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THE WHITE HOUSE

WASHINGTON

July 21, 1975

MEMORANDUM FOR:

PHIL BUCHEN

THRU:

MAX L. FRIEDERSDORF *M.L.*
VERN LOEN *VL*

FROM:

CHARLES LEPPERT, JR. *CLJr*

SUBJECT:

H. R. 8617 - Federal Employees' Political
Activities Act of 1975.

Attached per your request is a copy of H. R. 8617, the Federal Employees' Political Activities Act of 1975.

Please note that page 2, line 9 defines "employee" to include the "President" and the "Vice President."



H.R. 8617

THE FEDERAL EMPLOYEES' POLITICAL ACTIVITIES ACT OF 1975

OPENING STATEMENT BY MR. CLAY

MR. CHAIRMAN, I move that the Committee take up and consider the bill, H.R. 8617, and that it be open for amendments at any point.

MR. CHAIRMAN, H.R. 8617, the Federal Employees' Political Activities Act of 1975, was reported by the Subcommittee on Employee Political Rights and Intergovernmental Programs as a "clean bill" on July 10, 1975.

Earlier, the Subcommittee conducted eleven days of hearings and received testimony from over one hundred witnesses in Washington and six other cities across the nation. Testimony in support of H.R. 3000, which I introduced earlier this year with the co-sponsorship of 64 of my colleagues, was overwhelmingly in support of this legislation. There were however, a number of recommendations for the strengthening of H.R. 3000 and related legislation which the Subcommittee has incorporated into the "clean bill", H.R. 8617.

MR. CHAIRMAN, the Hatch Act was enacted in an effort to protect federal employees from improper involvement in partisan political activities. Previous studies, public hearings, and staff surveys reveal no evidence that voluntary political activity in any way erodes the merit system or operates against the public interest. Yet, existing law, which actually consists of over 3000 administrative regulations, is vague, overly broad and infringes upon the rights of every American to participate fully in the political life of this nation.

H.R. 8617, takes these realities into consideration. It pro-

hibits those involuntary political activities which tend to erode

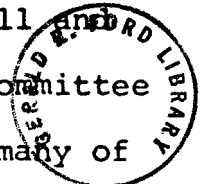


public confidence in the integrity of the merit system. It establishes an independent Board to adjudicate alleged violations. It gives the Commission strengthened authority for investigating alleged violations. It provides due process and judicial review for federal employees.

The major provisions of the Subcommittee bill follow:

- *States that federal employees are encouraged to exercise their right of voluntary political participation.
- *Prohibits the use of official authority, influence, or coercion with the right to vote, not to vote or to otherwise engage in political activity.
- *Prohibits use of funds to influence votes; solicitation of political contributions by superior officials; and making political contributions in government rooms or buildings.
- *Prohibits political activity while on duty, in federal buildings, or in uniform.
- *Provides leave for candidates for elective office.
- *Establishes an independent Board on Political Activities of Government Personnel whose function is to hear and adjudicate alleged violations of law.
- *Authorizes the Civil Service Commission to investigate alleged violations of law and provides for subpoena authority, due process, and judicial review of adverse decisions.
- *Subjects violators of law to removal, suspension or lesser penalties at the discretion of the Board.
- *Requires that the Civil Service Commission conduct a program for informing federal employees of their rights of political participation and report annually to the Congress on its implementation.

MR. CHAIRMAN, this bill represents a significant improvement over earlier legislative proposals which aimed to achieve full complete political suffrage for federal employees. The Subcommittee worked long and hard in forging this bill. It incorporates many of



the suggestions of not only its supporters but also the concerns of those relatively few who withheld their endorsement. The bill is comprehensive. The bill is specific. The bill is fair. I urge your support in ensuring the prompt and speedy enactment of this landmark legislation.



94TH CONGRESS
1ST SESSION

H. R. 8617

IN THE HOUSE OF REPRESENTATIVES

JULY 14, 1975

Mr. CLAY (for himself, Mrs. SPELLMAN, Mr. SOLARZ, Mr. CHARLES H. WILSON of California, Mr. HARRIS, and Mrs. SCHROEDER) introduced the following bill; which was referred to the Committee on Post Office and Civil Service

A BILL

To restore to Federal civilian and Postal Service employees their rights to participate voluntarily, as private citizens, in the political processes of the Nation, to protect such employees from improper political solicitations, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Federal Employees'
4 Political Activities Act of 1975".

5 SEC. 2. (a) Subchapter III of chapter 73 of title 5,
6 United States Code, is amended to read as follows:



1 "SUBCHAPTER III—POLITICAL ACTIVITIES

2 "§ 7321. Political participation

3 "It is the policy of the Congress that employees should
4 be encouraged to fully exercise, to the extent not expressly
5 prohibited by law, their rights of voluntary participation in
6 the political processes of our Nation.

7 "§ 7322. Definitions

8 "For the purpose of this subchapter—

9 "(1) 'employee' means any individual, including
10 the President and the Vice President, employed or
11 holding office in—

12 "(A) an Executive agency,

13 "(B) the government of the District of
14 Columbia,

15 "(C) the competitive service, or

16 "(D) the United States Postal Service or the
17 Postal Rate Commission;

18 but does not include a member of the uniformed services;

19 "(2) 'candidate' means any individual who seeks
20 nomination for election, or election, to any elective office,
21 whether or not such individual is elected, and, for the
22 purpose of this paragraph, an individual shall be deemed
23 to seek nomination for election, or election, to an elective
24 office, if such individual has—

25 "(A) taken the action required to qualify for
26 nomination for election, or election, or



1 “(B) received political contributions or made
2 expenditures, or has given consent for any other
3 person to receive political contributions or make ex-
4 penditures, with a view to bringing about such indi-
5 vidual’s nomination for election, or election, to such
6 office;

7 “(3) ‘political contribution’—

8 “(A) means a gift, subscription, loan, advance,
9 or deposit of money or anything of value, made for
10 the purpose of influencing the nomination for elec-
11 tion, or election, of any individual to elective office
12 or for the purpose of otherwise influencing the re-
13 sults of any election;

14 “(B) includes a contract, promise, or agree-
15 ment, express or implied, whether or not legally
16 enforceable, to make a political contribution for any
17 such purpose; and

18 “(C) includes the payment by any person,
19 other than a candidate or a political organization,
20 of compensation for the personal services of another
21 person which are rendered to such candidate or po-
22 litical organization without charge for any such
23 purpose;

24 “(4) ‘superior’ means an employee (other than the
25 President or the Vice President) who exercises super-



1 vision of, or control or administrative direction over,
2 another employee;

3 “(5) ‘elective office’ means any elective public
4 office and any elective office of any political party or
5 affiliated organization; and

6 “(6) ‘Board’ means the Board on Political Activi-
7 ties of Federal Employees established under section 7327
8 of this title.

9 **“§ 7323. Use of official authority or influence; prohibition**

10 “(a) An employee may not directly or indirectly use or
11 attempt to use the official authority or influence of such em-
12 ployee for the purpose of—

13 “(1) interfering with or affecting the result of any
14 election; or

15 “(2) intimidating, threatening, coercing, command-
16 ing, influencing, or attempting to intimidate, threaten,
17 coerce, command, or influence—

18 “(A) any individual for the purpose of inter-
19 fering with the right of any individual to vote as
20 such individual may choose, or of causing any indi-
21 vidual to vote, or not to vote, for any candidate or
22 measure;

23 “(B) any person to give or withhold any politi-
24 cal contribution; or



1 “(C) any person to engage, or not to engage,
2 in any form of political activity whether or not such
3 activity is prohibited by law.

4 “(b) For purposes of subsection (a) of this section, ‘use
5 of official authority or influence’ includes, but is not limited
6 to, promising to confer or conferring any benefit (such
7 as appointment, promotion, compensation, grant, contract,
8 license, or ruling), or effecting or threatening to effect any
9 reprisal (such as deprivation of appointment, promotion,
10 compensation, grant, contract, license, or ruling).

11 **“§ 7324. Solicitation; prohibition**

12 “An employee may not—

13 “(1) give or offer to give a political contribution
14 to any individual either to vote or refrain from voting,
15 or to vote for or against any candidate or measure, in
16 any election;

17 “(2) solicit, accept, or receive a political contribu-
18 tion to vote or refrain from voting, or to vote for or
19 against any candidate or measure, in any election;

20 “(3) knowingly give or hand over a political con-
21 tribution to a superior of such employee; or

22 “(4) knowingly solicit, accept, or receive, or be in
23 any manner concerned with soliciting, accepting, or
24 receiving, a political contribution—

25 “(A) from another employee (or a member



1 of another employee's immediate family) with re-
2 spect to whom such employee is a superior; or

3 " (B) in any room or building occupied in the
4 discharge of official duties by—

5 " (i) an individual employed or holding
6 office in the Government of the United States, in
7 the government of the District of Columbia,
8 or in any agency or instrumentality of the
9 foregoing; or

10 " (ii) an individual receiving any salary or
11 compensation for services from money derived
12 from the Treasury of the United States.

13 **§ 7325. Political activities on duty, etc.; prohibition**

14 "An employee may not engage in political activity—

15 " (1) while such employee is on duty,

16 " (2) in any room or building occupied in the dis-
17 charge of official duties by an individual employed or
18 holding office in the Government of the United States,
19 in the government of the District of Columbia, or in
20 any agency or instrumentality of the foregoing, or

21 " (3) while wearing a uniform or official insignia
22 identifying the office or position of such employee.

23 **§ 7326. Leave for candidates for elective office**

24 " (a) An employee who is a candidate for elective
25 office shall, upon the request of such employee, be granted



1 leave without pay for the purpose of allowing such employee
2 to engage in activities relating to such candidacy.

3 “(b) Notwithstanding section 6302 (d) of this title,
4 an employee who is a candidate for elective office shall, upon
5 the request of such employee, be granted accrued annual
6 leave. Such leave shall be in addition to leave without pay
7 to which such employee may be entitled under subsection
8 (a) of this section.

9 **“§ 7327. Board on Political Activities of Federal Employees**

10 “(a) There is established a board to be known as the
11 Board on Political Activities of Federal Employees. It shall
12 be the function of the Board to hear and decide cases regard-
13 ing violations of section 7323, 8324, and 7325 of this title.

14 “(b) The Board shall be composed of 3 members—

15 “(1) one member of which shall be appointed, with
16 the confirmation of a majority of both Houses of the
17 Congress, by the President and who shall serve as Chair-
18 man of the Board;

19 “(2) one member of which shall be appointed, with
20 the confirmation of a majority of both Houses of the
21 Congress, by the Speaker of the House of Representa-
22 tives, after consultation with the majority leader of the
23 House and the minority leader of the House; and

24 “(3) one member of which shall be appointed, with
25 the confirmation of a majority of both House of the



1 Congress, by the President pro tempore of the Senate,
2 after consultation with the majority leader of the Senate
3 and the minority leader of the Senate.

4 “(c) Members of the Board shall be chosen on the basis
5 of their professional qualifications from among individuals
6 who, at the time of their appointment, are employees (as
7 defined under section 7322 (1) of this title).

8 “(d) (1) Members of the Board shall serve a term of
9 3 years, except that of the members first appointed—

10 “(A) the Chairman shall be appointed for a term
11 of 3 years,

12 “(B) the member appointed under subsection (b)
13 (2) of this section shall be appointed for a term of 2
14 years, and

15 “(C) the member appointed under subsection (b)
16 (3) of this section shall be appointed for a term of 1
17 year.

18 An individual appointed to fill a vacancy occurring other
19 than by the expiration of a term of office shall be appointed
20 only for the unexpired term of the member such individual
21 will succeed. Any vacancy occurring in the membership of
22 the Board shall be filled in the same manner as in the case
23 of the original appointment.

24 “(2) If an employee who was appointed as a member
25 of the Board is separated from service as an employee he



1 may not continue as a member of the Board after the 60-
2 day period beginning on the date so separated.

3 “(e) The Board shall meet at the call of the Chairman.

4 “(f) All decisions of the Board with respect to the
5 exercise of its duties and powers under the provisions of this
6 subchapter shall be made by a majority vote of the Board.

7 “(g) A member of the Board may not delegate to any
8 person his vote nor, except as expressly provided by this
9 subchapter, may any decisionmaking authority vested in the
10 Board by the provisions of this subchapter be delegated to
11 any member or person.

12 “(h) The Board shall prepare and publish in the Fed-
13 eral Register written rules for the conduct of its activities.
14 shall have an official seal which shall be judicially noticed,
15 and shall have its office in or near the District of Columbia
16 (but it may meet or exercise any of its powers anywhere
17 in the United States).

18 “(i) The Civil Service Commission shall provide such
19 clerical and professional personnel, and administrative sup-
20 port, as the Chairman of the Board considers appropriate
21 and necessary to carry out the Board's functions under this
22 subchapter. Such personnel shall be responsible to the Chair-
23 man of the Board.

24 “(j) The Administrator of the General Services Ad-
25 ministration shall furnish the Board suitable office space ap-



1 appropriately furnished and equipped, as determined by the
2 Administrator.

3 “(k) (1) Members of the Board shall receive no addi-
4 tional pay on account of their service on the Board.

5 “(2) Members shall be entitled to leave without loss of
6 or reduction in pay, leave, or performance or efficiency rating
7 during a period of absence while in the actual performance
8 of duties vested in the Board.

9 **“§ 7328. Investigation; procedures; hearing**

10 “(a) The Civil Service Commission shall investigate
11 reports and allegations of any activity prohibited by section
12 7323, 7324, or 7325 of this title.

13 “(b) As a part of the investigation of the activities of an
14 employee, the Commission shall provide such employee an
15 opportunity to make a statement concerning the matters
16 under investigation and to support such statement with any
17 documents the employee wishes to submit. An employee of
18 the Commission lawfully assigned to investigate a violation of
19 this subchapter may administer an oath to a witness attend-
20 ing to testify or depose in the course of the investigation.

21 “(c) (1) If it appears to the Commission after investi-
22 gation that a violation of section 7323, 7324, or 7325 of this
23 title has not occurred, it shall so notify the employee and the
24 agency in which the employee is employed.



1 “(2) Except as provided in paragraph (3) of this sub-
2 section, if it appears to the Commission after investigation
3 that a violation of section 7323, 7324, or 7325 of this title
4 has occurred, the Commission shall submit to the Board and
5 serve upon the employee a notice by certified mail, return
6 receipt requested (or if notice cannot be served in such man-
7 ner, then by any method calculated to reasonably apprise
8 the employee) —

9 “(A) setting forth specifically and in detail the
10 charges of alleged prohibited activity;

11 “(B) advising the employee of the penalties pro-
12 vided under section 7329 of this title;

13 “(C) affording a period of not less than 30 days
14 within which the employee may file with the Board a
15 written answer to the charges in the manner prescribed
16 by rules issued by the Board; and

17 “(D) advising the employee that unless the em-
18 ployee answers the charges, in writing, within the time
19 allowed therefor, the Board is authorized to treat such
20 failure as an admission by the employee of the charges
21 set forth in the notice and a waiver by the employee of
22 the right to a hearing on the charges.

23 “(3) If it appears to the Commission after investiga-
24 tion that a violation of section 7323, 7324, or 7325 of this
25 title has been committed by—



1 “(A) the Vice President;

2 “(B) an employee appointed by the President by
3 and with the advice and consent of the Senate;

4 “(C) an employee whose appointment is expressly
5 required by statute to be made by the President;

6 “(D) the Mayor of the District of Columbia; or

7 “(E) the Chairman or a member of the Council of
8 the District of Columbia, as established by the District of
9 Columbia Self-Government and Governmental Reor-
10 ganization Act;

11 the Commission shall refer the case to the Attorney General
12 for prosecution under title 18, and shall report the nature and
13 details of the violation to the President and to the Con-
14 gress.

15 “(d) (1) If a written answer is not duly filed within
16 the time allowed therefor, the Board may, without further
17 proceedings, issue its final decision and order.

18 “(2) If an answer is duly filed, the charges shall be
19 determined by the Board on the record after a hearing
20 conducted by a hearing examiner appointed under section
21 3105 of this title, and, except as otherwise expressly pro-
22 vided under this subchapter, in accordance with the require-
23 ments of subchapter II of chapter 5 of this title, notwith-
24 standing any exception therein for matters involving the
25 tenure of an employee. The hearing shall be commenced



1 within 30 days after the answer is filed with the Board
2 and shall be conducted without unreasonable delay. As soon
3 as practicable after the conclusion of the hearing, the exam-
4 iner shall serve upon the Board, the Commission, and the
5 employee such examiner's recommended decision with notice
6 to the Commission and the employee of opportunity to file
7 with the Board, within 30 days after the date of such notice,
8 exceptions to the recommended decision. The Board shall
9 issue its final decision and order in the proceeding no later
10 than 60 days after the date the recommended decision is
11 served. The employee shall not be removed from active duty
12 status by reason of the alleged violation of this subchapter
13 at any time before the effective date specified by the Board
14 in its final order.

15 “(e) (1) At any stage of a proceeding or investigation
16 under this subchapter, the Board may, at the written request
17 of the Commission or the employee, require by subpoena the
18 attendance and testimony of witnesses and the production
19 of documentary or other evidence relating to the proceeding
20 or investigation at any designated place, from any place in
21 the United States or any territory or possession thereof, the
22 Commonwealth of Puerto Rico, or the District of Columbia.
23 Any member of the Board may issue subpoenas and members
24 of the Board and any hearing examiner authorized by the
25 Board may administer oaths, examine witnesses, and receive



1 evidence. In the case of contumacy or failure to obey a sub-
2 pena, the United States district court for the judicial district
3 in which the person to whom the subpoena is addressed
4 resides or is served may, upon application by the Board,
5 issue an order requiring such person to appear at any desig-
6 nated place to testify or to produce documentary or other
7 evidence. Any failure to obey the order of the court may be
8 punished by the court as a contempt thereof.

9 “(2) The Board (or a member designated by the
10 Board) may order the taking of depositions at any stage of
11 a proceeding or investigation under this subchapter. Deposi-
12 tions shall be taken before an individual designated by the
13 Board and having the power to administer oaths. Testimony
14 shall be reduced to writing by or under the direction of the
15 individual taking the deposition and shall be subscribed by
16 the deponent.

17 “(3) An employee may not be excused from attending
18 and testifying or from producing documentary or other evi-
19 dence in obedience to a subpoena of the Board on the ground
20 that the testimony or evidence required of the employee
21 may tend to incriminate the employee or subject the em-
22 ployee to a penalty or forfeiture for or on account of any
23 transaction, matter, or thing concerning which the employee
24 is compelled to testify or produce evidence. No employee
25 shall be prosecuted or subjected to any penalty or forfeiture



1 for or on account of any transaction, matter, or thing con-
2 cerning which the employee is compelled, after having
3 claimed the privilege against self-incrimination, to testify
4 or produce evidence, nor shall testimony or evidence so com-
5 pelled be used as evidence in any criminal proceeding against
6 the employee in any court, except that no employee shall
7 be exempt from prosecution and punishment for perjury
8 committed in so testifying.

9 “(f) An employee upon whom a penalty is imposed
10 by an order of the Board under subsection (d) of this section
11 may, within 30 days after the date on which the order was
12 issued, institute an action for judicial review of the Board’s
13 order in the United States District Court for the District of
14 Columbia or in the United States district court for the judicial
15 district in which the employee resides or is employed. The
16 institution of an action for judicial review shall not operate
17 as a stay of the Board’s order, unless the court specifically
18 orders such stay. A copy of the summons and complaint
19 shall be served as otherwise prescribed by law and, in
20 addition, upon the Board. Thereupon the Board shall certify
21 and file with the court the record upon which the Board’s
22 order was based. If application is made to the court for
23 leave to adduce additional evidence, and it is shown to the
24 satisfaction of the court that the additional evidence may
25 materially affect the result of the proceeding and that there



1 were reasonable grounds for failure to adduce the evidence
2 at the hearing conducted under subsection (d) (2) of this
3 section, the court may direct that the additional evidence be
4 taken before the Board in the manner and on the terms and
5 conditions fixed by the court. The Board may modify its
6 findings of fact or order, in the light of the additional evi-
7 dence, and shall file with the court such modified findings or
8 order. The Board's findings of fact, if supported by substan-
9 tial evidence, shall be conclusive. The court shall affirm the
10 Board's order if it determines that it is in accordance with
11 law. If the court determines that the order is not in ac-
12 cordance with law—

13 “(1) it shall remand the proceeding to the Board
14 with directions either to enter an order determined by
15 the court to be lawful or to take such further proceedings
16 as, in the opinion of the court, are required; and

17 “(2) it may assess against the United States rea-
18 sonable attorney fees and other litigation costs reason-
19 ably incurred by the employee.

20 “(g) The Commission or the Board, in its discretion,
21 may proceed with any investigation or proceeding instituted
22 under this subchapter notwithstanding that the Commission
23 or the head of an employing agency or department has re-
24 ported the alleged violation to the Attorney General as re-
25 quired by section 535 of title 28.



1 **“§ 7329. Penalties**

2 “(a) Subject to and in accordance with section 7328
3 of this title, an employee who is found to have violated
4 any provision of section 7323, 7324, or 7325 of this title
5 shall, upon a final order of the Board, be—

6 “(1) removed from such employee’s position, in
7 which event that employee may not thereafter hold any
8 position (other than an elected position) as an em-
9 ployee (as defined in section 7322 (1) of this title) for
10 such period as the Board may prescribe;

11 “(2) suspended without pay from such employee’s
12 position for such period as the Board may prescribe; or

13 “(3) disciplined in such other manner as the Board
14 shall deem appropriate.

15 “(b) The Board shall notify the Commission, the em-
16 ployee, and the employing agency of any penalty it has
17 imposed under this section. The employing agency shall cer-
18 tify to the Board the measures undertaken to implement the
19 penalty.

20 **“§ 7330. Education program; reports**

21 “(a) The Commission shall establish and conduct a
22 continuing program to inform all employees of their rights
23 of political participation and to educate employees with
24 respect to those political activities which are prohibited.



1 “(b) On or before March 30 of each calendar year, the
2 Commission shall submit a report covering the preceding
3 calendar year to the Speaker of the House of Representa-
4 tives and the President pro tempore of the Senate for referral
5 to the appropriate committees of the Congress. The report
6 shall include—

7 “(1) the number of investigations conducted under
8 section 7328 of this title and the results of such investi-
9 gations;

10 “(2) the name and position or title of each indivi-
11 dual involved, and the funds expended by the Commis-
12 sion, in carrying out the program required under subsec-
13 tion (a) of this section; and

14 “(3) an evaluation which describes—

15 “(A) the manner in which such program is
16 being carried out; and

17 “(B) the effectiveness of such program in
18 carrying out the purposes set forth in subsection
19 (a) of this section.

20 **“§ 7331. Regulations**

21 “The Civil Service Commission shall prescribe such
22 rules and regulations as may be necessary to carry out its
23 responsibilities under this subchapter.”

24 (b) (1) Sections 8332 (k) (1), 8706 (e), and 8906
25 (e) (2) of title 5, United States Code, are each amended
26 by inserting immediately after “who enters on” the follow-



1 ing: "leave without pay granted under section 7326 (a)
2 of this title, or who enters on".

3 (2) Section 3302 of title 5, United States Code, is
4 amended by striking out "7153, 7321, and 7322" and in-
5 serting in lieu thereof "and 7153".

6 (3) Section 1308 (a) of title 5, United States Code,
7 is amended—

8 (A) by inserting "and" at the end of paragraph

9 (2);

10 (B) by striking out paragraph (3); and

11 (C) by redesignating paragraph (4) as paragraph

12 (3).

13 (4) The second sentence of section 8332 (k) (1) of title
14 5, United States Code, is amended by striking out "second"
15 and inserting "last" in lieu thereof.

16 (5) The section analysis for subchapter III of chapter
17 73 of title 5, United States Code, is amended to read as
18 follows:

"SUBCHAPTER III—POLITICAL ACTIVITIES

"Sec.

"7321. Political participation.

"7322. Definitions.

"7323. Use of official authority or influence; prohibition.

"7324. Solicitation; prohibition.

"7325. Political activities on duty, etc.; prohibition.

"7326. Leave for candidates for elective office.

"7327. Board on Political Activities of Federal Employees.

"7328. Investigation; procedures; hearing.

"7329. Penalties.

"7330. Education program; reports.

"7331. Regulations."



1 (c) Sections 602 and 607 of title 18, United States
2 Code, relating to solicitations and making of political con-
3 tributions, are each amended by adding at the end thereof the
4 following new sentence: "This section does not apply to any
5 activity of an employee as defined in section 7322 (1) of
6 title 5 unless such activity is prohibited by section 7324 of
7 that title."

8 (d) Section 6 of the Voting Rights Act of 1965 (42
9 U.S.C. 1973d) is amended by striking out "the provisions of
10 section 9 of the Act of August 2, 1939, as amended (5
11 U.S.C. 118i), prohibiting partisan political activity" and by
12 inserting in lieu thereof "the provisions of subchapter III
13 of chapter 73 of title 5, United States Code, relating to
14 political activities".

15 (e) Sections 103 (a) (4) (D) and 203 (a) (4) (D) of
16 the District of Columbia Public Education Act are each
17 amended by striking out "sections 7324 through 7327 of
18 title 5" and inserting in lieu thereof "section 7325 of title 5".

19 (f) The amendments made by this section shall take
20 effect on the ninetieth day after the date of the enactment
21 of this Act.



Cong

THE WHITE HOUSE

WASHINGTON

August 5, 1975

MEMORANDUM FOR: PHIL BUCHEN

FROM: DUDLEY CHAPMAN *DC*
BARRY ROTH *BR*

SUBJECT: Assertion of Executive Privilege
for Departmental Position on
Legislation

The Administration has opposed H.R. 5493 which would require packers or other persons buying livestock or poultry to provide adequate bonding or other security to pay the producers of such commodities. Agriculture's proposed letter to the Chairman of the House Agriculture Committee, which it submitted to OMB for clearance, would have favored the bill (Tab A). Justice, in a letter by Assistant Attorney General Michael M. Uhlmann addressed to Jim Lynn, gave its reasons for disagreeing with Agriculture (Tab B). After the President had decided in favor of the Justice view, Bruce Wilson of the Antitrust Division testified before the House Agriculture Committee and, in the course of that testimony, furnished a copy of Uhlmann's letter to the Committee. The Justice/Administration position received a hostile reception from the Committee which has asked for a copy of the original Department of Agriculture's proposed letter in support of the bill. The Justice letter specifically refers to the Agriculture letter both in its arguments and for facts not repeated by Justice. OMB has asked whether the Department of Agriculture's proposed reply should be withheld on grounds of executive privilege (Tab C).

On the merits, the Agriculture letter, although framed as a communication to the House Committee on Agriculture, is an internal recommendation that was not accepted, and is, therefore, covered by executive privilege.



Two factors weigh against asserting privilege in this instance:

(1) The fact that Justice has already released its own internal recommendation in support of the Administration's position would make our position inconsistent if we assert the privilege as to Agriculture but not Justice. Since the Justice letter was not prepared as a communication to the Committee, but as an internal recommendation to OMB, it is clearly a privileged document. Justice felt warranted in releasing it because its position had been embraced by the Administration and it appears to have been either an oversight or a shortage of time that resulted in submission of a document in this form rather than in a more conventional departmental comment on legislation.

(2) While I am told by Bill Nichols that there is not any notable precedent for releasing unsuccessful recommendations submitted to OMB for clearance, there is precedent for authorizing departments and agencies whose recommendations have been rejected to state their views to a Congressional Committee. This is normally done when there are severe differences within the Administration, and that appears to be the case here.

Two ways of handling the request would be:

(A) Refuse the request on grounds of privilege; or

(B) Comply with the request on the ground that the Administration has effectively waived privilege on this subject.

We recommend Option B for the reasons stated above.

Approve Option A _____

Approve Option B _____

See Me _____





DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D. C. 20250

Honorable Thomas S. Foley
Chairman, Committee on Agriculture
House of Representatives

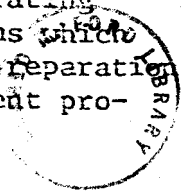
Dear Mr. Chairman:

This is in reply to your letter of March 26, 1975, requesting a report of the Department's recommendations on H.R. 5493, a bill "To amend the Packers and Stockyards Act of 1921, as amended, to require packers or other persons buying or acquiring livestock or poultry to provide adequate bonding or other security to pay the producers for such commodities." Since this bill includes the amendments to the Act proposed in H.R. 4070, on which you have requested a report, this report will be equally applicable to that bill, as well as to H.R. 5827, an identical bill to H.R. 5493.

The Department favors enactment of the bill but recommends that the proposals to make the insolvency and reparation provisions applicable to packers be limited to livestock and poultry matters. Suggestions to accomplish this revision are set out in Attachment 1.

Briefly, the bill seeks to accomplish the primary objective of increasing financial protection to livestock producers through (1) requiring the bonding of packers for the payment of livestock purchased, (2) providing a temporary injunction procedure through the Federal courts so as to prevent irreparable damage to producers by enjoining persons from operating, or operating except under such conditions as the court may prescribe, until administrative action by the Department can be resolved, and (3) upgrading the priority of accounts payable for livestock owned by persons selling to packers in the event of bankruptcy.

The bill would also strengthen the Act and the Secretary's ability to carry out this objective through (1) clarifying and extending the definitions of "packer", (2) eliminating the requirement of proving that a particular violation occurred "in commerce" while retaining the requirement of proving that the respondent was subject to the Act including proving that he was engaged in business "in commerce", (3) extending the Department's authority in insolvency matters to order packers to cease and desist from operating while insolvent, or operating while insolvent except under conditions which the Secretary may prescribe to protect producers, (4) extending the reparation procedure to packers, and (5) strengthening the reparation enforcement procedures to assure payment of awards.



able Thomas S. Foley

2

Based on current forecasts, it is believed that the cost of enacting this legislation would total approximately \$800,000. This amount would be reduced approximately \$225,000 if the suggestions of the Department to limit the solvency and reparation provisions to matters relating to livestock and poultry are adopted.

These estimates include all expenses to be incurred for salaries, travel, and equipment for approximately 40 employees or under the suggested changes, approximately 29 employees. No changes, other than required salary and travel adjustments, would be anticipated during the next five years. A cost breakdown by sections of the bill is set out in Attachment 2.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

Attachments 3



13-1115
(view)
UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20250

OFFICE OF MANAGEMENT AND FINANCE

May 9, 1975

Director, Office of Management and Budget
Executive Office of the President
ATTENTION: Assistant Director for
Legislative Reference
Washington, D. C.

SUBJECT: 94th Congress, Proposed report on H.R. 5493

Enclosed, for advise pursuant to Budget Circular A-19, are six
copies of subject bill.

By direction of the Secretary.

Sincerely,

A. E. Brennan
Director of Finance

Enclosures 6



JUL 8 1975

Honorable James T. Lynn
Director, Office of Management
and Budget
Washington, D.C. 20503

Peters

Dear Mr. Lynn:

This is in response to your request for the views of the Department of Justice on the Department of Agriculture's report on H.R. 4070, H.R. 5493 and H.R. 5827 (94th Cong., 1st Sess.). The bills deal with the bonding and buying of livestock. H.R. 5493 and H.R. 5827 are identical and all provisions of H.R. 4070 are included in the other bills. As was done in the Department of Agriculture's analysis, references made in this report will be to the sections of H.R. 5493.

In the attachments to its letter the Department of Agriculture summarizes each section of the bill and comments in some detail on how the present regulatory scheme would be changed. Rather than needlessly repeat Agriculture's analysis, this report will focus specifically on those points on which the views of the Department of Justice may differ from those of Agriculture.

While few would deny that government regulation of industry is sometimes necessary, it must be realized that the imposition of additional costs and restrictions on competition that result from regulation will frequently lead to higher prices and sub-optimal allocations of scarce resources. In recent years it has become increasingly clear that costs of inefficient operations engendered by regulation of some of this nation's major industries have not always been offset by the advantages of regulation. At a time when serious consideration is being given to proposals for partial deregulation of some of the regulated industries, a proposal that would increase the level of regulation in the meat industry deserves very close scrutiny.

LIBRARY

primary objective of the bill is to provide financial protection to livestock producers. While this may be a laudable objective, the Department questions whether there is a pressing need for Federal action in this area. The danger of debtors defaulting in their obligations is a risk that is faced in all types of business. Where a seller sees that there is a substantial danger that a buyer may not be able to meet his obligations the seller certainly has methods available to protect his interests - including refusing to extend credit. Other than stating that livestock producers face financial losses if packers fail to pay for livestock, Agriculture's report contains virtually no discussion of whether livestock producers are more in need of the type of protection provided by the proposed bill than are sellers in any other industry. In light of the increase in regulation that would result from passage of the bill, the showing of a compelling need should be a prerequisite to any decision to support the legislation.

The present bonding requirement of the Packers and Stockyards Act applies to persons who sell livestock on a commission, those who provide stockyard services, and dealers in livestock, as defined in 7 U.S.C. §201(d). The Act has been read to require bonding of those who act as agents of the buyer or seller. United States v. Robert & Oake, 65 F.2d 630 (7th Cir., 1933). It is common practice to require agents having a possessory but not a proprietary interest in property to be bonded. It is much less common to require, as H.R. 5493 would, a buyer, who upon completion of the sale takes full title to the property, to be bonded. Thus, the proposed amendment would extend the scope of protection offered by the Packers and Stockyards Act significantly and would add a rather unusual encumbrance to the relationship of buyer to seller.

The Department of Agriculture has estimated the cost of the bonding requirement to the industry and the increase in regulatory expenses that the bill would generate. While it is not clear that significant anticompetitive effects would result from the bonding requirement, the increased costs incurred by the packers will be reflected in the food bill of the American consumer. [In a time of high unemployment and severe inflation, measures which would be likely to increase the costs of basic food products should be instituted only to meet a compelling need, and then only if less costly alternatives are not available. It is not clear that this proposal could meet either of these tests.]



Agriculture's report notes that 21 states have already enacted bonding statutes and many private marketing organizations have bonding requirements. The fact that a substantial number of producers are already protected by bonding requirements casts some doubt on the need for a statute at the Federal level. There would not seem to be any pressing need for national uniformity of bonding requirements.

Section 2 of H.R. 5493, which changes the definition of "packer" in 7 U.S.C. §191, will also significantly increase the regulatory power of the Department of Agriculture. As defined in H.R. 5493, the term "packer" would include any person buying or selling in commerce meat, meat products, poultry or poultry products. To qualify as a "packer" as it is presently defined, a person must be engaged in the slaughter of livestock or in manufacturing or preparing meat or meat products. While the Department of Agriculture can presently regulate some supermarket chains as packers, it can do so only because these chains, as well as running retail operations, slaughter livestock or are engaged in the manufacture of meat products. If the amendments proposed in H.R. 5493 were adopted, the regulatory power of the Department of Agriculture would extend to most of the local, retail grocery stores in the country. This is certainly a very substantial increase in the level of regulation in the food industry, and the regulation of retail meat sales is, at best, only remotely related to the bill's goal of providing financial protection to livestock producers. This is certainly an approach inconsistent with the growing move toward less economic regulation by the Federal Government, and one which should be taken only with the strongest justification.

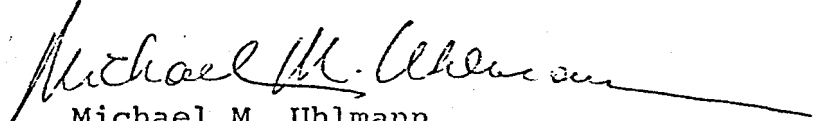
Section 4 of the bill gives the Secretary power to order packers to cease and desist from operating while insolvent. Section 5 expands the damages provision of 7 U.S.C. §209 to allow any person injured by an action in violation of the Packers and Stockyards Act to file a claim for reparation with the Department of Agriculture. Section 6 provides procedural guidelines for hearings by Agriculture, and Section 7 provides that the Secretary may, through the Attorney General, apply to the courts for temporary injunctions when necessary to effectuate the purposes of the Act. These sections provide the administrative authority for substantial regulation of



the buying and selling of meat and poultry. As provided by Section 2, this regulatory power would apply to almost every transfer of the product from the time it leaves the farm to the time it is purchased from the retailer. Absent the showing of a compelling need for such extensive government control of meat sales and the lack of other rational alternatives, the Department of Justice does not feel that passage of the bill would be in the public interest.

The Department of Justice strongly recommends against submission of the proposed report to the Congress.

Sincerely,



Michael M. Uhlmann
Assistant Attorney General





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

August 1, 1975

MEMORANDUM FOR BARRY ROTH

Subject: Executive Privilege

Attached are the documents which were the subject of your conversations with Jim Mitchell yesterday and today, and a copy of OMB Circular A-19.

I am advised that the Department of Justice letter of July 8, 1975 has been released to a member of the House Agriculture Committee, and that the Department of Agriculture has now received a written request from the Chairman of the House Agriculture Committee for a copy of their undated letter attached to their May 9 memo to the Director, OMB.

Please advise me at your earliest convenience whether OMB and Agriculture are authorized to withhold these documents on the ground of executive privilege.

W. M. N.

William M. Nichols
Acting General Counsel

Enclosures

cc:
Jim Mitchell



THE WHITE HOUSE

WASHINGTON

September 22, 1975

MEMORANDUM FOR: PHILIP BUCHEN
ROD HILLS

FROM: MAX FRIEDERSDORF *M.F.*

SUBJECT: S.1284

Industry is apparently becoming alarmed about the strong possibility of Congressional passage of S.1284 which they contend will make American industry subject to class action suit which could be brought by persons not directly or indirectly damaged by alleged consumer anti-trust violations.

It is my understanding that Justice has testified in lukewarm support of the legislation.

It is a complicated area and I make no pretense of expertise.

However, I have been contacted by Bill Grief, Washington Representative for Bristol Myers, who requested that I forward the attached material to you together with a request that you grant an appointment to Mr. Philip A. Lacovara whose card I am attaching to the material.

I have no idea of the merits of the industry's arguments, however, if this bill is anti-business, we may not want to be in a position of endorsing it.



THE WHITE HOUSE
WASHINGTON

Date 1/2/76

TO: Phil Buchen

FROM: BARRY ROTH

ACTION:

Approval/Signature

Comments/Recommendations

✓

For Your Information

REMARKS:

We have recommended approval of the Folklife Preservation Act. Ken has drafted the attached signing statement noting the constitutional problems raised by Justice. Domestic Council has the action and has indicated that the statement is OK with



STATEMENT BY THE PRESIDENT

file

I have today signed H. R. 6673, the "American Folklife Preservation Act."

H. R. 6673 establishes in the Library of Congress an American Folklife Center to preserve and present American folklife. The Center is to be directed by a Board of Trustees composed as follows: four members appointed by the President from among Federal officials concerned with folklife; four members appointed each by the President pro tempore of the Senate and the Speaker of the House of Representatives from among private individuals noted for their involvement in folklife; the Librarian of Congress; the Secretary of the Smithsonian; the Chairman of the National Endowments for the Arts and the Humanities and the Director of the Center.

The Center is authorized to enter into contracts for activities including research, scholarship, training, publications, exhibits, workshops and educational projects for classroom and general usage. It will also establish and maintain a national archive and center for American folklife, collect specific types of works for preservation in the archive and loan such works to the public.



I have serious reservations concerning the constitutional propriety of placing the functions to be performed by the Center outside the Executive branch and the assignment of executive duties to officers appointed by Congress. However, given historical practice and custom in the area of cultural and educational affairs and the potential of H. R. 6673 to enrich the cultural life of the nation, I am granting my approval to the measure.



Friday 1/2/76

10:20 Ken Lazarus said he thinks the President should sign the Folklife Preservation Act.

Scalia's memo is not adamant on it. It's O.K. if the President wants to sign it.

If you agree, they can go ahead and work up a draft signing statement. Ken thinks it's O.K. -- but if you want to discuss it, he would be glad to talk with you when you're free.



**IMPORTANT
AND URGENT**

GPO 16-64099-1

Department of Justice
Washington, D.C. 20530

DEC 31 1975

MEMORANDUM FOR THE HONORABLE PHILIP W. BUCHEN
Counsel to the President

Re: Enrolled Bill H.R. 6673, 94th Cong., 1st Sess., "To provide for the establishment of an American Folklife Center in the Library of Congress, and for other purposes."

This is in response to the telephone request of Mr. Barry Roth of your staff for the views of the Department of Justice on the constitutional aspects of the above-entitled enrolled bill, with which the department has had no prior contact.

The bill contains findings to the effect that it is appropriate and necessary for the Federal Government to support research and scholarship in American folklife, and that the encouragement and support of American folklife is an appropriate matter of concern to the Federal Government. Section 2. The bill then sets up an American Folklife Center in the Library of Congress. Section 4(a). The Center would be under the direction of a Board of Trustees composed as follows:

Four members appointed by the President of the United States;

Four members appointed by the President pro tempore of the Senate;

Four members appointed by the Speaker of the House of Representatives;

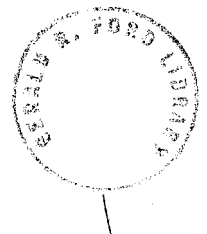
The Librarian of Congress;

The Secretary of the Smithsonian Institution;

The Chairman of the National Endowment for the Arts;

The Chairman of the National Endowment for the Humanities; and

The Director of the Center. Section 4(b).



The Librarian of Congress is empowered to appoint a Director of the Center after consultation with the Board. Section 4(f). The Director would be the chief executive officer of the Center, and would have responsibility for carrying out the functions of the Center, subject to the direction of the Board and the general supervision of the Librarian. Section 4(g).

Section 5 sets forth the functions which the Librarian of Congress is authorized to perform under the Act (subsection (a)) and provides that they are to be carried out through the Center (subsection (b)).

In our view the bill presents two important constitutional problems: The first involves the doctrine of the separation of powers, which requires that statutes assigning executive duties must be administered by the Executive branch and not by Congressional officers, such as the Librarian of Congress; the second is the principle that functions of an executive nature must be carried out by officers of the United States appointed in compliance with the requirements of Article II of the Constitution.

I.

Article I of the Constitution vests the legislative power of the United States in the Congress. Article II vests the Executive power of the United States in the President and directs him to "take Care that the laws be faithfully executed." This means that statutes creating functions of an executive nature are to be carried out by the Executive branch of the Government under the supervision of the President, and not by Congressional agencies. This basic constitutional consideration, of course, does not preclude the performance of internal Congressional functions and of Congressional services by Congressional officers. The bill, however, goes far beyond that. Some of the functions to be performed by the Librarian of Congress through the American Folklife Center have, it is true, a substantial nexus with the Library of Congress (see, e. g., section 5(a)(2)-(5))--though even as to these it is open to question whether they truly come within the ambit of



an institution whose primary purpose is to give library and reference service to Congress. This, however, cannot under any circumstances be said of the contract authority set forth in section 5(a)(1), empowering the Librarian to--

"(1) enter into, in conformity with Federal procurement statutes and regulations, contracts with individuals and groups for programs for the--

"(A) initiation, encouragement, support, organization, and promotion of research, scholarship, and training in American folk-life;

"(B) initiation, promotion, support, organization, and production of live performances, festivals, exhibits, and workshops related to American folklife;

"(C) purchase, receipt, production, arrangement for, and support of the production of exhibitions, displays, publications, and presentations (including presentations by still and motion picture films, and audio and visual magnetic tape recordings) which represent or illustrate some aspect of American folklife; and

"(D) purchase, production, arrangement for, and support of the production of exhibitions, projects, presentations, and materials specially designed for classroom use representing or illustrating some aspect of American folklife."



These activities do not appear to be related to any internal Congressional function or service. While it is true that a few other functions of the Library, such as the provision of books and sound production records to the blind and other physically handicapped persons, 2 U.S.C. 135(a), are not directly so related either, they are at least a logical adjunct of the historical library function which the venerable institution has provided. While one may permit this for reasons of practicality and historical prescription, the extension of the institution's activities into the entirely unrelated field of funding folklife training and performances is a change of qualitative nature. The extension would thus have been made first, from an institution which serves the Congress as a library to one which serves the public in the same capacity; and finally, to one which serves the public in capacities entirely unrelated either to Congressional service or to libraries. This last extension moves the Library of Congress into areas now occupied by the National Endowment for the Arts, and the National Endowment for the Humanities (both Executive agencies).

II.

The second constitutional problem in the bill concerns the manner in which ten members of the Board of Trustees of the American Folklife Center are to be appointed.

Under the bill, the Board would perform important functions in the administration of the statutory program; its responsibilities would not be limited to advice. For example, it would give direction, not merely advice, to the Director of the Center, an official appointed by the Librarian (section 4(f)); and certain functions of the Center could be undertaken only if the Board considers them "appropriate." Sections 5(b), 6. Again, certain types of contracts may be entered into only with the concurrence of the Board. See, e.g., sections 6(a), 7(a)(2), (8). Under section 7(a)(7) a majority of two-thirds of the members of the Board may even waive otherwise applicable bonding requirements.

The Board therefore performs functions of an executive nature. Its activities are not merely of an advisory nature or limited to a single task of limited duration, as is the



case with so-called "ad hoc" officers. See The Constitution of the United States, Analysis and Interpretation, Sen. Doc. 92-82, p. 523 (1973).

It follows that the functions of the members of the Board of Trustees can be performed only by persons who are officers of the United States and appointed in the manner prescribed by Article II, section 2, clause 2 of the Constitution, namely, by the President by and with the advice of the Senate, or with Congressional authorization by the President alone, or the courts of law, or the heads of departments.

The bill fails to comply with these constitutional requirements with respect to the following members of the Board:

(a) The eight members appointed by the President pro tempore of the Senate and the Speaker of the House, respectively;

(b) The Secretary of the Smithsonian Institution, who is appointed by the Board of Regents of the Smithsonian Institution (20 U.S.C. 44), which cannot be viewed as the equivalent of a department head within the meaning of Article II; and

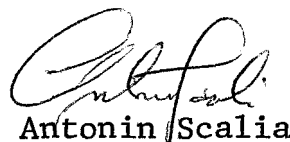
(c) The Director of the Center who would be appointed by the Librarian of Congress who similarly does not have the status of a department head within the meaning of Article II of the Constitution.

A similar problem arose in connection with the legislation establishing the Japan-United States Friendship Commission (Public Law 94-118) and in the Arts and Artifacts Indemnity Act (Public Law 94-158). There, as indicated in the President's signing statements, it was possible to obviate the difficulty by considering the members appointed by the President pro tempore and the Speaker to be advisory-nonvoting members. This approach does not appear to be available here, because the improperly appointed members would constitute ten out of seventeen of the Board's membership.



For the above reasons, it is our view that the provisions of this legislation are contrary to the strict provisions of the Constitution. It must be acknowledged, however, that in the area of cultural and educational affairs, the separation of powers may not have been strictly observed. Despite the fact that they do not constitute as drastic a departure from the constitutional requirements as the present bill, those provisions of the Library of Congress Act which authorize the provision of specific services to the public must be considered a technical anomaly. Indeed, it is probably demonstrable that from an early date the primary function of the Library of Congress has been public service rather than Congressional assistance. Similarly, the makeup of the Smithsonian Institution--if that is to be regarded as a Federal agency, a point which is subject to some dispute--contravenes the constitutional text.

Complete acceptance of this historical practice runs the risk of inviting further transfers to the Library of Congress of cultural and educational functions; and perhaps of encouraging more serious encroachments upon Executive prerogatives through the assignment of entirely different functions to the General Accounting Office. Moreover, it appears from our experience with the Japan-United States Friendship Commission and the Arts and Artifacts Indemnity Act, discussed above, that only a Presidential veto directed at this practice will suffice to call the attention of Congress to the problem involved. Given the very nature of all of these cultural and educational proposals, it may be vain to await an occasion for a Presidential veto more propitious than the present. Nonetheless, in light of the historical practice we think the President can responsibly sign the present legislation with expression of his serious reservation concerning the constitutional propriety of placing such functions outside the Executive branch.



Antonin Scalia
Assistant Attorney General
Office of Legal Counsel



U. S. DEPARTMENT OF JUSTICE

WASHINGTON, D. C. 20530

OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE, \$300

*Sent to Ken
1/2/76*

Honorable Philip W. Buchen
Counsel to the President
The White House
Washington, D. C. 20500

Call Esh. 2632

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JUS-431



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Department of Justice

Washington, D.C. 20530

DEC 31 1975

MEMORANDUM FOR THE HONORABLE PHILIP W. BUCHEN
Counsel to the President

Re: Enrolled Bill H.R. 6673, 94th Cong., 1st Sess., "To provide for the establishment of an American Folklife Center in the Library of Congress, and for other purposes."

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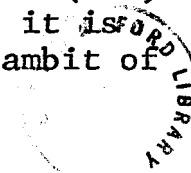
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Under the bill, the Board would perform important functions in the administration of the statutory program; its responsibilities would not be limited to advice. For example, it would give direction, not merely advice, to the Director of the Center, an official appointed by the Librarian (section 4(f)); and certain functions of the Center could be undertaken only if the Board considers them "appropriate." Sections 5(b), 6. Again, certain types of contracts may be entered into only with the concurrence of the Board. See, e.g., sections 6(a), 7(a)(2), (8). Under section 7(a)(7) a majority of two-thirds of the members of the Board may even waive otherwise applicable bonding requirements.

The Board therefore performs functions of an executive nature. Its activities are not merely of an advisory nature or limited to a single task of limited duration, as is the



case with so-called "ad hoc" officers. See The Constitution of the United States, Analysis and Interpretation, Sen. Doc. 92-82, p. 523 (1973).

It follows that the functions of the members of the Board of Trustees can be performed only by persons who are officers of the United States and appointed in the manner prescribed by Article II, section 2, clause 2 of the Constitution, namely, by the President by and with the advice of the Senate, or with Congressional authorization by the President alone, or the courts of law, or the heads of departments.

The bill fails to comply with these constitutional requirements with respect to the following members of the Board:

(a) The eight members appointed by the President pro tempore of the Senate and the Speaker of the House, respectively;

(b) The Secretary of the Smithsonian Institution, who is appointed by the Board of Regents of the Smithsonian Institution (20 U.S.C. 44), which cannot be viewed as the equivalent of a department head within the meaning of Article II; and


(c) The Director of the Center who would be appointed by the Librarian of Congress who similarly does not have the status of a department head within the meaning of Article II of the Constitution.

A similar problem arose in connection with the legislation establishing the Japan-United States Friendship Commission (Public Law 94-118) and in the Arts and Artifacts Indemnity Act (Public Law 94-158). There, as indicated in the President's signing statements, it was possible to obviate the difficulty by considering the members appointed by the President pro tempore and the Speaker to be advisory-nonvoting members. This approach does not appear to be available here, because the improperly appointed members would constitute ten out of seventeen of the Board's membership.



For the above reasons, it is our view that the provisions of this legislation are contrary to the strict provisions of the Constitution. It must be acknowledged, however, that in the area of cultural and educational affairs, the separation of powers may not have been strictly observed. Despite the fact that they do not constitute as drastic a departure from the constitutional requirements as the present bill, those provisions of the Library of Congress Act which authorize the provision of specific services to the public must be considered a technical anomaly. Indeed, it is probably demonstrable that from an early date the primary function of the Library of Congress has been public service rather than Congressional assistance. Similarly, the makeup of the Smithsonian Institution--if that is to be regarded as a Federal agency, a point which is subject to some dispute--contravenes the constitutional text.

Complete acceptance of this historical practice runs the risk of inviting further transfers to the Library of Congress of cultural and educational functions; and perhaps of encouraging more serious encroachments upon Executive prerogatives through the assignment of entirely different functions to the General Accounting Office. Moreover, it appears from our experience with the Japan-United States Friendship Commission and the Arts and Artifacts Indemnity Act, discussed above, that only a Presidential veto directed at this practice will suffice to call the attention of Congress to the problem involved. Given the very nature of all of these cultural and educational proposals, it may be vain to await an occasion for a Presidential veto more propitious than the present. Nonetheless, in light of the historical practice we think the President can responsibly sign the present legislation with expression of his serious reservation concerning the constitutional propriety of placing such functions outside the Executive branch.



Antonin Scalia

Assistant Attorney General
Office of Legal Counsel



Monday 5/10/76

10:55 Bill Kendall said that you were worrying about S. Res. 400 regarding declassification. He said to relax -- Congress isn't going to take any action right away.

*Referred Kendall
to Mr. Leigh*

