-year limit to apply for

the writ following exhaustion of state remedies; and (3) requiring deference to state court determinations of factual and legal issues which have been fully and fairly adjudicated in state proceedings. Reforms of this kind are supported by a majority of the Justices of the Supreme Court, many other eminent federal judges, leading scholars concerned with federal court jurisdiction, and by virtually all state judges and attorneys general.

The Administration's anti-crime proposals are the products of extensive study and consultation. They are all important and integral parts of our war against crime. They deserve the support of the American people.

School Prayer

We have an excellent opportunity in the coming weeks to take action against one of the most wrong-headed court decisions yet against voluntary prayer in the schools.

Lubbock Civil Liberties Union v. Lubbock Independent School District was decided in March of this year by the U.S. Fifth Circuit Court of Appeals.

The Lubbock school system adopted a policy in 1979 that allowed both religious and nonreligious student groups to meet before or after school, on a voluntary club basis, for any educational, moral, ethical or religious purpose. In effect, the policy was neutral toward religious and nonreligious clubs, and allowed freedom of speech without regard to the religious content of the speech.

The school district was then sued by the Lubbock chapter of the ACLU. The federal district court held for the school, saying its policy was in accord with government neutrality toward religion.

But the Fifth Circuit reversed and held the policy violated the separation of church and state. The court's opinion raised the specter that students might be unduly influenced by seeing the football captain or other student leaders entering a prayer meeting.

The school district plans to seek Supreme Court review, and it will file a petition so requesting, by November 13.

Department of Education has already asked the Justice Department to file a brief urging the Supreme Court to review this case.

We should file, and do so with maximum publicity. This is a case where the ACLU and activist judges are actually trampling on free speech. The Supreme Court has already said state universities may not discriminate against religious speech; why should any governmental entity do so? And if a local school system wants to be neutral, why should a federal court intervene to make it discriminate?

A victory in this case would be a major advance for our objective of voluntary prayer in the schools. This case is a golden opportunity to push for the forgotten civil right of freedom of religious speech.

Office of Policy Development
October 15, 1982

CABINET COUNCIL ON LEGAL POLICY

Communications Meeting
October 15, 1982

Legislative Priorities for the Lame Duck Session

- Immigration Reform
- Bankruptcy Court Reorganization
- Omnibus Crime Bill (or parts of it)
- Tuition Tax Credits
- Justice Assistance Act
  (good faith effort to help Rep. Hughes)

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

October 15, 1982

FOR: EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN
STEPHEN H. GALEBACH

SUBJECT: Strategy Concerning Abortions

The media attempt to portray Helms's defeat in September as the end for Congressional anti-abortion efforts has already proven false:

- Congress quietly enacted a provision in the continuing resolution that prevents federal employees from getting subsidized insurance coverage for abortions (thus enacting for the first time the "Ashbrook Amendment").

- The House voted overwhelmingly, 260-140, to prohibit NIH funding for experimentation on live aborted babies. (Congress recessed before the Senate could vote.)

A variety of anti-abortion efforts will doubtless continue in the next Congress, and a controversy is possible in the lame duck session, on whether to retain the Ashbrook prohibition when the continuing resolution is extended beyond December.

We have been meeting with anti-abortion leaders to assess the situation and to monitor the development of future legislative initiatives. The leaders and rank-and-file appear genuinely appreciative of the President's role in seeking cloture on the Helms measure. The New York Times reported some favorable political fallout in that Sasser lost 15 points of his lead to Beard when his anti-Helms vote became known in Tennessee.

We are convinced that it is possible to promote the President's objective of protecting unborn children, in a wide variety of ways. We should continue the President's stance of supporting all reasonable anti-abortion efforts, but we should especially seek action on those measures that can regain for us the rhetorical initiative, put the pro-abortion movement on the defensive, and divide Democrats between their radical feminist wing and their blue collar/pro-family base.

The following ideas are designed to achieve the President's objectives and succeed politically:

- o Attack those aspects of abortion that are hardest for the pro-abortionists to defend:

  -- Federal funding for abortions (which is consistently opposed by a majority in the polls);

  -- Experimentation on live aborted babies;

  -- Abortion techniques, such as saline injections, that inflict cruel and unusual pain on babies in the womb;

  -- Medical school discrimination against anti-abortion students and applicants (the laws against this have never been effectively enforced);

  -- Hospital discrimination against nurses and doctors who conscientiously object to abortion (there are unenforced laws against this as well).

- o Take high-visibility steps to help unwed mothers who generally do <u>not</u> have effective, informed choice because of lack of alternatives to abortion:

  -- Give publicity to the Adolescent Family Life Program, enacted last year and only recently funded by Congress, which provides $10 million dollars to groups that help unwed mothers.

  -- Encourage and give public recognition to voluntary efforts by private sector to help unwed mothers.

  -- Cut away federal regulatory barriers to adoption and call for states to do the same -- stress that adoption <u>builds</u> families.

- o Continue to support all reasonable anti-abortion initiatives in Congress, including Constitutional Amendments, but obtain vote-count estimates before committing to lobby for any particular measure.

- o Subtly encourage additional pro-life Senators -- such as Armstrong, Hatfield, Nickles, Mattingly, Hatch, even Eagleton and Proxmire -- to take lead role jointly with Helms (this must be done as an effort to <u>reinforce</u> Helms, not shunt him aside).

<u>To pursue these strategies, we should take the following steps before January</u>:

- o Continue to talk with all anti-abortion leaders and monitor their development of initiatives for next Congress.

- Explore the opportunities for achieving some popular objectives by regulation -- such as prohibiting funding for experimentation on live aborted babies.

- Assess the chances for various Constitutional Amendments and statutory proposals in light of November electoral results.

- Develop ideas for Senate hearings or HHS investigations into such issues as the pain inflicted by saline abortion, as a way to gain rhetorical initiative.

- Develop a plan, in conjunction with OPL women's group liaison, to give recognition to private groups and government programs that support unwed mothers and promote adoptions.

- Coordinate with OPM to implement Ashbrook Amendment in manner that will be publicly defensible and appealing (e.g., federal employees should not get taxpayer money for abortions when poor people do not).