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Collection/Office of Origin: Counsels Office, White House
Series: Schwartz, Amy, Files and Walden, Greg, Files
Subseries:

OA/ID Number: CF00630
Folder ID Number: CF00630-018

Folder Title:
G - Emoluments

Stack:

G

Row:

18

Section:

5

Shelf:

3

Position:



U.S. Department of Justice
Office of Legal Counsel

Washington, D.C. 20530

DATE: DEC. 14, 1989

FACSIMILE TRANSMISSION SHEET

FROM: DAN COLLINS OFFICE PHONE: 633-2054

TO: AMY SCHWARTZ OFFICE PHONE: 456-2674

NUMBER OF PAGES: 4

FACS NUMBER: 456-7929

REMARKS:

ANY QUESTIONS, PLEASE CONTACT KEVIN SMITH ON 633-2067 or
KATHLEEN MURPHY ON 633-2057

OFFICE OF LEGAL COUNSEL FACS NUMBER: 786-4221



Kmiec
Carvin
Love
Garrett

Files
Ret.
Reading File
NEAL SHER, OSI
Jim Thessin, State Dept.

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

JUL 30 1987

MEMORANDUM FOR FRANK G. BURKE
Acting Archivist of the United States

Re: Applicability of Emoluments Clause to Proposed
Service of Robert Wolfe on Commission of
International Historians

This memorandum responds to your request of July 27, 1987, for our views on the applicability of the Emoluments Clause of the Constitution to proposed service by Robert Wolfe, Assistant Director of the Military Archives Division in the Office of the National Archives, as a member of a commission of international historians established to review the wartime record of Dr. Kurt Waldheim, President of Austria. According to the information you have provided us, the commission was established at the request of the Austrian government, is being funded entirely by the Austrian government, and will submit its final report to the Austrian government. You indicate that Mr. Wolfe has asked that he be permitted to accept an invitation to serve as a member of the commission, extended to him by the commission's co-chairman, in his private capacity. While your letter indicates that Mr. Wolfe would be entitled to reimbursement of his expenses and an honorarium from the Austrian government, we understand that Mr. Wolfe has indicated a willingness to forego the honorarium and to rely upon private sources of funding for his expenses.

As discussed more fully below, we believe that, in the circumstances as we understand them, Mr. Wolfe's acceptance of the invitation to serve as a member of this commission would be inconsistent with the prohibition in the Emoluments Clause against a federal official's accepting an "office" from a foreign state.

Article I, section 9, clause 8 of the Constitution provides:

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the consent of Congress, accept of any present, Emolument, Office or Title, of any kind whatsoever, from any King, Prince or foreign State.

This clause, adopted unanimously at the Constitutional Convention of 1787, was intended by the Framers to preserve the independence of foreign ministers and other officers of the United States from "corruption and foreign influence." 3 Farrand, The Records of

the Federal Convention of 1787 327 (1966 ed.). See also 2 Farrand, at 327, 389.¹ Consistent with its expansive language and underlying purpose, the provision has been interpreted as being "particularly directed against every kind of influence by foreign governments upon officers of the United States, based on our historic policies as a nation." 24 Ops. A.G. 116, 117 (1902) (emphasis in original). See also Story's Commentaries on the Constitution, §1352 (4th ed.) ("the provision is highly important, as it puts out of the power of any officer of the government to wear borrowed honors, which shall enhance his supposed importance abroad by a titular dignity at home"). By its terms, the prohibition is directed not just to payments of money or gifts from foreign governments, but also to the acceptance of an "office."

There seems little doubt that Mr. Wolfe occupies an "office of profit or trust under [the United States]" as that phrase is used in the Emoluments Clause.² And the Emoluments Clause is

¹ Farrand reports Governor Randolph's explanation of the clause at the Virginia Convention as follows:

[This] restriction restrains any persons in office from accepting of any present or emolument, title or office, from any foreign prince or state. This restriction is provided to prevent corruption. All men have a natural inherent right of receiving emoluments from any one, unless they be restrained by the regulations of the community. An accident which actually happened, operated in producing the restriction. A box was presented to our ambassador by the king of our allies. It was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding emoluments from foreign states. I believe, that if at that moment, when we were in harmony with the king of France, we had supposed he was corrupting our ambassador, it might have disturbed that confidence, and diminished that mutual friendship, which contributed to carry us through the war.

³ Farrand at 327.

² See 27 Op. A.G. 219 (1909) (postal clerk holds an office of profit or trust for Emoluments Clause purposes, since he "holds his appointment from a head of a Department . . . , receives for his services a fixed compensation from moneys appropriated for the purpose by Congress, . . . has regularly prescribed services to perform, and his duties are continuing and permanent, and not occasional and temporary"). See also Memorandum from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, to the Assistant General Counsel of the United States Nuclear Regulatory Commission, June 3, 1986 (part-time staff consultant for NRC holds a position requiring his undivided loyalty to the United States).

This case
has already
been done.

Terry

THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

PE001

INCOMING

DATE RECEIVED: NOVEMBER 24, 1989

NAME OF CORRESPONDENT: THE HONORABLE HELEN DELICH BENTLEY

SUBJECT: REQUESTS INVESTIGATION INTO REPORT THAT A
WHITE HOUSE STAFF MEMBER IS SERVING AS AN
ADVISOR TO THE MINISTRY OF INTERNATIONAL
TRADE AND INDUSTRY IN JAPAN AND URGES REMOVAL

		ACTION		DISPOSITION	
ROUTE TO:		ACT	DATE	TYPE	C COMPLETED
OFFICE/AGENCY	(STAFF NAME)	CODE	YY/MM/DD	RESP	D YY/MM/DD
FREDERICK MCCLURE		ORG	89/11/24	FM A	89/11/30 TR
PD Port ✓	REFERRAL NOTE:	R	89/12/8	TR	1 1
CLIGRAY ✓	REFERRAL NOTE:	A	89/12/8	TR	1 1
Cuapf	REFERRAL NOTE:	A	89/12/12		1 1
Cyde 12	REFERRAL NOTE:	A	89/12/13		589/12/23
	REFERRAL NOTE:				

COMMENTS:

ADDITIONAL CORRESPONDENTS: 7 MEDIA:L INDIVIDUAL CODES: 1240 1230
MAIL USER CODES: (A) (B) (C)

*ACTION CODES:	*DISPOSITION	*OUTGOING
*	*	*CORRESPONDENCE:
*A-APPROPRIATE ACTION	*A-ANSWERED	*TYPE RESP=INITIALS
*C-COMMENT/RECOM	*B-NON-SPEC-REFERRAL	*OF SIGNER
*D-DRAFT RESPONSE	*C-COMPLETED	*CODE = A
*F-FURNISH FACT SHEET	*S-SUSPENDED	*COMPLETED = DATE OF
I-INFO COPY/NO ACT NEC		*OUTGOING
*R-DIRECT REPLY W/COPY *		*
*S-FOR-SIGNATURE *		*
*X-INTERIM REPLY *		*

REFER QUESTIONS AND ROUTING UPDATES TO CENTRAL REFERENCE
(ROOM 75, OEOB) EXT-2590
KEEP THIS WORKSHEET ATTACHED TO THE ORIGINAL INCOMING
LETTER AT ALL TIMES AND SEND COMPLETED RECORD TO RECORDS
MANAGEMENT.

November 30, 1989

Dear Helen:

Thank you for your recent letter to the President, cosigned by seven of your colleagues, expressing your concern about reports that a government economist to the Council of Economic Advisors also sits on the advisory board for MITI's Research Institute.

We appreciate being advised of your interest in this matter. I have taken the liberty of sharing your comments with the President's advisors in this area for their prompt and careful consideration.

Thank you again for your interest in writing.

With best regards,

Sincerely,

Frederick D. McClure
Assistant to the President
for Legislative Affairs

The Honorable Helen Delich Bentley
House of Representatives
Washington, D.C. 20515

FDM:HGP:ckb (PC6)

cc: w/copy of inc to the Council of Economic Advisors -
for Direct Response

cc: w/copy of inc to the Office of the White House Counsel -
for appropriate action

HELEN DELICH BENTLEY
2D DISTRICT, MARYLAND

WASHINGTON OFFICE:
1610 LONGWORTH BUILDING
WASHINGTON, DC 20515
202-225-3061

DISTRICT OFFICES:
200 EAST JOPPA ROAD
TOWSON, MD 21204
301-337-7222

7458 GERMAN HILL ROAD
DUNDALK, MD 21222
301-285-2747

6 NORTH MAIN STREET
BEL AIR, MD 21014
301-879-2517

Congress of the United States
House of Representatives
Washington, DC 20515

November 21, 1989

92538
COMMITTEE ON
THE BUDGET
COMMITTEE ON
PUBLIC WORKS AND
TRANSPORTATION
(ON LEAVE)
COMMITTEE ON
MERCHANT MARINE
AND FISHERIES
SUBCOMMITTEES:
MERCHANT MARINE
PANAMA CANAL/OUTER
CONTINENTAL SHELF
COAST GUARD & NAVIGATION
SELECT COMMITTEE ON AGING
SUBCOMMITTEE ON HEALTH
AND LONG TERM CARE
TASK FORCE ON WOMEN
AND SOCIAL SECURITY

The Honorable George Bush
President of the United States
The White House
Washington, D.C.

Dear Mr. President:

An article in New Technology Week is causing considerable consternation because it indicates that an important White House staff member is serving as an advisor to the Ministry of International Trade and Industry (MITI) in Japan.

We are writing to ask you to look into this matter because of our deep concern over the United States losing the race in the high technology field to Japan.

If there is a conflict, we urge you to act expeditiously to remove any possible embarrassment arising from this situation.

Gary Saxonhouse, a U.S. government economist to the Council of Economic Advisors' Chairman Michael Boskin, also sits on the advisory board for MITI's Research Institute. The concern is that Mr. Saxonhouse is responsible for U.S. policy recommendations regarding Japan. Therefore, a conflict of interest may exist.

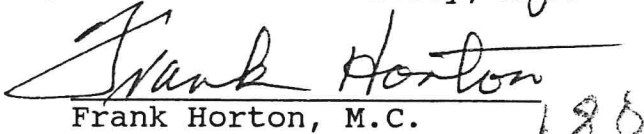
It is difficult for us to understand how any U.S. government economist, making critical policy decisions on the future of this country, could participate as an advisor to any foreign government or foreign agency.

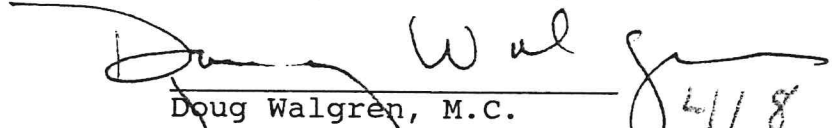
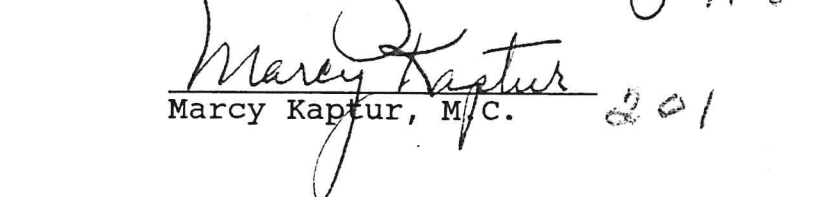
Promptness is vital on this crucial matter.

With warm regards,

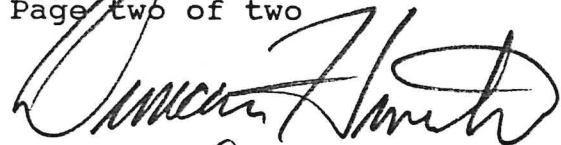
Sincerely,


Helen Delich Bentley, M.C. 93

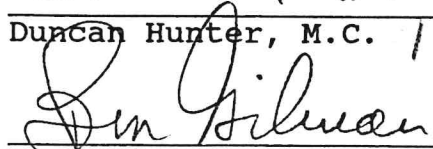

Frank Horton, M.C. 180


Doug Walgren, M.C. 4/18

Marcy Kaptur, M.C. 201

The Honorable George Bush
Page two of two



Duncan Hunter, M.C. 186

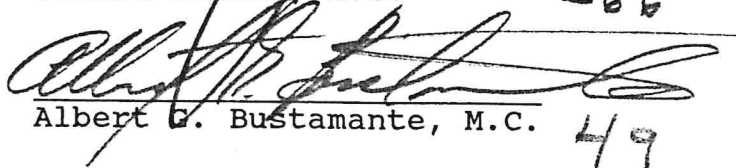


Benjamin Gilman, M.C. 144



Norman Mineta, M.C.

266



Albert G. Bustamante, M.C.

49

plainly applicable where an official is offered the gift, title or office in his private capacity.³ Moreover, as we understand the circumstances of this commission's establishment and funding, it is clear that the invitation in this case came from the Austrian government, itself indisputably a "foreign state" under the Emoluments Clause.

The only question as to which there appears to be any issue is whether acceptance of membership on the commission would constitute acceptance of an "office" under the Emoluments Clause. We believe that it would.

While we have found no case or other formal precedent directly on point, there are several Attorney General opinions that indicate that a United States government official's acceptance of membership, in a personal capacity, on an entity established and funded by a foreign government may violate the Emoluments Clause. In 13 Op. A.G. 537 (1871), Attorney General Akerman considered "whether an American minister to one foreign power can accept a diplomatic commission to the same power from another foreign power." He concluded that:

Unquestionably, a minister of the United States abroad is not prohibited by the Constitution from rendering a friendly service to a foreign power, even that of negotiating a treaty for it, provided he does not become an officer of that power. But whatever difficulties may grow out of the vagueness with which this term is defined in the books, it is clear that the acceptance of a formal commission as minister plenipotentiary creates an official relation between the individual thus commissioned and the government which in this way accredits him as its representative.

13 Op. A.G. at 538. See also 6 Op. A.G. 409 (1854)(United States

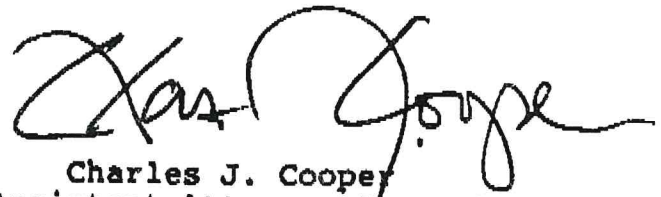
³ Cf. Memorandum for the Counsel to the President from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, April 11, 1977, 2 Op. O.L.C. 345 (1978)(Emoluments Clause does not prohibit assumption by the People's Republic of China of the expenses of an official U.S. delegation).

⁴ Even if it could be concluded that the invitation in this case had been extended by an international body, we believe the concerns expressed by the Framers in the Emoluments Clause would still be applicable. In this regard, we note that the Foreign Gifts and Decorations Act, by which Congress gave its express consent for officials to accept gifts from foreign countries under certain limited circumstances, includes within its definition of "foreign government" "any international or multinational organization whose membership is composed of any unit of foreign government." 5 U.S.C. 7342(a)(2)(B).

13 Op. A.G. at 538. See also 6 Op. A.G. 409 (1854) (United States Marshal for Florida could not hold the "office" of Commercial Agent of France).

We are advised by the Legal Adviser's Office of the Department of State that it has construed the Emoluments Clause to prohibit a federal official from accepting, in a private capacity, appointment to a commission established by a foreign government. In 1983 the Legal Adviser informed a member of a presidential advisory committee that his membership on a "bi-national" commission established by the Costa Rican government constituted acceptance of a foreign "office" prohibited by the Emoluments Clause, and advised him that he must resign.

As a general matter, we believe that a United States government official's membership on an entity established and funded by a foreign government raises serious issues under the Emoluments Clause. In this case, the facts lead us to conclude that Mr. Wolfe's membership on the commission would create the kind of "official relation" between him and the Austrian government that the Framers of the Constitution wished to avoid, and that it therefore constitutes an "office" under the Emoluments Clause. Accordingly, we believe Mr. Wolfe is constitutionally prohibited from accepting the invitation to serve as a member of the Austrian government's commission.



Charles J. Cooper
Assistant Attorney General
Office of Legal Counsel

⁵ Our conclusion in this situation is reinforced by the circumstances surrounding the commission's creation and its mandate. We do not, however, intend our conclusion respecting the applicability of the Emoluments Clause to suggest that Mr. Wolfe would be subjected to improper foreign influence, or otherwise to leave any negative inference respecting the integrity of the service he would render as a member of the commission. It is also worth noting that it could prove embarrassing to the United States government if the findings of the commission, one of whose members was a United States official, were at odds with positions taken by the United States. See April 27, 1987, Department of Justice press release announcing the Department's determination that "a prima facie case of excludability exists with respect to Kurt Waldheim as an individual, and his name is being placed on the 'watch list.' This determination was based on United States law prohibiting entry to any foreign national who assisted or otherwise participated in activities amounting to persecution during World War II."

THE WHITE HOUSE

WASHINGTON

December 22, 1989

Dear Congressman Gephardt:

This is in response to your recent letter (co-signed by 11 of your colleagues) in which you expressed concern about possible ties between Administration officials and advisory groups associated with foreign governments.

Your letter specifically inquired about the relationship between Council of Economic Advisors Chairman Michael J. Boskin and Council economic expert Gary R. Saxonhouse to boards associated with Japan's Ministries of Finance and International Trade and Industry. Perhaps the individual who drafted your letter was not aware that -- as recently reported by the New York Times -- that last December, before assuming his government position, Chairman Boskin resigned his membership from the International Associates Club of the Institute of Fiscal and Monetary Policy of the Ministry of Finance. This institute is a research group, not an advisory or policy board, and Dr. Boskin received no compensation from the Institute.

As to Professor Saxonhouse, he is an economic expert working for the Council on a part-time, intermittent basis. He has worked for the Council two to three days each week, and has no prearranged schedule. While working for the Council, Professor Saxonhouse has continued to teach at the University of Michigan. Professor Saxonhouse is not a Presidential appointee and has no responsibility for setting policy; all policy recommendations are the responsibility of the Council Chairman and other two Council members.

During the clearance process for his employment (prior to his beginning work for the Council), Professor Saxonhouse disclosed his affiliation with an advisory board to the Research Institute of International Trade and Industry (RITI), which is institutionally distinct from but financed by Japan's Ministry of International Trade and Industry. RITI encourages basic, theoretical, and empirical research by Japanese and other researchers and publishes, in English and Japanese, a discussion paper series. The sole function of the RITI advisory board consists of helping RITI's director to identify promising areas of economic research of an academic nature.

Professor Saxonhouse's advisory affiliation with RITI is unpaid, does not involve policy-making, and, in any case, has not and will not require any activity whatsoever during Professor Saxonhouse's Federal employment. In fact, the advisory board, which is made up of 22 economists from around the world, meets only once every two years. His interaction -- prior to joining

the CEA -- with the Institute consisted of: commenting, at a public research conference, on a research paper presented by another economist; advising RITI on promising areas of economic research; and presentation, at a public conference, of a technical econometric paper. The board met last before Professor Saxonhouse assumed his current position with the CEA and will not meet again until 1991, well after his work for the CEA will be completed. (Professor Saxonhouse will complete the work he had agreed to perform for CEA, including his contributions to the annual report, during January.)

In view of the fact that Professor Saxonhouse would have no dealings with the Japanese government during his work on the CEA staff, his minimal dealings with RITI after his CEA work is completed, and the non-policy-making nature of his CEA duties, CEA made the determination that no conflict of interest was posed by his continued affiliation with the RITI board. CEA stands by that determination, and on the basis of the facts presented to me, I have no reason to doubt the determination.

In considering this whole issue, it is important to recognize that Professor Saxonhouse is considered by many to be America's leading academic expert on the Japanese economy. The fact of his having provided past advice that may have in some way benefited Japan should not be cause to deny this country the benefit of his unique expertise. Indeed, many United States research agencies themselves encourage and/or fund joint cooperative research efforts involving the United States and Japan. The CEA depends for its success on its ability to hire from among the top economic talent in the United States. If all scholars who have previously provided advice to other countries were to be excluded from the pool of available talent, the CEA would be sorely handicapped.

Finally, you requested information about whether any senior level Administration officials serve in any unpaid or paid capacity for a foreign government, foreign-owned company, or foreign entity. There is no central repository for such information in the Executive Branch. You should be aware, however, that all Presidential appointees have been screened during the clearance process with a view toward ensuring that any outside affiliations are consistent with the full and proper performance of their duties.

Moreover, under Executive Order 12674, no full-time non-career Presidential appointee in the Executive Branch is permitted to have any outside earned income at all, during his or her federal service. In addition, we have enforced during the clearance process the President's general policy that full-time non-career Presidential appointees resign any positions they hold on the boards of all for-profit entities. The same is true of our

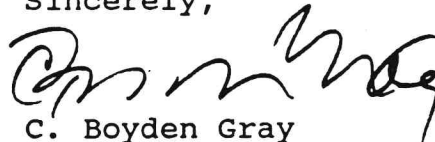
clearance process for members of the White House staff. Each Executive Branch employee is also subject to 18 U.S.C. 208, which prohibits the employee from acting personally and substantially in any matter in which the employee, his or spouse or minor child, or an entity in which the employee serves as officer, director, trustee or employee, has a financial interest.

By contrast, as a matter of interest, Members of Congress and congressional staff are subject to far fewer restrictions than in the Executive Branch and have been much more free to accept outside earnings, honoraria and travel expenses from foreign sources.

In any event, Designated Agency Ethics Officials at each agency (and not the White House or the White House Counsel's Office) maintain and review the public financial disclosure reports for officials at each agency. These reports would provide more detailed information about any particular employee's outside sources of income, outside positions, and/or arrangements for employment.

I hope this has been helpful.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. Boyden Gray', written in a cursive style.

C. Boyden Gray
Counsel to the President

The Honorable Richard A. Gephardt
Office of the Majority Leader
U. S. House of Representatives
Washington, D. C. 20515

THE WHITE HOUSE
WASHINGTON
December 22, 1989

Dear Congresswoman Kaptur:

This is in response to your recent letter (co-signed by 11 of your colleagues) in which you expressed concern about possible ties between Administration officials and advisory groups associated with foreign governments.

Your letter specifically inquired about the relationship between Council of Economic Advisors Chairman Michael J. Boskin and Council economic expert Gary R. Saxonhouse to boards associated with Japan's Ministries of Finance and International Trade and Industry. Perhaps the individual who drafted your letter was not aware that -- as recently reported by the New York Times -- that last December, before assuming his government position, Chairman Boskin resigned his membership from the International Associates Club of the Institute of Fiscal and Monetary Policy of the Ministry of Finance. This institute is a research group, not an advisory or policy board, and Dr. Boskin received no compensation from the Institute.

As to Professor Saxonhouse, he is an economic expert working for the Council on a part-time, intermittent basis. He has worked for the Council two to three days each week, and has no prearranged schedule. While working for the Council, Professor Saxonhouse has continued to teach at the University of Michigan. Professor Saxonhouse is not a Presidential appointee and has no responsibility for setting policy; all policy recommendations are the responsibility of the Council Chairman and other two Council members.

During the clearance process for his employment (prior to his beginning work for the Council), Professor Saxonhouse disclosed his affiliation with an advisory board to the Research Institute of International Trade and Industry (RITI), which is institutionally distinct from but financed by Japan's Ministry of International Trade and Industry. RITI encourages basic, theoretical, and empirical research by Japanese and other researchers and publishes, in English and Japanese, a discussion paper series. The sole function of the RITI advisory board consists of helping RITI's director to identify promising areas of economic research of an academic nature.

Professor Saxonhouse's advisory affiliation with RITI is unpaid, does not involve policy-making, and, in any case, has not and will not require any activity whatsoever during Professor Saxonhouse's Federal employment. In fact, the advisory board, which is made up of 22 economists from around the world, meets only once every two years. His interaction -- prior to joining

the CEA -- with the Institute consisted of: commenting, at a public research conference, on a research paper presented by another economist; advising RITI on promising areas of economic research; and presentation, at a public conference, of a technical econometric paper. The board met last before Professor Saxonhouse assumed his current position with the CEA and will not meet again until 1991, well after his work for the CEA will be completed. (Professor Saxonhouse will complete the work he had agreed to perform for CEA, including his contributions to the annual report, during January.)

In view of the fact that Professor Saxonhouse would have no dealings with the Japanese government during his work on the CEA staff, his minimal dealings with RITI after his CEA work is completed, and the non-policy-making nature of his CEA duties, CEA made the determination that no conflict of interest was posed by his continued affiliation with the RITI board. CEA stands by that determination, and on the basis of the facts presented to me, I have no reason to doubt the determination.

In considering this whole issue, it is important to recognize that Professor Saxonhouse is considered by many to be America's leading academic expert on the Japanese economy. The fact of his having provided past advice that may have in some way benefited Japan should not be cause to deny this country the benefit of his unique expertise. Indeed, many United States research agencies themselves encourage and/or fund joint cooperative research efforts involving the United States and Japan. The CEA depends for its success on its ability to hire from among the top economic talent in the United States. If all scholars who have previously provided advice to other countries were to be excluded from the pool of available talent, the CEA would be sorely handicapped.

Finally, you requested information about whether any senior level Administration officials serve in any unpaid or paid capacity for a foreign government, foreign-owned company, or foreign entity. There is no central repository for such information in the Executive Branch. You should be aware, however, that all Presidential appointees have been screened during the clearance process with a view toward ensuring that any outside affiliations are consistent with the full and proper performance of their duties.

Moreover, under Executive Order 12674, no full-time non-career Presidential appointee in the Executive Branch is permitted to have any outside earned income at all, during his or her federal service. In addition, we have enforced during the clearance process the President's general policy that full-time non-career Presidential appointees resign any positions they hold on the boards of all for-profit entities. The same is true of our

clearance process for members of the White House staff. Each Executive Branch employee is also subject to 18 U.S.C. 208, which prohibits the employee from acting personally and substantially in any matter in which the employee, his or spouse or minor child, or an entity in which the employee serves as officer, director, trustee or employee, has a financial interest.

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Sincerely,

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C. Boyden Gray
Counsel to the President

The Honorable Marcy Kaptur
U. S. House of Representatives
Washington, D. C. 20515

THE WHITE HOUSE
WASHINGTON
December 22, 1989

Dear Congressman Eckart:

This is in response to your recent letter (co-signed by 11 of your colleagues) in which you expressed concern about possible ties between Administration officials and advisory groups associated with foreign governments.

Your letter specifically inquired about the relationship between Council of Economic Advisors Chairman Michael J. Boskin and Council economic expert Gary R. Saxonhouse to boards associated with Japan's Ministries of Finance and International Trade and Industry. Perhaps the individual who drafted your letter was not aware that -- as recently reported by the New York Times -- that last December, before assuming his government position, Chairman Boskin resigned his membership from the International Associates Club of the Institute of Fiscal and Monetary Policy of the Ministry of Finance. This institute is a research group, not an advisory or policy board, and Dr. Boskin received no compensation from the Institute.

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In considering this whole issue, it is important to recognize that Professor Saxonhouse is considered by many to be America's leading academic expert on the Japanese economy. The fact of his having provided past advice that may have in some way benefited Japan should not be cause to deny this country the benefit of his unique expertise. Indeed, many United States research agencies themselves encourage and/or fund joint cooperative research efforts involving the United States and Japan. The CEA depends for its success on its ability to hire from among the top economic talent in the United States. If all scholars who have previously provided advice to other countries were to be excluded from the pool of available talent, the CEA would be sorely handicapped.

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I hope this has been helpful.

Sincerely,

A handwritten signature in dark ink, appearing to read "C. Boyden Gray", written in a cursive style.

C. Boyden Gray
Counsel to the President

The Honorable Dennis E. Eckart
U. S. House of Representatives
Washington, D. C. 20515

THE WHITE HOUSE
WASHINGTON
December 22, 1989

Dear Congressman Glickman:

This is in response to your recent letter (co-signed by 11 of your colleagues) in which you expressed concern about possible ties between Administration officials and advisory groups associated with foreign governments.

Your letter specifically inquired about the relationship between Council of Economic Advisors Chairman Michael J. Boskin and Council economic expert Gary R. Saxonhouse to boards associated with Japan's Ministries of Finance and International Trade and Industry. Perhaps the individual who drafted your letter was not aware that -- as recently reported by the New York Times -- that last December, before assuming his government position, Chairman Boskin resigned his membership from the International Associates Club of the Institute of Fiscal and Monetary Policy of the Ministry of Finance. This institute is a research group, not an advisory or policy board, and Dr. Boskin received no compensation from the Institute.

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C. Boyden Gray
Counsel to the President

The Honorable Dan Glickman
U. S. House of Representatives
Washington, D. C. 20515

THE WHITE HOUSE

WASHINGTON

December 22, 1989

Dear Congressman Nagle:

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Sincerely,


C. Boyden Gray
Counsel to the President

The Honorable David R. Nagle
U. S. House of Representatives
Washington, D. C. 20515

THE WHITE HOUSE

WASHINGTON

December 22, 1989

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Dear Congressman Fazio:

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C. Boyden Gray
Counsel to the President

The Honorable Vic Fazio
U. S. House of Representatives
Washington, D. C. 20515

THE WHITE HOUSE

WASHINGTON

December 22, 1989

Dear Congressman Wolpe:

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C. Boyden Gray
Counsel to the President

The Honorable Howard Wolpe
U. S. House of Representatives
Washington, D. C. 20515

THE WHITE HOUSE
WASHINGTON
December 22, 1989

Dear Congressman Hoyer:

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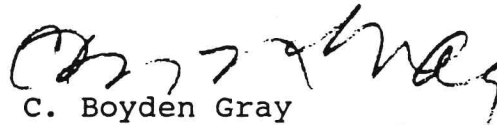
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C. Boyden Gray
Counsel to the President

The Honorable Steny H. Hoyer
U. S. House of Representatives
Washington, D. C. 20515

THE WHITE HOUSE

WASHINGTON

December 22, 1989

Dear Congressman Wise:

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In view of the fact that Professor Saxonhouse would have no dealings with the Japanese government during his work on the CEA staff, his minimal dealings with RITI after his CEA work is completed, and the non-policy-making nature of his CEA duties, CEA made the determination that no conflict of interest was posed by his continued affiliation with the RITI board. CEA stands by that determination, and on the basis of the facts presented to me, I have no reason to doubt the determination.

In considering this whole issue, it is important to recognize that Professor Saxonhouse is considered by many to be America's leading academic expert on the Japanese economy. The fact of his having provided past advice that may have in some way benefited Japan should not be cause to deny this country the benefit of his unique expertise. Indeed, many United States research agencies themselves encourage and/or fund joint cooperative research efforts involving the United States and Japan. The CEA depends for its success on its ability to hire from among the top economic talent in the United States. If all scholars who have previously provided advice to other countries were to be excluded from the pool of available talent, the CEA would be sorely handicapped.

Finally, you requested information about whether any senior level Administration officials serve in any unpaid or paid capacity for a foreign government, foreign-owned company, or foreign entity. There is no central repository for such information in the Executive Branch. You should be aware, however, that all Presidential appointees have been screened during the clearance process with a view toward ensuring that any outside affiliations are consistent with the full and proper performance of their duties.

Moreover, under Executive Order 12674, no full-time non-career Presidential appointee in the Executive Branch is permitted to have any outside earned income at all, during his or her federal service. In addition, we have enforced during the clearance process the President's general policy that full-time non-career Presidential appointees resign any positions they hold on the boards of all for-profit entities. The same is true of our

clearance process for members of the White House staff. Each Executive Branch employee is also subject to 18 U.S.C. 208, which prohibits the employee from acting personally and substantially in any matter in which the employee, his or spouse or minor child, or an entity in which the employee serves as officer, director, trustee or employee, has a financial interest.

By contrast, as a matter of interest, Members of Congress and congressional staff are subject to far fewer restrictions than in the Executive Branch and have been much more free to accept outside earnings, honoraria and travel expenses from foreign sources.

In any event, Designated Agency Ethics Officials at each agency (and not the White House or the White House Counsel's Office) maintain and review the public financial disclosure reports for officials at each agency. These reports would provide more detailed information about any particular employee's outside sources of income, outside positions, and/or arrangements for employment.

I hope this has been helpful.

Sincerely,



C. Boyden Gray
Counsel to the President

The Honorable Bob Wise
U. S. House of Representatives
Washington, D. C. 20515

THE WHITE HOUSE
WASHINGTON
December 22, 1989

Dear Congressman Gray:

This is in response to your recent letter (co-signed by 11 of your colleagues) in which you expressed concern about possible ties between Administration officials and advisory groups associated with foreign governments.

Your letter specifically inquired about the relationship between Council of Economic Advisors Chairman Michael J. Boskin and Council economic expert Gary R. Saxonhouse to boards associated with Japan's Ministries of Finance and International Trade and Industry. Perhaps the individual who drafted your letter was not aware that -- as recently reported by the New York Times -- that last December, before assuming his government position, Chairman Boskin resigned his membership from the International Associates Club of the Institute of Fiscal and Monetary Policy of the Ministry of Finance. This institute is a research group, not an advisory or policy board, and Dr. Boskin received no compensation from the Institute.

As to Professor Saxonhouse, he is an economic expert working for the Council on a part-time, intermittent basis. He has worked for the Council two to three days each week, and has no prearranged schedule. While working for the Council, Professor Saxonhouse has continued to teach at the University of Michigan. Professor Saxonhouse is not a Presidential appointee and has no responsibility for setting policy; all policy recommendations are the responsibility of the Council Chairman and other two Council members.

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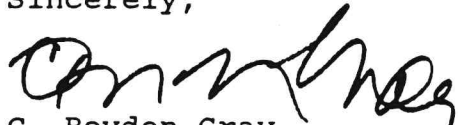
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I hope this has been helpful.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Boyden Gray", written over the printed name.

C. Boyden Gray
Counsel to the President

The Honorable William H. Gray, III
U. S. House of Representatives
Washington, D. C. 20515

THE WHITE HOUSE

WASHINGTON

December 22, 1989

Dear Congressman Bonior:

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C. Boyden Gray
Counsel to the President

The Honorable David E. Bonior
U. S. House of Representatives
Washington, D. C. 20515

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A handwritten signature in dark ink, appearing to read 'C. Boyden Gray', written in a cursive style.

C. Boyden Gray
Counsel to the President

The Honorable Robert G. Torricelli
U. S. House of Representatives
Washington, D. C. 20515

- ☐
- O - OUTGOING

☐ H - INTERNAL

☐ I - INCOMING

Date Correspondence
Received (YY/MM/DD)

Name of Correspondent: Jim Cichone

- ☐
- MI Mail Report**

User Codes: (A) _____ (B) _____ (C) _____

Subject: Institutions, practices, the Council
of Economic Ministers and international
research organizations

ACTION

DISPOSITION

Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Crop		ORIGINATOR	8/1/21/14			
Cyat		Referral Note:	8/1/21/14			
Cyay		Referral Note:				
		Referral Note:				
		Referral Note:				
		Referral Note:				
		Referral Note:				

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

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Code = "A"
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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.

December 14, 1989

1989 DEC 14 AM 10:03

MEMORANDUM FOR THE PRESIDENT

FROM: MICHAEL J. BOSKIN

RE: FYI

- o Recently, two letters from Congressional Democrats have raised questions about the associations between the Council of Economic Advisers and international research organizations associated with the Japanese government. These questions appear to be rooted in the current emotional "Japan-bashing" frenzy of which Congressman Gephardt--the primary signator of one of the letters--is the leading example.
- o Based on all the information we have, there is absolutely no conflict of interest involved.
- o Dr. Boskin, while he was a Professor at Stanford University, was an unpaid member of a large number of academic/research organizations. One of them was the International Economists Associate Club of the Institute of Monetary and Fiscal Policy Research (which is associated with the Japanese Ministry of Finance), an organization which included 160 prominent economists from around the world, including many Americans. Interestingly, associate members and/or visiting scholars included economists who are policy advisors to the Democratic party such as Larry Summers (Dukakis's economic advisor during the campaign) and former USTR official Clyde Prestowitz, author of the Japan-bashing book, Trading Places.
 - Dr. Boskin resigned from all such boards, including this one, in December of last year before joining the Administration.
 - Dr. Boskin received no compensation from the organization at any time.
 - The organization's purpose is to promote economic research. It is not a policy board and Dr. Boskin neither gave policy advice nor was it solicited from him.
- o Dr. Saxonhouse, a Professor at the University of Michigan, and a part-time economic expert employed on a temporary basis by the Council is considered one of America's leading academic experts on the Japanese economy. Dr. Saxonhouse is an unpaid member of a number of academic/research boards and committees, including one associated with the Japanese Ministry of International Trade and Industry.
 - Like the organization Dr. Boskin used to be associated with, this organization is a research rather than a policy group and Professor Saxonhouse has assured the Council that he has neither received compensation nor provided advice to the Japanese or any other foreign government while employed at the Council.
 - The last meeting of the MITI research group occurred prior to his coming to work at the Council and the next meeting will not occur until mid-1991, one and one-half years after his planned departure from the Council.

CBG

Revised draft.

Also Forwarded to Rob,
OGE,

DRAFT; December 14, 1989

Dear

This responds to your letter to me regarding possible ties between Administration officials and advisory groups associated with foreign governments. I am sending a similar response to each of the co-signers of your letter.

Your letter specifically inquired about the relationship between Council of Economic Advisors Chairman Michael J. Boskin and Council consultant Gary R. Saxonhouse to boards associated with Japan's Ministries of Finance and International Trade and Industry. Perhaps the individual who drafted your letter was not aware -- as already publicly reported by the New York Times in a recent article -- that last December, before assuming his government position, Chairman Boskin resigned from his position as an associate member of an advisory group to the Institute of Fiscal and Monetary Policy of the Ministry of Finance.

As to Professor Saxonhouse, he is a part-time staff economist for the Council, who works two to three days a week. He has no responsibility for setting policy; all policy recommendations are the responsibility of the Council Chairman and other two Council members.

During the clearance process for his appointment, Professor Saxonhouse disclosed his affiliation with an advisory board to the Research Institute of International Trade and Industry (RITI), which is separate from but financed by Japan's Ministry of International Trade and Industry. RITI encourages academic research by Japanese and other researchers and publishes, in English and Japanese, a discussion paper series.

Professor Saxonhouse's advisory affiliation is unpaid, does not involve policy-making, and does not require any activity whatsoever during Professor Saxonhouse's Federal employment. In fact, the advisory board, which is made up of 22 economic researchers from a range of countries, meets only once every two years. It met last before Professor Saxonhouse assumed his current position with the CEA and will not meet again until 1991, when his work for the CEA will be completed. His work for that board includes such matters as: commenting, at a public research conference, on a research paper presented by another economist; advising the director of RITI (a professor at a Japanese university) on promising areas of economic research; and presentation, at a public conference, of a paper on econometric analysis of trade structure.

In view of the minimal nature of Professor Saxonhouse's dealings

with the Japanese government and the non-policy-making nature of his CEA duties, CEA made the determination that no conflict of interest was posed by his continued affiliation with the RITI board. CEA stands by that determination, and on the basis of the facts presented to me, I have no reason to doubt the determination.

In considering this whole issue, it is important to recognize the that Professor Saxonhouse is considered by many to be America's leading academic expert on the Japanese economy. The fact of his having provided past advice that may have in some way benefited Japan should not be cause to deny this country the benefit of his unique expertise. Indeed, many United States research agencies themselves encourage and/or fund joint cooperative research efforts involving the United States and Japan. The CEA depends for its success on its ability to hire from among the top economic talent in the United States. If all scholars who have previously provided advice to other countries were to be excluded from the pool of available talent, I fear the CEA would be sorely handicapped.

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By contrast, Members of Congress and congressional staff are subject to far fewer restrictions than in the Executive Branch and have been much more free to accept outside earnings, honoraria and travel expenses from foreign sources. In the case of Members of Congress, there are also no special barriers to accepting campaign contributions from foreign entities. In view of the divergent rules between the two branches, we have

difficulty understanding your level of concern about the possible affiliations with foreign interests of individuals serving in the Executive Branch.

In any event, Designated Agency Ethics Officials at each agency maintain and review the public financial disclosure reports for officials at each agency. These reports would provide more detailed information about any particular employee's outside sources of income, outside positions, and/or arrangements for employment.

I hope this has been helpful.

Sincerely,

C. Boyden Gray
Counsel to the President

To CGC.

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In clearing Professor Saxonhouse for his appointment, the Designated Agency Ethics Official at the CEA inquired about his sources of funding, outside employment, and advisory board memberships to ensure that there would be no conflict of interest. It is my understanding that in the course of that process Professor Saxonhouse agreed, for instance, not to do any corporate consulting during the period of his appointment.

During ~~this~~ ^{the} clearance process, ^{for his appointment} Professor Saxonhouse disclosed his affiliation with an advisory board to the Research Institute of International Trade and Industry (RITI), which in turn is financed by and advises Japan's Ministry of International Trade and Industry. The advisory affiliation is unpaid, does not involve policy-making, and does not require any activity whatsoever during Professor Saxonhouse's Federal employment. In fact, the advisory board, which is made up of 22 economic researchers from a range of countries, meets only once every two years. It met last before Professor Saxonhouse assumed his current position with the CEA and will not meet again until 1991, when his work for the CEA will be completed. His work for that board includes such matters as review of research applications to RITI, and comment on research papers.

In view of the minimal nature of Professor Saxonhouse's dealings

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acceptance
of

Designated Agency Ethics Officials at each agency maintain and review the public financial disclosure reports for officials at each agency. These reports would provide more detailed information about any particular employee's outside sources of income, outside positions, and/or arrangements for employment.

I hope this has been helpful.

Sincerely,

C. Boyden Gray
Counsel to the President



observant bank officials, acknowledges Alan Doody, the resident agent in charge of the Los Angeles office of the Customs Service, which is a branch of the Treasury. Computer detective work in Washington was "secondary," he says.

Treasury analysts, swamped by millions of currency reports, rarely produce fresh leads, according to David Wilson, head of financial investigations for the Drug Enforcement Administration. As for

which indictments were brought earlier this year against the alleged leaders of a ring that purportedly moved \$1.2 billion in cocaine profits out of the country in 18 months. The DEA and the FBI say they broke the case based on tips from bank and armored-car-company employees, as well as on undercover work. They say one Los Angeles jewelry business implicated in the scheme made \$25 million in cash bank deposits in only three months without prompting an alert from the Treasury. "If that didn't show up" on analysts' computer screens, "what would?" asks the DEA's Mr. Wilson.

Treasury officials say their computers did spot the anomalous transactions in Polar Cap roughly at the same time that the DEA and the FBI launched their investigations. And Charles Simonsen, head of currency investigations at Customs, angrily rejects the suggestion that mountains of information have buried his analysts. "Treasury is handling the data coming in and handling it pretty well," he says. Even within the Treasury, though, agents in the field concede that computer-

Customs Service financial analysts hoard intelligence officials concede

In response has revived an more bureaucratic collect and from throughout the states, supposed to be data bases—on

Consultant's Link To Japan Chafes Several Lawmakers

By DAVID WESSEL

Staff Reporter of THE WALL STREET JOURNAL
WASHINGTON—In a sign of the intensifying suspicion of Japan within the U.S. government, several members of Congress are complaining about links between the President's Council of Economic Advisers and unpaid, international advisory panels formed by Japanese government agencies.

Led by House Democratic Leader Richard Gephardt of Missouri, a dozen members of Congress yesterday pointed to Gary Saxonhouse, a consultant to the council. Mr. Saxonhouse, a University of Michigan professor, is one of several academics who advise the Research Institute of Japan's Ministry of International Trade and Industry on economic research topics.

Rep. Gephardt noted that Michael Boskin, chairman of the council, has served on a similar Japanese Finance Ministry panel. Mr. Boskin resigned from it before joining the administration.

In a letter to White House Counsel Boyden Gray, Rep. Gephardt and the others said they were "deeply troubled" by the possibility that anyone was simultaneously advising the U.S. government and foreign governments or companies. They asked for a list of senior officials who serve in such "a dual capacity."

Mr. Saxonhouse said last night that he specifically pointed out his MITI post when he signed on with the council, and "I was told that neither as a matter of law or propriety was there any problem with my continued membership" on the committee. He said it was precisely because of his contacts in Japan and his knowledge of the Japanese economy that the council asked for advice, and he described the lawmakers' comments as "an attempt to take me out of the policy debate."

The MITI panel met last year for the first time, before Mr. Saxonhouse went on the government payroll, and isn't slated to meet again until next year. Richard Cooper, a Harvard economist who sits on the committee, said Mr. Saxonhouse's membership "should in no sense disqualify him" from advising the U.S. government.

Some, including Mr. Cooper, suggest that the controversy reflects not so much conflicts of interest as the growing emotionalism in the U.S. over the economic threat from Japan.

"Saxonhouse has written some things as an American scholar which are not consistent with the current drumbeat in some political quarters in this country, including some congressmen," Mr. Cooper said. The conflict-of-interest issue is "a cover for really objecting to what he has written," he said.

Another group of lawmakers, this one led by Rep. Helen Delich Bentley (D., Md.) questioned Mr. Saxonhouse's role in a letter to President Bush in November.

In a response released by Rep. Bentley's office yesterday, the chief White House lobbyist, Frederick McClure, simply thanked the lawmakers for their concern.

Increased Spending On Medicine to Fight Drug Abuse Is Urged

By a WALL STREET JOURNAL Staff Reporter

WASHINGTON—Sen. Joseph Biden (D., Del.) proposed sharply increased federal spending as part of a plan to speed the research and development of new medicines to treat drug addiction.

Mr. Biden, a leading spokesman for congressional Democrats on drug issues, outlined legislation to spend \$1 billion over the next 10 years on such medicines, which, he said, government "has virtually ignored" and private industry has largely avoided.

Only two medications for drug addiction have received required approval from the Food and Drug Administration, which has taken an average of more than 10 years to review such treatments, the senator said. There isn't an approved medicine specifically designed to treat cocaine addiction.

Mr. Biden recommended that the FDA accelerate its approval process for anti-drug abuse medicines, as it has done for treatments for AIDS. He also proposed that Congress provide exclusive marketing arrangements to companies that develop medicines to treat drug abusers, as is already done for makers of treatments for rare diseases. The senator, who based his proposals on a 38-page report by his staff, said he would introduce bills to carry out his plan when Congress reconvenes in January.

Mr. Biden faulted the Bush administration for "failing to meaningfully address the need for pharmacological treatments" for drug addiction, a charge quickly rebutted by William Bennett, the White House drug-policy director. Congress approved President Bush's recommendation to double federal spending in the field, to a total of \$40 million for the fiscal year that began Oct. 1. Mr. Bennett called that amount "pretty substantial."

The Pharmaceutical Manufacturers Association, responding to Mr. Biden's charge that private companies haven't aggressively developed medicines for drug abuse, said the industry "is making a strong effort" to develop such medicines, "despite the many challenges and problems."

Separately, the White House announced that President Bush will be attending an anti-drug summit in Cartagena, Colombia, Feb. 15. Mr. Bush is expected to meet with leaders of Colombia, Bolivia and Peru, three of the biggest cocaine-producing countries, to discuss ways of cutting the supply of and demand for illegal drugs.

Texas Gov. Clements Signs Workers-Comp Overhaul

By a WALL STREET JOURNAL Staff Reporter

AUSTIN, Texas — Gov. William P. Clements signed into law a revision of the state's \$3 billion system for compensating workers injured on the job.

The overhaul is meant to lessen insurers' losses and cut insurance premiums paid by Texas employers. Gov. Clements had called the reform vital to the state's economic recovery.

But even the bill's backers, led by employers and insurers, concede that actual reductions in premiums and losses are two to three years away. Workers-compensation insurers have already won state approval for a 22% increase in premiums affecting

worker can expect to receive while raising the maximum available benefits to \$416 per week from \$238. The bill also sets up measures to contain medical costs and spells out reforms for the insurance pool created to cover employers unable to get coverage elsewhere.

The heart of the bill—and the part that provoked the most controversy—creates a workers-compensation commission that will hear most workers' claims in administrative proceedings and determine the amount of compensation from a rating system developed by the American Medical Association.

The measure discourages lawyers'

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niques. "The answers were quite surprising," said Dr. David D. Ho, who directed the project.

Until now, scientists believed that people with the acquired immune deficiency syndrome had the virus

latent use infection frequently lies dormant for years after the initial infection.

The study and a related paper by Dr. Robert W. Coombs and colleagues at the University of Washington were published in yesterday's New England Journal of Medicine.

ciption," the report concluded. Blood banks routinely screen donations for signs of infection, and transmission of AIDS through blood transfusions is now rare. But the virus is still being spread by dirty syringes shared among drug addicts. The researchers estimated that a

low, some critics have questioned whether HIV really causes AIDS.

In an accompanying editorial, Drs. David Baltimore and Mark B. Peinberg of the Whitehead Institute for Biomedical Research said the latest data "should dispel any lingering doubts about whether HIV is the true culprit in AIDS."

Conflict claim irks White House

By Frank J. Murphy
THE WASHINGTON TIMES

Congressional accusations that Michael Boskin, President Bush's top economic adviser, may be abusing both the United States and Japan were dismissed last night by the White House as a "crazy, 'irrelevant' and 'cheap political shot.'"

House Majority Leader Richard Gephardt and 11 other Democrats wrote to White House Counsel C. Boyden Gray yesterday, asking him to investigate a possible conflict of interest by Mr. Boskin and Gary Saxonhouse, a part-time senior economist who specializes in Japan.

"We are deeply troubled by reports that senior officials in the administration may be serving in the

dual capacity of advising the U.S. government while simultaneously providing counsel, advice or other services to foreign governments, foreign corporations or other foreign entities," said the letter, which called the two White House aides examples that raise serious questions about conflict of interest.

"He's crazy. Gephardt's a Japanese, that's all," White House Press Secretary Martin Fitzwater said after discussing the matter with Mr. Boskin.

"There's no conflict of interest. There's no relevance. Michael Boskin resigned in December of 1988. He's not on the advisory committee. He has not been on the advisory committee since this administration started," said Mr. Fitzwater, who said

he didn't know if Mr. Gray would investigate.

"We'll respond to it," he said of the letter.

Mr. Boskin himself chimed in briefly, responding "So what's new," when told by a reporter during a chance hallway meeting that the complaint had come from Mr. Gephardt.

Mr. Boskin refused comment. In a press release issued by the majority leader's office, Mr. Gephardt suggested an overlap between the economist's service and negotiations on the FSX fighter, foreign investment and talks on lowering Japanese trade barriers.

The New York Times reported Sunday and New Technology Week reported Nov. 13 that Mr. Boskin had

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TV Marti test delayed until next month

By Alan McConagha
THE WASHINGTON TIMES

The beginning of a testing phase for TV Marti has been postponed until late January because of difficulty in developing the airborne equipment that will beam the first uncensored television images into Cuba in 30 years.

Instead of the startup tentatively planned for November, officials in charge of the technically innovative United States Information Agency project expect the 90-day test will begin transmission in about six weeks.

A U.S. official close to the project said the delay is a result of design, testing and production problems in development of the technical systems. "Things took a little bit longer than we thought," he said.

"As you can imagine, it is a relatively unique system," added the official who asked not to be identified. "It takes a while to get all the bugs ironed out."

The test involves sending a signal by satellite from Washington to an elite receiver on Cudjoe Key off the coast of Florida. The receiver will beam the signal by microwave to a

balloon 10,000 feet over the key. The balloon, known as an aerosol, will carry a receiver, transmitter and antenna that will direct the program more than 100 miles to Havana to add television to the 24-hour broadcasts of Radio Marti.

The aerosol, about the size of the Goodyear blimp, is on loan from the Air Force. In effect, it will function as a television tower, which would have been environmentally difficult to build on the key.

An official of a Cuban-American organization added, "As far as we are concerned the delay is entirely technical. There is difficulty in developing innovative technology."

"There are the usual hiccups in the State Department about retaliation from (Cuban dictator Fidel) Castro. TV Marti will make it difficult for him and nobody knows what form it [the retaliation] will take. But the [White House] is very committed."

Last April, Carlos Rafael Rodríguez, Cuba's vice president, warned that his country would take "all appropriate measures" against TV Marti. He said U.S. officials knew Havana had the means to repel a "re-actatory attack."



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WHITE HOUSE REACHES AGREEMENT WITH BRAZIL TO WRAP UP STEEL TALKS

U.S. officials last week concluded a steel trade agreement with Brazil, the last country not to have reached an agreement with the U.S. on the amount of steel trade that will be allowed into the country until March 31, 1992. Under the agreement just reached, Brazil would get an initial 1.8% share of the U.S. market. It would be increased to a 2.1% share in 1991, according to informed sources.

Brazil also signed onto a steel agreement to limit subsidies and market barriers that distort steel trade. Similar agreements were also reached with the other countries who signed so-called voluntary restraint agreements. The Brazilian source said that signing onto such a consensus agreement was much more difficult for Brazil than for most countries since it had to promise to tear down a variety of industry assistance programs. He pointed out that these assistance programs are sanctioned by exceptions to rules of the General Agreement on Tariffs & Trade.

HOUSE MEMBERS ASK BUSH TO PROBE CEA ADVISOR'S LINKS TO JAPAN

Lawmakers late last month requested President Bush to begin an investigation of into alleged ties between the Council of Economic Advisors and the Japanese government, according to informed sources. On Nov. 21, eight House members wrote to President Bush requesting an investigation of alleged Japanese government ties to a CEA Japanese economic issues specialist, Gary Saxonhouse. The letter says that lawmakers are concerned that Saxonhouse may have acted against U.S. trade interests because of his ties to a research institute funded by the Japanese government.

Saxonhouse, also an economics professor at the University of Michigan, is under congressional scrutiny for his role as an unpaid adviser to an economic research institute, called the Research Institute of International Trade & Industry, which is funded by Japan's Ministry of International Trade & Industry. The advisory board that Saxonhouse sits on meets once every two years.

Saxonhouse is a consultant to CEA, advising it on Japanese economic issues. One of Saxonhouse's primary functions at the CEA is to review and critique U.S. agency position papers on Japanese trade issues, including those addressed in the so-called Structural Impediments Initiative (SII) and in the Super 301 talks. In the SII talks, the U.S. is attempting to remove structural market-access barriers that arise from that country's business and cultural practices. The Super 301 talks are aimed at removing specific barriers that hinder U.S. access to Japan's market for forest products, satellites and supercomputers.

Saxonhouse participated in numerous staff-level and high-level interagency meetings where U.S. positions on these issues were being formulated, and he often criticized some agencies' position papers as "too critical of Japan," said one Administration critic of Saxonhouse. "[He] was very critical of the U.S. government position [on Japan]," he said. But another Administration source said that Saxonhouse's views and positions were not out of step with the "normal CEA biases and perspectives."

The eight congressmen expressed their "deep concern" to Bush about Saxonhouse's contacts with Japan. "We are writing to ask you to look into this matter because of our deep concern over the United States losing the race in the high technology field to Japan," the congressmen told Bush in the letter.

The congressmen, led by Rep. Helen Delich Bentley (R-MD), wrote the letter partly in response to recent reports that the Administration was considering cutting funding to high-technology research ventures that would aid such areas as high definition television and semiconductor manufacturing. According to a CEA source, Saxonhouse's functions with CEA did not entitle him to participate in policy decisions affecting the government's role in aiding the high-technology sector. The congressional letter was sparked by an article in *New Technology Week*, a Washington newsletter.

There is some dispute over what Saxonhouse's position is with CEA. Saxonhouse advises the CEA part time on Japanese economic issues, yet he is referred to as a senior staff economist on a government list of members of the staff-level interagency Section 301 Committee. CEA sources said Saxonhouse is not a senior staff economist with them but instead a consultant. Despite his membership with this interagency group, which is where the interagency process begins on trade issues, Saxonhouse has never sat in on a meeting of that committee, said a CEA source. But he has participated in other, higher-level interagency meetings, such as the Trade Policy Staff Committee and the Trade Policy Review Group, according to sources. All of these groups, which are chaired by officers of the U.S. Trade Representative, are charged with unifying an Administration position on foreign trade issues.

CEA ethics officers did not object to Saxonhouse's affiliation with the Japanese research group when he came on to the council's staff as a consultant in August, the CEA sources said. Further, Saxonhouse's expected term as a CEA consultant is apparently short-term, possibly less than one year, the sources said. If this is so, it would be unlikely that there would be a meeting of the Japanese advisory board on which Saxonhouse sits during his tenure with CEA, one CEA source said.

Inside the White House

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Defense cuts put at \$10-billion

FY-91 BUDGET MAY SLASH \$18-BILLION IN DOMESTIC PROGRAMS; \$8-BILLION FROM MEDICARE

President Bush's FY-91 budget may seek to cut as much as \$18-billion from non-defense discretionary spending with many programs being held at the FY-90 nominal level, according to informed sources. In addition, the Administration may seek as much as \$8-billion in savings from the Medicare program at the same time the White House calls for a major reform of the Medicare system in an effort to slow spending growth. The White House is also eyeing around \$10-billion in defense spending cuts in FY-91 as part of the Administration's announced reduction in defense spending, sources say.

The figures are preliminary and have not yet been signed off by Budget Director Richard Darman,

continued on page 7

While favoring gasoline tax hike, Income surtax

PANETTA: DEMOCRATS TO SEEK 33% TOP TAX RATE IF BUSH WANTS CAPITAL GAINS CUT

House Budget Committee Chairman Leon Panetta (D-CA) this week said the Democratic Leadership likely would seek a 33% top individual income tax rate for FY-91 if President Bush presses for a cut in the capital gains tax. In addition, Panetta said he would favor "some form of energy taxes" that would include an increase in the federal gasoline excise tax along with an oil import fee. Panetta also said he favors a temporary income "surtax" with the money being applied to deficit reduction. Panetta made his remarks to reporters after speaking at an American Enterprise Institute meeting on the FY-91 budget. All

continued on page 7

EX-OMB CHIEF: ANNOUNCED DEFENSE CUTBACKS MAY MAKE IT HARDER TO RESIST TAX HIKE

President Bush may have made it more difficult to resist tax increases in FY-91 because he has created a "crisis of heightened expectations" of resources being available for domestic spending by announcing sharp cutbacks in defense spending over the next five years, said former Budget Director James C. Miller. In an exclusive interview with *Inside the White House*, Miller said that the Bush Administration's announcement of a dramatic decline in defense spending has been "a real tragedy for the Administration and those of us who want to hold the line on taxes" because lawmakers may seek to use the money from the defense cutback to increase social spending. The problem, Miller said, is that the level of cutbacks announced by the Administration likely would not be enough either for deficit reduction or

continued on page 6

Systemic changes to procurement policy envisioned

BUSH NOT EXPECTED TO VEER SHARPLY FROM CURRENT DEFENSE POSTURE TO CUT BUDGET

President Bush's next five-year defense plan is not expected to dramatically shift U.S. defense policy to a greater reliance on strategic weapons and away from conventional forces as has been widely speculated, according to sources familiar with early discussions inside the White House and the Pentagon on how to manage as much as \$180-billion in defense spending reductions. Instead, the Defense Dept. expects to dramatically overhaul the way the Pentagon buys weapons and manages weapons programs to make up a large part of the \$180-billion in savings envisioned over the next five-years, a top official told *Inside the White House* last week. The planned changes to the Pentagon weapons purchasing system would

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nor during the news conference was there any disclosure of Mr. Eberle's relationship with Nissan.

Mr. Eberle said in an interview that he worked on the project "in my own capacity as a C.E.D. trustee" and that he was among those taking the hardest line on Japan. He said everyone on the committee "knew of my relationship with Nissan." He also said that "because there is this anti-Japanese feeling building, things like this tend to get distorted."

Despite these anti-Japanese sentiments, Japanese companies have numerous employees, customers and suppliers in the United States and have been able to mobilize them to help influence Washington.

This "market power" or "leverage lobbying" was a factor in the softening of the Toshiba sanctions. Toshiba brought to Capitol Hill executives of many of the smaller American companies that make data processors,

is doing that. Some legislators and academic analysts believe the United States suffers from the lack of foreign economic policy goals. Although there is growing recognition that the nation's future will be determined by how it fares in global economic competition, economic concerns are regularly being subordinated to military and political objectives.

But in Japan, the goals of industry and Government are closely aligned, and the country appears to have a cohesive strategy of accumulating the bulk of high-paying, high-knowledge jobs of the next century, which is evident in its actions of the last decade and the instructions that go out to its army of Washington lobbyists.

"The lack of policy objectives," said Robert C. Angel of the University of South Carolina, "has helped Japan manage the United States to achieve maximum benefits for Japan."

QUESTIONS ON CAPITOL HILL

TOGETHER with a number of other American economists, Gary R. Saxonhouse serves on the advisory board of an economic research institute financed by Japan's Ministry of International Trade and Industry, but he also is a part-time economist on the President's Council of Economic Advisers and its chief Japanese expert.

The position in Japan is unpaid, and the board meets only once every two years. Still the linkage has stirred questions on Capitol Hill.

Eight members of the House, led by Helen Delich Bentley, Republican of Maryland, recently called for a White House investigation. "It is difficult to understand how any U.S. Government economist, making critical decisions on the future of this country, could participate as an adviser to any foreign government or foreign agency," they wrote. They said they were acting out of "our deep concern over the United States losing the race in the high-technology field to Japan."

The White House dismissed the complaint, noting, according to one official, that Mr. Saxonhouse's membership was "irrelevant" because of the infrequent meetings of the Japanese board. Mr. Saxonhouse is also a professor of economics at the University of Michigan.

The chairman of the Council

of Economic Advisers, Michael J. Boskin, had been on a similar board of an institute financed by the Japanese Ministry of Finance. To avoid a possible conflict of interest, he resigned before joining the Bush Administration. But as a part-time employee of the council, Mr. Saxonhouse is not covered by White House ethics rules, according to a council spokesman, Steve Landfeld.

Noting his 20-year background as a student of the Japanese economy, Mr. Saxonhouse said that in the course of his research he had developed associations with many Japanese scholars and Government officials. "It is precisely because of these associations, my detailed knowledge of the Japanese economy, and my well-known and distinctive views on U.S.-Japanese relations that the Council of Economic Advisers sought to have me serve as a consultant with them," he said.

Mr. Saxonhouse has published widely quoted studies concluding that Japan is not protectionist. While Tokyo may tinker heavily with trade, the net impact on flows, he contends, is light. Japan's low level of imports, he argues, reflects such forces as economies of scale, distances from industrial competitors and a natural dependence on imported raw materials.

Mr. C. Dwyer Gray
Office of Legal Counsel
The White House
Washington, D.C.

Dear Mr. Gray:

This letter is written to address constitutional concerns raised about Professor Gary Saxonhouse's status and activities. Professor Saxonhouse, who has been a member of the Economics Department at the University of Michigan for many years, is now serving as an "Expert" for the Council of Economic Advisers. According to his Form 50-B, he serves on an "Intermittant Basis" with "No Predetermined Scheduled Tour of Duty." He is not eligible for health benefits or leave. In fact, Professor Saxonhouse spends about two days a week in Washington, as needed, providing advice to the Council and conducting research on U.S.-Japan trade relations and is paid on a daily rate in relation to the work he actually performs.

Professor Saxonhouse is also a member of the 22-person Advisory Board of the Research Institute of International Trade and Industry in Japan, which conducts research for and is financed primarily by Japan's Ministry of International Trade and Industry. This Advisory Board meets every two years. Its membership currently consists of six Japanese academics and sixteen from other countries, including seven from U.S. campuses. Its members receive no compensation, but are reimbursed for the actual expenses connected with their attendance at the advisory meetings. The responsibility of the Advisory Board is to identify appropriate academic topics for research. The Research Institute is directed by a college professor who works for the Institute on a part-time basis. Its research work is conducted primarily by members of the Japanese academic community along with some government officials who are seconded to the Institute for temporary periods.

The question has been raised whether this combination of activities is in conflict with Article I, section 9, clause 8 of the U.S. Constitution, which reads as follows:

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

In our professional judgment, Professor Saxonhouse's activity definitely does not violate this clause. He does not hold an "Office of Profit or Trust" in the United States government, and in addition his service on the Research Institute's Advisory

Board does not constitute a "present, emolument, Office, or Title...from any King, Prince, or foreign State."

"Office of Profit or Trust"

The term "Offica" is not defined in the U.S. Constitution, but the word was clearly selected to refer to a subcategory of personnel and was not intended to cover all persons who work for the federal government ~~in~~ in any capacity. The ~~in~~ term "Office" refers to an element of the sovereign authority of a government--an "officer" is a person who can speak for a government or act on its behalf. An "Office" must be created by a statute, and the process of appointment must be identified in the statute that establishes the Office. The term clearly does not cover a part-time consultant.

The U.S. Supreme Court has dealt with this term in several cases, and its treatment of the term indicates without doubt that Professor Saxonhouse does not hold an "Office." ~~In~~ In United States v. Germaine, 99 U.S. 508 (1879), a surgeon appointed by the U.S. Commissioner of Pensions was indicted under a statute ~~prohibiting~~ prohibiting extortion by any "officer" of the United States. The Supreme Court recognized that the term "officer" was meant to be a limiting one and that if the statute had been "designed for others than officers as defined by the Constitution, words to that effect would be used, as servant, agent, person in the service or employment of the Government..." 99 U.S. at 510; emphasis added. The Court went on to say that the term "officer" "embraces the idea of tenure, duration, emolument and duties," which are "continuing and permanent." Id. at 511-12. Dr. ~~Germaine's~~ Germaine's relation to the U.S. government did not meet that definition, and the Court ruled that he could not be indicted under the statute. His duties were to make periodic examination of pensioners and to advise the Commissioner about their health. "He is but an agent of the commissioner, appointed by him and removable by him at his pleasure, to procure information needed to aid in his performance of his own official duties." Id. at 512. * This sentence is also a good summary of Professor Saxonhouse's relationship to the Council of Economic Advisers.

The Supreme Court also had to interpret this term in Metcalf & Eddy v. Mitchell, 269 U.S. 4 514 (1926), a case ~~in~~ involving a federal statute that exempted from a federal tax "officers and employees" of the federal and state government. Metcalf & Eddy were consulting engineers who advised local ~~governments~~ governments regarding water supply and sewage disposal systems. Justice Stone's opinion for the Court drew language from the Germaine opinion to conclude that these consultants were not "officers" because their relationship with the governments was not fixed by law in terms of tenure, duration, emoluments and duties. 269 U.S. at 520. The opinion went on to conclude that these consultants were not even "employees," but rather were "independent contractors":

3

In each instance the performance of their contract involved the use of judgment and discretion on their part and they were required to use their best professional skill to bring about the desired result. This permitted to them liberty of action which excludes the idea that control or right of control by the employer which characterizes the relation of employer and employee and differentiates the employee or servant from the independent contractor.

Id. at 521. This is once again an apt ~~and~~ description of Professor Saxonhouse's relationship with the Council of Economic Advisers, strongly reinforcing the conclusion that he does not ~~hold~~ hold an "Office." He is primarily a Professor of ~~Economics~~ ~~Economica~~ at the University of Michigan who is serving as a part-time consultant as needed for the Council of Economic Advisers.

"...any present, emolument, Office, or Title of any kind whatever from any King, Prince, or foreign State.

Professor Saxonhouse's membership on the Advisory Board of the Research Institute for International Trade and Industry also does not violate this part of Article I, section 9, clause 8. He receives no compensation for his services other than actual expenses ~~connected~~ connected with attendance at biannual meetings. He holds no "Office" in the Institute nor does he hold any "Title." The latter term is primarily designed to prohibit Titles of Nobility as is clear from the first phrase in this clause.

Finally, the Research Institute is established as an independent academic body ~~designed~~ designed to give independent advice to Japan's Ministry of International Trade and Industry. As mentioned above, it is directed by a college professor who works for the Institute on a part-time basis, and its work is done primarily by members of the Japanese academic community. Although it receives funds from the Japanese government, it is independent in ~~its~~ purpose and structure and should not be viewed as a mere agent of the Japanese government. See, e.g., 62 Op. Comptroller General 432 (1983).

~~See~~ *****

Professor Saxonhouse is a highly regarded member of a strong ~~Economics~~ Economics Department in a major U.S. university. His research and writing on Japan's trade and investment policies and his independent academic views ~~are~~ are clearly of interest and importance to the decisions facing our nation in the current era. It is appropriate for a U.S. governmental entity to seek his advice, ~~as~~ a part-time consultant, but he cannot be viewed as an "officer" of the United States or as a person holding an "Office of Profit or Trust" because he cannot speak or act for the United States. In addition, he is not ~~receiving~~ now receiving any ~~present, emolument, Office, or Title of any kind whatever~~ "present, ~~emolument, Office, or Title of any kind whatever~~ from any King, Prince, or foreign State."

I Thank you for your consideration of this analysis. Please let us know if we can provide any further information on this ~~subject~~ subject.

Final RESPONSE TO GEPHARDT LETTER

Dear

This is in response to your recent letter (co-signed by 11 of your colleagues) in which you expressed concern about possible ties between Administration officials and advisory groups associated with foreign governments.

Your letter specifically inquired about the relationship between Council of Economic Advisors Chairman Michael J. Boskin and Council economic expert Gary R. Saxonhouse to boards associated with Japan's Ministries of Finance and International Trade and Industry. Perhaps the individual who drafted your letter was not aware that -- as recently reported by the New York Times -- that last December, before assuming his government position, Chairman Boskin resigned his membership from the International Associates Club of the Institute of Fiscal and Monetary Policy of the Ministry of Finance. This institute is a research group, not an advisory or policy board, and Dr. Boskin received no compensation from the Institute.

As to Professor Saxonhouse, he is an economic expert working for the Council on a part-time, intermittent basis. He has worked for the Council two to three days each week, and has no prearranged schedule. While working for the Council, Professor Saxonhouse has continued to teach at the University of Michigan. Professor Saxonhouse is not a Presidential appointee and has no responsibility for setting policy; all policy recommendations are the responsibility of the Council Chairman and other two Council members.

During the clearance process for his employment (prior to his beginning work for the Council), Professor Saxonhouse disclosed his affiliation with an advisory board to the Research Institute of International Trade and Industry (RITI), which is institutionally distinct from but financed by Japan's Ministry of International Trade and Industry. RITI encourages basic, theoretical, and empirical research by Japanese and other researchers and publishes, in English and Japanese, a discussion paper series. The sole function of the RITI advisory board consists of helping RITI's director to identify promising areas of economic research of an academic nature.

Professor Saxonhouse's advisory affiliation with RITI is unpaid, does not involve policy-making, and, in any case, has not and will not require any activity whatsoever during Professor Saxonhouse's Federal employment. In fact, the advisory board, which is made up of 22 economists from around the world, meets only once every two years. His interaction -- prior to joining

the CEA -- with the Institute consisted of: commenting, at a public research conference, on a research paper presented by another economist; advising RITI on promising areas of economic research; and presentation, at a public conference, of a technical econometric paper. The board met last before Professor Saxonhouse assumed his current position with the CEA and will not meet again until 1991, well after his work for the CEA will be completed. (Professor Saxonhouse will complete the work he had agreed to perform for CEA, including his contributions to the annual report, during January.)

In view of the fact that Professor Saxonhouse would have no dealings with the Japanese government during his work on the CEA staff, his minimal dealings with RITI after his CEA work is completed, and the non-policy-making nature of his CEA duties, CEA made the determination that no conflict of interest was posed by his continued affiliation with the RITI board. CEA stands by that determination, and on the basis of the facts presented to me, I have no reason to doubt the determination.

In considering this whole issue, it is important to recognize that Professor Saxonhouse is considered by many to be America's leading academic expert on the Japanese economy. The fact of his having provided past advice that may have in some way benefited Japan should not be cause to deny this country the benefit of his unique expertise. Indeed, many United States research agencies themselves encourage and/or fund joint cooperative research efforts involving the United States and Japan. The CEA depends for its success on its ability to hire from among the top economic talent in the United States. If all scholars who have previously provided advice to other countries were to be excluded from the pool of available talent, the CEA would be sorely handicapped.

Finally, you requested information about whether any senior level Administration officials serve in any unpaid or paid capacity for a foreign government, foreign-owned company, or foreign entity. There is no central repository for such information in the Executive Branch. You should be aware, however, that all Presidential appointees have been screened during the clearance process with a view toward ensuring that any outside affiliations are consistent with the full and proper performance of their duties.

Moreover, under Executive Order 12674, no full-time non-career Presidential appointee in the Executive Branch is permitted to have any outside earned income at all, during his or her federal service. In addition, we have enforced during the clearance process the President's general policy that full-time non-career Presidential appointees resign any positions they hold on the boards of all for-profit entities. The same is true of our

clearance process for members of the White House staff. Each Executive Branch employee is also subject to 18 U.S.C. 208, which prohibits the employee from acting personally and substantially in any matter in which the employee, his or spouse or minor child, or an entity in which the employee serves as officer, director, trustee or employee, has a financial interest.

By contrast, as a matter of interest, Members of Congress and congressional staff are subject to far fewer restrictions than in the Executive Branch and have been much more free to accept outside earnings, honoraria and travel expenses from foreign sources.

In any event, Designated Agency Ethics Officials at each agency (and not the White House or the White House Counsel's Office) maintain and review the public financial disclosure reports for officials at each agency. These reports would provide more detailed information about any particular employee's outside sources of income, outside positions, and/or arrangements for employment.

I hope this has been helpful.

Sincerely,

C. Boyden Gray
Counsel to the President

Ethics File
- MJB

Post-It™ brand fax transmittal memo 7671		# of pages > 1	
To	M. Boskin	From	Rossannah
Co.	CEA	Co.	NBER
Dept.		Phone #	415/326-5652
Fax #	202/395-3012	Fax #	415/328-4163

December 28, 1988

Dr. Shuzo Nakamura
Institute of Fiscal & Monetary Policy
Ministry of Finance
3-1-1 Kasumigaseki, Chiyoda-ku
Tokyo 100 Japan

Dear Dr. Nakamura:

Due to my new assignment on the Council of Economic Advisers, I must resign from all advisory committees, commissions, boards, etc. Therefore, I am hereby resigning from your International Associate Members Club.

Best wishes for continued success.

Sincerely,

Michael J. Boskin

MJB:rr

NEW TECHNOLOGY

Week

KING COMMUNICATIONS GROUP, INC.
627 NATIONAL PRESS BUILDING, WASHINGTON, D.C. 20045
Telephone: (202) 638-4260 • Telefax: (202) 682-9744
From the Editors of The Energy Daily and Defense Week

Monday, November 13, 1989

Volume 3, Number 45

Three Japanese Firms Vying For Perkin-Elmer

Three Japanese companies are attempting to outbid each other in the competition to snare Perkin-Elmer Corp.'s semiconductor manufacturing equipment division. Perkin-Elmer is one of two remaining U.S. manufacturers of step and repeat X-ray lithography technology.

Canon, Nikon and Matsushita are aggressively seeking to land Perkin-Elmer, government sources told *New Technology Week*. The sale of the division could take place as early as the next few weeks if approved by U.S. officials.

"Let me make this very clear, I am opposed to [Perkin-Elmer's sale to a foreign corporation]," said Robert Noyce, chief executive officer of Sematech.

In congressional testimony last week, Noyce blasted Perkin-Elmer's management and said that its value has accrued rapidly because of government research activity. The U.S. government has flooded Perkin-Elmer with millions of dollars in start-up funds in recent years to help introduce the next generation of lithography equipment to the market.

"If management wants to sell to a non-U.S. company, we ought to
(Continued on page 12)

Moynihan Mourns Maglev's Fate

BY RICHARD MCCORMACK

The efforts to create a magnetic levitation industry in the United States "are going to fail," says Sen. Daniel P. Moynihan (D-N.Y.), the technology's champion. "Japan and Germany will wipe us out in this."

Speaking to a group of high-speed rail industrialists last Thursday, Moynihan's views were interpreted as a rallying cry, a half-time tirade

from a coach of a team that is being beaten badly. "You're all going to lose," Moynihan said. Maglev represents "a very nice special case of a generalized case. Why will the failure persist?"

Germany and Japan gained their current economic strength from being turned to rubble during World War II, Moynihan pontificated. They didn't have in place an infrastructure of

(Continued on page 12)

Outrage Expressed Over Saxonhouse

Senior-level government officials involved in technology issues are expressing dismay over the discovery that a senior staff economist on the White House Economic Policy Council is also a member of an advisory board to Japan's Ministry of International Trade and Industry.

Gary Saxonhouse, staff economist to the Council on Economic Advisors' Chairman Michael Boskin, sits on the advisory board for MITI's Research Institute (MITI/RI). Saxonhouse, who is responsible for U.S. policy recommendations regarding Japan, is listed as a board member of the Research Institute's 1989 directory. He is one of 22 directors, seven of whom are American.

U.S. government sources question the former University of Michigan professor's involvement with both governments and believe it is a direct conflict. Saxonhouse could not be reached for comment. The information is expected to become public this week as news of the apparent conflict of interest is leaked to the U.S. press.

—LUCY REILLY

Change Of Course Outlined For HDTV

BY LUCY REILLY

Sensing that defeat is at hand, proponents of high-definition display systems are repackaging the technology as a national security issue rather than as an economic security issue that threatens the entire U.S. consumer electronics industry.

To win the support of the White House and the American public, the United States should focus its R&D muscle where its strength is: on non-consumer, military technologies, according to a recent report to the Defense Manufacturing Board.

By changing the rationale behind the U.S. government's involvement in the technology, the Manufacturing Board's High Definition Systems Task Force hopes to "attract support from conservative advocates of a free market/free trade perspective," says the report. The rationale that has been used to date—the preservation of U.S. economic prosperity—"would appear to have reached its persuasive limits. Its adherents spend more and more time 'preaching to the converted.'"

Foreign domination in high-definition displays could be a significant factor in the U.S. military market within two to five years as compared to the eight to 10 years that the technology is expected to take before hitting consumer applications such as HDTV.

"If DOD does nothing to pro-
(Continued on page 11)

Amey
Connect to
MIB
Stem
Call me
5084

DRAFT; December 14, 1989

Dear

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As to Professor Saxonhouse, he is a part-time staff economist for the Council, who works two to three days a week. He has no responsibility for setting policy; all policy recommendations are the responsibility of the Council Chairman and other two Council members.

During the clearance process for his appointment, Professor Saxonhouse disclosed his affiliation with an advisory board to the Research Institute of International Trade and Industry (RITI), which is separate from but financed by Japan's Ministry of International Trade and Industry. RITI encourages academic research by Japanese and other researchers and publishes, in English and Japanese, a discussion paper series.

Professor Saxonhouse's advisory affiliation is unpaid, does not involve policy-making, and does not require any activity whatsoever during Professor Saxonhouse's Federal employment. In fact, the advisory board, which is made up of 22 economic researchers from a range of countries, meets only once every two years. It met last before Professor Saxonhouse assumed his current position with the CEA and will not meet again until 1991, when his work for the CEA will be completed. His work for that board includes such matters as: commenting, at a public research conference, on a research paper presented by another economist; advising the director of RITI (a professor at a Japanese university) on promising areas of economic research; and presentation, at a public conference, of a paper on econometric analysis of trade structure.

In view of the minimal nature of Professor Saxonhouse's dealings

Institute

Interaction - prior to joining the CEA - with
technical econometrics
h

with the Japanese government and the non-policy-making nature of his CEA duties, CEA made the determination that no conflict of interest was posed by his continued affiliation with the RITI board. CEA stands by that determination, and on the basis of the facts presented to me, I have no reason to doubt the determination.

In considering this whole issue, it is important to recognize the that Professor Saxonhouse is considered by many to be America's leading academic expert on the Japanese economy. The fact of his having provided past advice that may have in some way benefited Japan should not be cause to deny this country the benefit of his unique expertise. Indeed, many United States research agencies themselves encourage and/or fund joint cooperative research efforts involving the United States and Japan. The CEA depends for its success on its ability to hire from among the top economic talent in the United States. If all scholars who have previously provided advice to other countries were to be excluded from the pool of available talent, I fear the CEA would be sorely handicapped.

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Moreover, under Executive Order 12674, no full-time non-career Presidential appointee in the Executive Branch is permitted to have any outside earned income at all, during his or her federal service. In addition, we have enforced during the clearance process the President's policy that full-time non-career Presidential appointees resign any positions they hold on the boards of all for-profit entities. The same is true of our clearance process for members of the White House staff. Each Executive Branch employee is also subject to 18 U.S.C. 208, which prohibits the employee from acting personally and substantially in any matter in which the employee, his/her spouse or minor child, or an entity in which the employee serves as officer, director, trustee or employee, has a financial interest.

By contrast, Members of Congress and congressional staff are subject to far fewer restrictions than in the Executive Branch and have been much more free to accept outside earnings, honoraria and travel expenses from foreign sources. In view of the divergent rules between the two branches, we have difficulty understanding your level of concern about the possible affiliations with foreign interests of individuals serving in the

Executive Branch.

In any event, Designated Agency Ethics Officials at each agency maintain and review the public financial disclosure reports for officials at each agency. These reports would provide more detailed information about any particular employee's outside sources of income, outside positions, and/or arrangements for employment.

I hope this has been helpful.

Sincerely,

C. Boyden Gray
Counsel to the President

DRAFT; December 14, 1989

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In view of the minimal nature of Professor Saxonhouse's dealings

with the Japanese government and the non-policy-making nature of his CEA duties, CEA made the determination that no conflict of interest was posed by his continued affiliation with the RITI board. CEA stands by that determination, and on the basis of the facts presented to me, I have no reason to doubt the determination.

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I hope this has been helpful.

Sincerely,

C. Boyden Gray
Counsel to the President

This document is on a disk (see
Henry Plaster - East wing)

Henry Plaster

856-6221

Steve Landefeld

December 7, 1989

Dear

In response to your letter to the President regarding Professor Gary Saxonhouse, I have discussed the issue with Dr. Michael Boskin, Chairman of the President's Council of Economic Advisers. He has assured me that there is no conflict of interest associated with Professor Saxonhouse's providing technical assistance and advice to the Council of Economic Advisers.

Professor Saxonhouse of the University of Michigan is widely regarded as one of America's leading experts on the Japanese economy. He could neither attain nor maintain that expertise without having many contacts with fellow scholars in Japan. The Council and the United States Government are fortunate to have had access to his knowledge and experience. Japan is the United States' second largest trading partner and the second largest economy in the world. Professor Saxonhouse's knowledge has been of immense value in understanding the detailed structure and operation of the Japanese economy. A solid understanding of that economy is plainly essential in today's interdependent world.

Professor Saxonhouse's contacts with research organizations in Japan are quite appropriate and are hardly unusual. Indeed, many U.S. Government research agencies, such as the National Science Foundation and the National Institutes of Health, encourage and/or fund joint cooperative research efforts involving the United States and Japan.

Regarding Professor Saxonhouse's relationship to MITI, his only connection is the one your letter notes: he serves as an unpaid member of an advisory board to the Research Institute of International Trade and Industry. The Council was fully aware of this when Professor Saxonhouse began work as an expert economist on a part-time basis. The purpose of this Institute is to promote economic research, and it is not a policy-making body. The advisory board is made up of twenty-two economic researchers from Japan, the United States, Europe, Australia and other Pacific Rim countries. The board meets once every two years, has not met since Professor Saxonhouse began work for the Council, and will not meet again until mid-1991, well after he has left. (Professor Saxonhouse is working for the Council on a short-term basis.) Professor Saxonhouse has neither provided policy advice to the Japanese Government nor received any payments from the Japanese or any other foreign government while working for the Council.

2

The Council of Economic Advisers is a very small group comprised of the Chairman and two other Members. All three are Presidential appointees subject to Senate confirmation. All policy recommendations and advice to the President are the direct responsibility of the Council Chairman and members.

For technical expertise and staff support, the Council has traditionally relied mainly on academia, using a mix of academic expert economists paid on a daily rate for these services--such as Professor Saxonhouse--and professors on short leaves of absence from their home universities. This staff reports to the Council and provides information, analysis, and other support.

The Council has zealously guarded the objectivity of these individuals, and, through special authority created by the Employment Act of 1946, the Council is able to base its hiring decisions solely on economic expertise. Its economic experts are neither political appointees nor civil servants. Over the years the Council has been able to draw upon some of the top economic talent in the United States (two staff members later went on to win the Nobel Prize); this is both cause and effect of its distinguished record of providing both the executive branch and the Congress with objective and extremely high quality advice and analysis. For over forty years, this unique institution has served Presidents of both parties and has been applauded by those within and those outside government as a most valuable and reliable source of objective economic analysis.

The Council has scrupulously avoided conflicts of interest in the past and will do so in the future. It would be unwise to expand the definition of conflict of interest to cover those with expertise and continued research interests in the areas of their expertise. That would not only be antithetical to basic American values, but the quality of technical advice and information offered to the Council and the United States Government would suffer greatly. For us to disqualify such individuals would violate a basic principle of good government: that decisions should be based on the best information available.

Sincerely,

Frederick D. McClure
Assistant to the President
for Legislative Affairs

Jane Ley

DRAFT; December 14, 1989

Dear

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In view of the minimal nature of Professor Saxonhouse's dealings

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By contrast, Members of Congress and congressional staff are subject to far fewer restrictions than in the Executive Branch and have been much more free to accept outside earnings, honoraria and travel expenses from foreign sources. In the case of Members of Congress, there are also no special barriers to accepting campaign contributions from foreign entities. In view of the divergent rules between the two branches, we have

difficulty understanding your level of concern about the possible affiliations with foreign interests of individuals serving in the Executive Branch.

In any event, Designated Agency Ethics Officials at each agency maintain and review the public financial disclosure reports for officials at each agency. These reports would provide more detailed information about any particular employee's outside sources of income, outside positions, and/or arrangements for employment.

I hope this has been helpful.

Sincerely,

C. Boyden Gray
Counsel to the President

THE WHITE HOUSE
WASHINGTON

Date 12/14

TO: Amy

FROM: ROBERT J. PORTMAN *RJP*
Deputy Assistant to the President
for Legislative Affairs

My suggestions attached.

LMD.

DRAFT; December 14, 1989

Dear

This ^{is in} ^{recent} responds to your letter ^{co-signed by - of your colleagues,} to me regarding possible ties between Administration officials and advisory groups associated with foreign governments. ^{in which you expressed concern about} ~~I am sending a similar response to each of the co-signers of your letter.~~

^{recently} Your letter specifically inquired about the relationship between Council of Economic Advisors Chairman Michael J. Boskin and Council consultant Gary R. Saxonhouse to boards associated with Japan's Ministries of Finance and International Trade and Industry. Perhaps the individual who drafted your letter ~~was not aware -- as already publicly reported by the New York Times in a recent article -- that last December, before assuming his~~ ^{you were not aware that} government position, Chairman Boskin resigned from his position as an associate member of an advisory group to the Institute of Fiscal and Monetary Policy ~~of the Ministry of Finance.~~ ^{an advisory group to the Japanese}

As to Professor Saxonhouse, he is a part-time staff economist for the Council, who works two to three days a week. He has no responsibility for setting policy; all policy recommendations are the responsibility of the Council Chairman and other two Council members. ^{economists from around the world}

During the clearance process for his appointment, Professor Saxonhouse disclosed his affiliation with an advisory board to the Research Institute of International Trade and Industry (RITI), which is separate from but financed by Japan's Ministry of International Trade and Industry. RITI encourages academic research by ~~Japanese and other researchers~~ and publishes, in English and Japanese, a discussion paper series. ^{with RITI}

^{in any case, has not and will} Professor Saxonhouse's advisory affiliation is unpaid, does not involve policy-making, and ~~does not~~ require any activity whatsoever during Professor Saxonhouse's Federal employment. In fact, the advisory board, which is made up of 22 economic researchers from a range of countries, meets only once every two years. It met last before Professor Saxonhouse assumed his current position with the CEA and will not meet again until 1991, when his work for the CEA will be completed. His work for that board includes such matters as: commenting, at a public research conference, on a research paper presented by another economist; [?] ~~advising the director of RITI (a professor at a Japanese university)~~ on promising areas of economic research; and presentation, at a public conference, of a paper on economic analysis of trade structure. ^{world have no}

In view of the ~~minimal nature of~~ Professor Saxonhouse's dealings ^{fact that}

✓ with the Japanese government, and the non-policy-making nature of his CEA duties, CEA made the determination that no conflict of interest was posed by his continued affiliation with the RITI board. CEA stands by that determination, and on the basis of the facts presented to me, I have no reason to doubt the determination.

In considering this whole issue, it is important to recognize ~~the~~ that Professor Saxonhouse is considered by many to be America's leading academic expert on the Japanese economy. The fact of his having provided past advice ~~that may have in some way benefited Japan~~ should not be cause to deny this country the benefit of his unique expertise. Indeed, many United States research agencies themselves encourage and/or fund joint cooperative research efforts involving the United States and Japan. The CEA depends for its success on its ability to hire from among the top economic talent in the United States. If all scholars who have previously provided advice to other countries were to be excluded from the pool of available talent, ~~I fear the CEA would be sorely handicapped.~~

Finally, you requested information about whether any senior level Administration officials serve in any unpaid or paid capacity for a foreign government, foreign-owned company, or foreign entity. There is no central repository for such information in the Executive Branch. You should be aware, however, that all Presidential appointees have been screened during the clearance process to ensure that any outside affiliations are consistent with the full and proper performance of their duties.

✓ Moreover, under Executive Order 12674, ~~no~~ ^{general} full-time non-career Presidential appointee in the Executive Branch is permitted to have any outside earned income at all, during his or her federal service. In addition, we have enforced during the clearance process the President's policy that full-time non-career Presidential appointees resign any positions they hold on the boards of all for-profit entities. The same is true of our clearance process for members of the White House staff. Each Executive Branch employee is also subject to 18 U.S.C. 208, which prohibits the employee from acting personally and substantially in any matter in which the employee, his/her spouse or minor child, or an entity in which the employee serves as officer, director, trustee or employee, has a financial interest.

By contrast, Members of Congress and congressional staff are subject to far fewer restrictions ~~than in the Executive Branch~~ and have been much more free to accept outside earnings, honoraria and travel expenses from foreign sources. In the case of Members of Congress, there are also no special barriers to accepting campaign contributions from foreign entities. In view of the divergent rules between the two branches, we have

as a matter of interest,

during his time as a CEA advisor, dealing with RITI after his turn ~~at the~~

to a research institute affiliated with a Japanese governmental agency

as I am sure you are aware,

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C. Boyden Gray
Counsel to the President

Counsel's
Office)

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As to Professor Saxonhouse, he is a part-time staff economist for the Council, who works two to three days a week. He has no responsibility for setting policy; all policy recommendations are the responsibility of the Council Chairman and other two Council members.

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In view of the minimal nature of Professor Saxonhouse's dealings

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In short, the rules governing the Executive Branch in this area are far more strict than the rules that you

difficulty understanding your level of concern about the possible affiliations with foreign interests of individuals serving in the Executive Branch.

In any event, Designated Agency Ethics Officials at each agency maintain and review the public financial disclosure reports for officials at each agency. These reports would provide more detailed information about any particular employee's outside sources of income, outside positions, and/or arrangements for employment.

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Sincerely,

C. Boyden Gray
Counsel to the President

Mr. C. Boyden Gray
December 12, 1989
Page 2

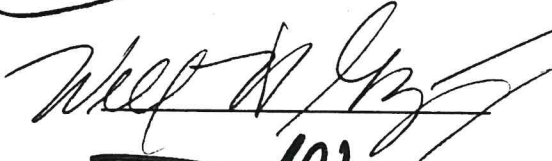
We and the President must ensure that the information and advice that we receive on important policy issues be in America's best interest.

We look forward to a prompt reply.

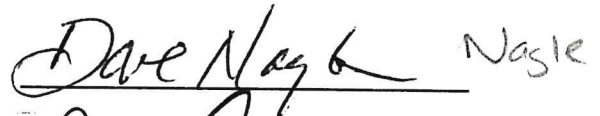
Yours very truly,



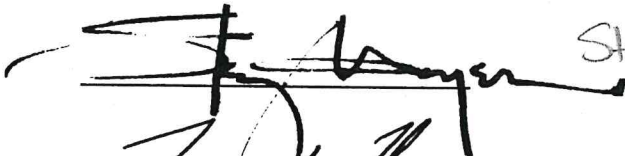
David Bonior



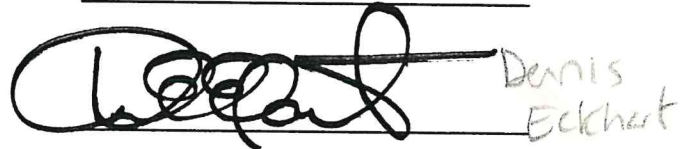
Bill Gray



Bob Wise



Steny Hoyer



Howard Wolpe



Vic Fazio



* Note: Senior level officials include: (1) the President of the United States; (2) the Vice President of the United States; (3) the head of each executive department defined in section 101 of title 5; (4) an individual who is appointed by the President or Vice President under sections 105(a)(2)(A) of title 3 and 106(a)(1)(A) of title 3 respectively; an individual serving in a position in level I, II, III, IV or V of the Executive Schedule; or, a member of a uniformed service in a pay grade of 0-7 or higher and is serving on active duty.

DRAFT
December 21, 1989

Dear

This responds to your letter to me regarding possible ties between Administration officials and advisory groups associated with foreign governments. I am sending a similar response to each of the co-signers of your letter.

Your letter specifically inquired about the relationship between Council of Economic Advisers Chairman Michael J. Boskin and Council consultant Gary R. Saxonhouse to boards associated with Japan's Ministries of Finance and International Trade and Industry. Perhaps the individual who drafted your letter was not aware--as already publicly reported by The New York Times in a recent article--that last December, before assuming his government position, Chairman Boskin resigned his membership from the International Associates Club of the Institute of Fiscal and Monetary Policy, which is associated with the Ministry of Finance. This institute is a research group--not an advisory or policy board--and Dr. Boskin received no compensation from the Institute.]

As to Professor Saxonhouse, he is [an economic expert working for the Council on a part-time, intermittent basis. He has worked for the Council two or three days each week and has no pre-arranged schedule. While working for the Council, Professor Saxonhouse has continued to teach at the University of Michigan. Professor Saxonhouse is not a Presidential appointee] and has no responsibility for setting policy; all policy recommendations are the responsibility of the Council Chairman and the other two Council members.

During the clearance process, [prior to his beginning work for the Council] Professor Saxonhouse disclosed his affiliation with an advisory board to the Research Institute of International Trade and Industry (RITI), which is [institutionally distinct] from, but financed by, Japan's Ministry of International Trade and Industry. RITI encourages basic theoretical and empirical research on economic topics by Japanese professors and other economic researchers and publishes a discussion paper series in English and in Japanese.

Professor Saxonhouse's advisory affiliation with RITI is unpaid, does not involve policymaking, and does not require any activity whatsoever while Professor Saxonhouse is working for the Federal Government. In fact, the advisory board, which is made up of 22 economic researchers from a range of countries, meets only once every two years. It met last before Professor Saxonhouse began work for the Council and will not meet again

until 1991, well after Professor Saxonhouse has completed his work for the CEA. [(Professor Saxonhouse will complete the work he had agreed to perform for CEA, including his contributions to the annual report, during January.)] The sole function of the RITI advisory board consists of helping RITI's director (who is a ~~full-time college professor and serves as the director of RITI on a part-time basis~~) to identify promising areas of economic research of an academic nature.

In view of the minimal nature of Professor Saxonhouse's dealings

→ Need an invoice for stuff for RNC

→ Need response.

- Must know from NYT article. → as you must have known. ref. sloppy stuff with Saxonhouse.

- Some point -

- Not repository for info. Perhaps OGE. Available.

Assure you we have reviewed our stuff, pub. domain. Supply equiv. info.

Sax = bd affil w/ MIT.

Never discussed anything.

Not doing policy work here.

Does see internal memos.

All data used by CEA = public avail.
Leading as expert on Jap. ec.

Toward Ind.
11/5-12/7

~~No memo~~ Of less concern to us than -

→ Package to Geophant. Copy to Saxonhouse to Bentley as one letter.

→

→ Ask RNC legal if they have 2785.

[- WSJ
- WashTimes]

To Amy Schwab -

See esp. pp. 20 et seq.

N.

The Journal of Attenuated Subtleties

Volume 1, Number 1, May 1982

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Manley W. Roberts

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The Journal of Attenuated Subtleties

Volume 1, Number 1, May 1982

Editorial Board

Robert A. James
Editor-in-Chief

J. David Kirkland, Jr.
Managing Editor

Lynley W. Roberts

Benjamin C. Zuraw

Foreword: Form Over Substance

De minimis non curat lex.¹

The law may not care about trifles, but lawyers certainly do. From time out of memory,² members of the bar have delighted in advancing the arcane argument, in drawing the strained analogy, and in resuscitating the outmoded doctrine; even today, when "exalt[ing] form over substance" is reversible error,³ the fascination with long dead and unimportant detail continues to pervade the legal mind. A "case is not to be decided by attenuated subtleties,"⁴ but the fancy of the lawyer is surely to be struck by them.

It is to this fascination with the defunct, trivial, recherché, and inconsequential that this Journal is dedicated. In this and forthcoming issues, we propose to present short scholarly essays, gracefully written, cogently argued, and copiously referenced, which treat subjects long and justifiably neglected in the "substantial" legal literature⁵-- legal topics made obsolete by time or logic.

1. *Taverner v. Cromwell*, 1 Cro. Elis. 353, 353, 78 Eng. Rep. 601, 601 (C.P. 1594).

2. That is, since before Sept. 23, 1189. See 2 W. BLACKSTONE, COMMENTARIES 31.

3. *Parker v. Flook*, 437 U.S. 584, 590 (1978), rev'ing *In re Flook*, 559 F.2d 21 (C.C.P.A. 1977).

4. *Lucas v. Earl*, 281 U.S. 111, 114 (1930) (Holmes, J.).

5. It must be acknowledged that there is a small body of legal writing which deals in the humorous. See, e.g., Review, 79 YALE L.J. 1198 (1970) (review of the "With the Editors" section of *The Harvard Law Review*); Note, Crossing the Bar, 70 YALE L.J. 484 (1969) (analysis of ceremonials in the *Federal Reporter* and the *Federal Supplement* honoring or in memory of federal judges). Legal trivia, on the other hand, have been heretofore ignored by "serious" scholars.

This Journal, however, is not for every lawyer. The attorney who has never stopped to wonder about the odd footnote affixed to Supreme Court syllabi, for example, will find nothing of interest in these pages. The practitioner who dismisses thoughts of Supreme Court jury trials or claims based on the Titles of Nobility Clauses because of their extreme infrequency and improbability will take no delight in our forays; nor will the lawyer who looks to the Court only for holdings and not for historical richness appreciate an analysis of its geographical center. Our colleagues of this ilk must find their recreation outside the law, in alcohol or bowling.

The Journal is for those steeped in the law who love the subtle and the attenuated. To them we extend our invitation to read our works and to submit their own efforts for publication. Here, then, is to form over substance; here is to trifles.

- The Editorial Board

Instructions in Supreme Court Jury Trials

Robert A. James*

The United States Supreme Court has, by virtue of Constitutional grant, original jurisdiction over all controversies in which a State or foreign emissary is a party.¹ Although the number of categories of cases in which the Court has exclusive jurisdiction is extensively limited by statute, the Court is still the court of first resort for all controversies between two or more States;² the Court also occasionally exercises its nonexclusive original jurisdiction.³ The Seventh Amendment to the United States Constitution⁴

* A.B., Stanford University, 1980; J.D. candidate, Yale Law School, 1983.

1. U.S. CONST. art. III, § 2: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction."

The intent of the framers on this provision is thoroughly unascertainable. Professor Farrand has concluded that "surprisingly little [is] found in the records of the convention" regarding jurisdiction and the judicial branch in general. M. FARRAND, *THE FRAMING OF THE CONSTITUTION* 150 (1913). See, however, the speculation in Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 665 & n.3 (1959) (purpose of clause to insure prestige of tribunal hearing claims involving sovereign or quasi-sovereign entities).

2. 28 U.S.C. § 1251(a) (Supp. IV 1980): "The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States." Formerly, the exclusive original jurisdiction extended to suits brought against foreign emissaries, but jurisdiction with respect to these actions was made nonexclusive by the Diplomatic Relations Act of 1970, Pub. L. No. 95-393, 92 Stat. 809, 810, sec. 8(b)(1).

3. For a recent instance, see *United States v. California*, 449 U.S. 400 (1981).

Relatively few original cases have been heard in the Supreme Court's reported history. See Note, *supra* note 1, at 701-719 (123 reported original jurisdiction cases counted as of 1959); 17 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* 107 n.1 (1978) (hereinafter cited as *WRIGHT & MILLER*) (eight cases docketed in 1974, 1975, and 1976 Terms combined).

4. U.S. CONST. amend. VII: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

and a statutory enactment⁵ guarantee the right to trial by jury in the resolution of cases at common law before the Court.⁶ There have been very few jury trials in the Court's history,⁷ but the assertion in an original jurisdiction action of a party's Seventh Amendment right "remains a theoretical possibility."⁸ Once the possibility is acknowledged, a procedural problem becomes apparent: how is a multimember Court to deliver jury instructions where the Justices are not in agreement?

§. Judiciary Act of 1789, c. 20, 1 Stat. 73, 88-81, § 13, codified at 28 U.S.C. § 1872 (1976): "In all original actions at law in the Supreme Court against citizens of the United States, issues of fact shall be tried by a jury."

The right to trial by jury was addressed most recently in *United States v. Louisiana*, 339 U.S. 699 (1950). Mr. Justice Douglas for the Court held that the State of Louisiana was not entitled to a jury trial where it sought the equitable remedies of injunction and accounting: "The Seventh Amendment and the statute [28 U.S.C. § 1872], assuming they extend to cases under our jurisdiction, are applicable only to actions at law." *Id.* at 706 (footnote omitted).

Commentators have inferred from the conditional nature of Justice Douglas's discussion that the right to a Supreme Court jury trial may be in doubt. See WRIGHT & MILLER, *supra* note 3, at 197-98 & n.27. This inference gains no support from Justice Douglas's opinion or the relevant provisions. The language of 28 U.S.C. § 1872 is explicit in its assurance of the right in actions against citizens, *see* note 5 *supra*; the text of the Seventh Amendment, moreover, contains no limitation of the jury right to actions in district courts. *See* note 4 *supra*. It is apparent that governmental bodies, like all other parties, are entitled to assert the right, *see* *United States v. Pitsch*, 256 U.S. 547, 553-54 (1921); *Collins v. Gov't of Virgin Islands*, 366 F.2d 279, 283 (5th Cir.), *cert. denied*, 386 U.S. 958 (1966), so the exclusive category of actions between States is not immune from the prospect of a jury demand. Furthermore, it is sound judicial practice to refrain from deciding more issues than the essential elements of the case at bar. *See, e.g.,* *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 510, 549 (1851); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 734 (1838) (where Court found original jurisdiction suit equitable in nature, no discussion of right to jury trial for legal actions).

7. There have apparently been only three such trials, all in the eighteenth century. Only one is officially reported, that in *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794), discussed in the text accompanying notes 9-12 *infra*. Two others are evidenced by other Court records, and are discussed in 1 H. CARSON, *THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 169 n.1 (rev. ed. 1902), and in *The Supreme Court--Its Homes Past and Present*, 27 A.B.A. J. 283, 286 & n.3 (1941). In *Oswald v. New York* (U.S. Feb. 4, 1795), a jury verdict for \$5,315.06 was entered; in *Cutting v. South Carolina* (U.S. Aug. 8, 1797), the jury found \$5,502.04 in damages. *See also* *Cassey v. Galli*, 94 U.S. 673, 681 (1876) (parties waived "intervention of a jury").

8. WRIGHT & MILLER, *supra* note 3, at 197. Of course, the Supreme Court may avoid such a jury trial in nonexclusive cases by redirecting proceedings to the appropriate district court. Even in exclusive cases, the Court typically encourages parties to pursue factual disputes before a special master. *See, e.g.,* *Maryland v. Louisiana*, 451 U.S. 725, 734 (1981).

In *Georgia v. Brailsford*,⁹ the only reported Supreme Court jury trial, the Justices were able to agree on the charge. Mr. Chief Justice Jay for the Court remarked: "It is fortunate on the present, as it must be on every occasion, to find the opinion of the court unanimous" ¹⁰ When the jurors returned to ask additional questions, the Court was also unanimous in its responses;¹¹ the jury then rendered its decision.¹² In the future, however, the Court may not be fortunate enough to agree on the form and content of jury instructions.

Jury charges, unlike other judicial actions, require more than an affirmative or negative response to a motion; the body vested with interpretive authority must present a single algorithm, a single formulation of logical argument, to guide the jury in rendering a decision on factual issues. Where the Justices cannot come to agreement upon a single jury instruction, a decision rule must be adopted to determine which of alternative charges is to be delivered.¹³ Several potential decision rules may be summarily dismissed. A "pure race" rule, under which the first instruction presented by a Justice would be adopted,¹⁴ is clearly unjust and unworkable in this context. A rule under which the Chief Justice's proposal wins is also unacceptable, as it would appear to place more power in that position than is contemplated by the judicial system.

A plurality rule, one which recognizes the jury instruction endorsed by the largest number of Justices, appears to represent the sound and just resolution of the problem. Although opportunities for negotiation and strategy may be present,¹⁵ and the

9. 3 U.S. (3 Dall.) 1 (1794). The case involved the postwar effect on various creditors of a State's wartime sequestration of debts.

10. *Id.* at 4.

11. *Id.* at 5.

12. *Id.*; the jury found that property in the debts revested in the creditors after the wartime sequestration was nullified by the treaty of peace.

13. The jury instruction issue is therefore inextricably intertwined with the problems addressed by modern social choice theory. *See* K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963).

14. *Cf.* UNIFORM COMMERCIAL CODE § 9-312(5)(a) (1970) ("pure race" rule for priorities among secured creditors).

15. *Cf.* J. VON NEUMANN & O. MORGENSTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* (3d ed. 1953).

possibility of a tie would have to be addressed,¹⁶ incentives would be placed on the Justices to subscribe to the charge which most closely approximates their own views of the legal issue. The result under the plurality rule test would be the adoption of a single jury instruction which commands the widest support among the members of the Court and which is consistent with the unarticulated yet powerful principle of equality among Justices of the Supreme Court.¹⁷

The Supreme Court and the Westward Movement: A Demographic Study

Benjamin C. Zuraw*

Ever since the first days of the Republic, America's population steadily has been moving west.¹ This westward migration has had important effects on America's political, economic, and social history.² To the present day, the cry "Go West, young man!"³ has left its indelible mark on American institutions. This study examines whether the United States Supreme Court has moved westward along with the American public. It is important to know whether the Court has kept pace with America's westward migration, for a correlation between the two migrations could influence the way scholars analyze decisions of our highest tribunal.⁴

The geographical locations of Supreme Court Justices at various times in their careers were compiled and analyzed (see Table 1). Figure 2 plots the population shift of the Court based on its mean birthplace as of each decennial census year. As can be seen, the results are quite erratic, with the mean birthplace shifting back and forth from the Atlantic Ocean to the mainland. One problem with this approach is its inclusion of several Justices who were born overseas.⁵ Figure 3, therefore, displays the adjusted

16. Perhaps the Chief Justice Rule could here be profitably used; this situation requires a thorough analysis. Indeed, the problem of the equally divided court is one long neglected by commentators and courts alike. Cf. *United States v. Barnett*, 330 F.2d 369 (5th Cir. 1963) (en banc), certified question answered, 376 U.S. 681 (1964) (Court of Appeals equally divided in contempt proceeding against state governor).

17. It is not incomprehensible to imagine the guarantee of "one person, one vote" applied generally to the entire federal judiciary. Cf. *Reynolds v. Sims*, 377 U.S. 533 (1964) (principle of one person, one vote in state legislature apportionment); *Holling v. Sharpe*, 347 U.S. 97 (1954) (Fifth Amendment Due Process Clause contains equal protection component).

* B.A., Dartmouth College, 1980; J.D. candidate, Yale Law School, 1983. I am grateful to David Kirkland for invaluable assistance in technical aspects of this article. Any errors, however, are mine.

1. *WORLD ALMANAC AND BOOK OF FACTS FOR 1982* at 199 (1981); see also Table 1 *infra*.

2. See Turner, *The Significance of the Frontier in American History*, *REP. AM. HIST. A.* 190 (1893).

3. Soule, *Terre Haute (Ind.) Express* (1851); cf. J. PARTON, *LIFE OF HORACE GREELEY* (1855); *Contra*, W.O. DOUGLAS, *GO EAST, YOUNG MAN* (1974).

4. Decisions of a particular Court, for example, could be explained by the predominance on that Court of an eastern or frontier perspective. Indeed, a fuller theory of "Demographic Determinism" might be articulated.

5. Justice Brewer, for example, was born in Smyrna, Asia Minor (now part of Turkey) (lat. 39° 25' N, long. 27° 10' E), but moved to Leavenworth, Kansas (lat. 39° 19' N, long. 95° 55' W). Justice Frankfurter was born in Vienna,

mean birthplace of the Supreme Court, with all Justices born overseas removed from the data. This analysis yields results which are certainly more consistent than those of Figure 2; however, because a study based on birthplace neglects movements of people after their birth, it inadequately examines the mobile American society.⁶

Figure 1, instead of being based on the birthplaces of the Justices, as were Figures 2 and 3, displays the population shift of the Court as measured by the place of residence of each Justice at the time of his or her appointment to the Court. In this way, the study can take into account the large number of Justices who migrated to the West after being born on the eastern seaboard.⁷ Figure 1 displays both the mean appointment location of the Court and the geographical center of the United States population, and demonstrates that the Supreme Court's geographical shift has been surprisingly consistent with America's westward migration.

Until 1860, the Court moved steadily westward, although lagging slightly behind the American population. From 1860 to 1870, however, the Court's population center shifted dramatically from near White Sulphur Springs, West Virginia, to Portland, Indiana; from this decade through the 1920s, the Court's westward movement was slightly in front of that of the American people. Since the 1920s, the Court's westward migration has been more inconsistent, but still remarkably similar to America's steady westward shift. The 1982 Supreme Court's population center (near Stoutsville, Missouri) is quite close to the current United States population center (near De Soto, Missouri). Indeed, in a demographic sense, the Supreme Court has come home to the American people.

Austria (lat. 48 13' N, long. 16 22' E).

6. Cf. *Dunn v. Blumstein*, 405 U.S. 330 (1972) (fundamental right of interstate travel); *Shapiro v. Thompson*, 394 U.S. 610 (1969) (same).

7. For example, Justice Field was born in Haddam, Connecticut (lat. 41 20' N, long. 72 30' W), but left for the Marysville, California gold field (lat. 39 10' N, long. 121 34' W). Justice Rehnquist was born in Milwaukee, Wisconsin (lat. 43 03' N, long. 87 56' W), but headed for the sunnier climes of Phoenix, Arizona (lat. 33 30' N, long. 112 03' W).

TABLE 1

Arithmetic Mean Location of
American Population and Supreme Court, 1790-1982

Year	Supreme Court ⁸							
	American Population ⁵		Birthplace		Adjusted Birthplace ^W		At Time of Appointment	
	N Lat. W Long.	N Lat. W Long.	N Lat. W Long.	N Lat. W Long.	N Lat. W Long.	N Lat. W Long.	N Lat. W Long.	N Lat. W Long.
1790	39 16' 76 11'	43 18' 50 43'	38 14' 75 10'	38 12' 75 50'				
1800	39 16' 76 56'	41 17' 64 1'	38 30' 75 34'	39 27' 75 23'				
1810	39 11' 77 37'	38 11' 76 0'	38 11' 76 0'	38 17' 77 20'				
1820	39 5' 78 33'	38 16' 76 13'	38 16' 76 13'	38 22' 77 25'				
1830	38 57' 79 16'	39 30' 75 3'	39 30' 75 3'	38 50' 77 40'				
1840	39 2' 80 10'	39 6' 75 53'	39 6' 75 53'	38 22' 79 38'				
1850	38 59' 81 19'	39 10' 76 59'	39 10' 76 59'	38 32' 79 56'				
1860	39 0' 82 40'	38 40' 77 26'	38 40' 77 26'	37 46' 80 4'				
1870	39 12' 83 35'	41 12' 75 19'	41 12' 75 19'	40 37' 85 17'				
1880	39 4' 84 39'	40 34' 77 25'	40 34' 77 25'	40 32' 85 21'				
1890	39 11' 85 32'	40 15' 64 0'	40 29' 75 33'	39 32' 86 10'				
1900	39 9' 85 40'	39 43' 65 53'	39 52' 77 31'	39 23' 87 47'				
1910	39 10' 86 32'	38 32' 81 0'	38 32' 81 0'	37 49' 88 46'				
1920	39 10' 86 43'	38 57' 81 29'	38 57' 81 29'	39 17' 87 12'				
1930	39 3' 87 0'	41 50' 72 40'	40 34' 81 37'	40 30' 85 36'				
1940	38 56' 87 22'	40 50' 71 15'	39 55' 82 12'	39 41' 84 13'				
1950	38 40' 88 22'	39 39' 74 2'	38 35' 85 21'	39 0' 88 4'				
1960	38 35' 89 12'	39 30' 80 14'	38 25' 92 19'	38 49' 91 50'				
1970	38 27' 89 42'	40 27' 88 4'	40 27' 88 4'	41 4' 89 29'				
1980	38 0' 90 34'	40 52' 86 0'	40 52' 86 0'	40 15' 88 56'				
1982	-- -- -- --	39 53' 89 12'	39 53' 89 12'	39 38' 92 0'				

⁸ CONGRESSIONAL QUARTERLY, GUIDE TO THE SUPREME COURT 793-866 (1979).

⁵ WORLD ALMANAC AND BOOK OF FACTS FOR 1982 at 199 (1981).

^W Justices born outside the United States were removed from computation.

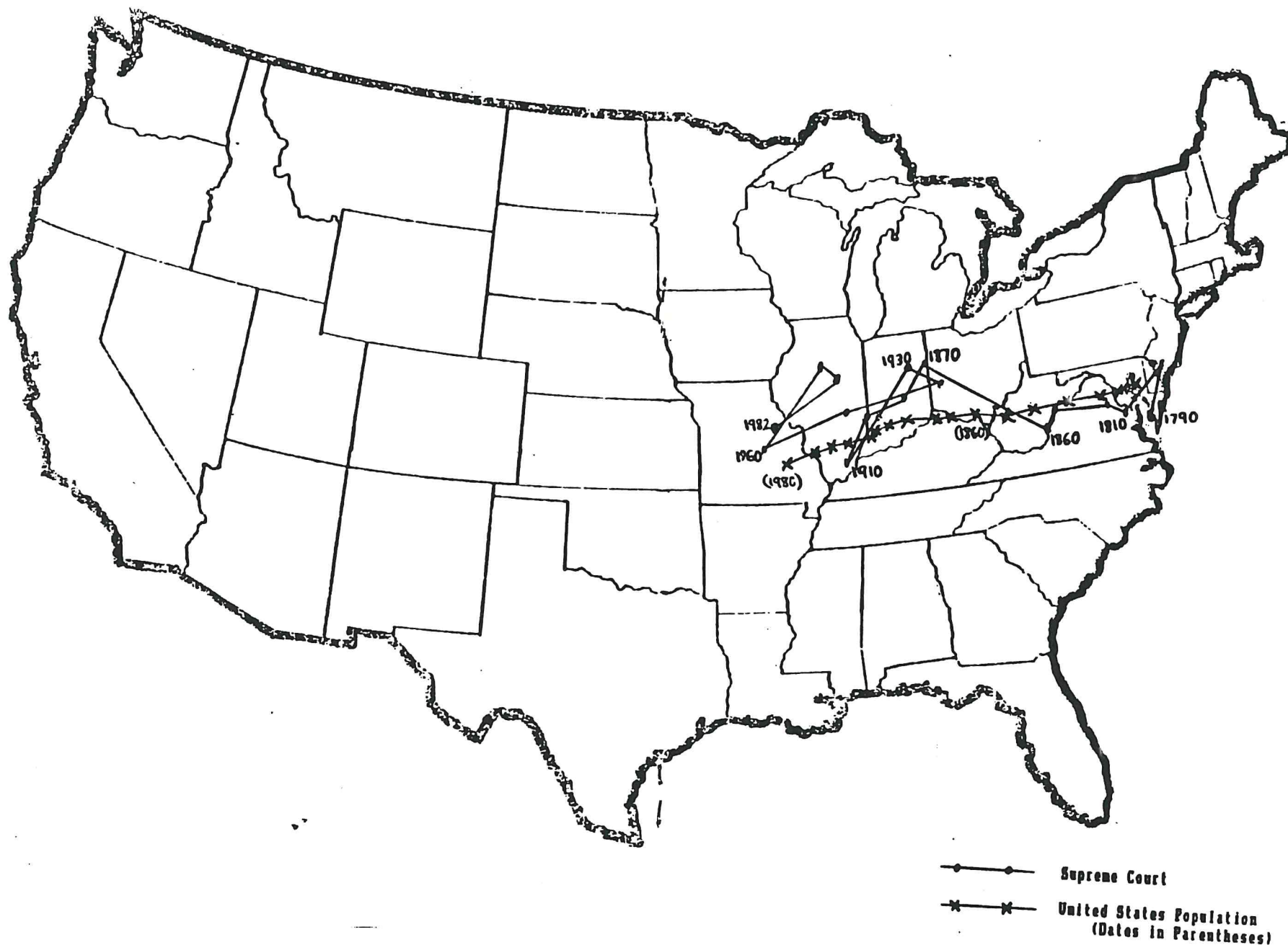


Figure 1
 Mean Residences of Supreme Court Justices at Time of Appointment,
 and United States Population Centers, 1790-1982

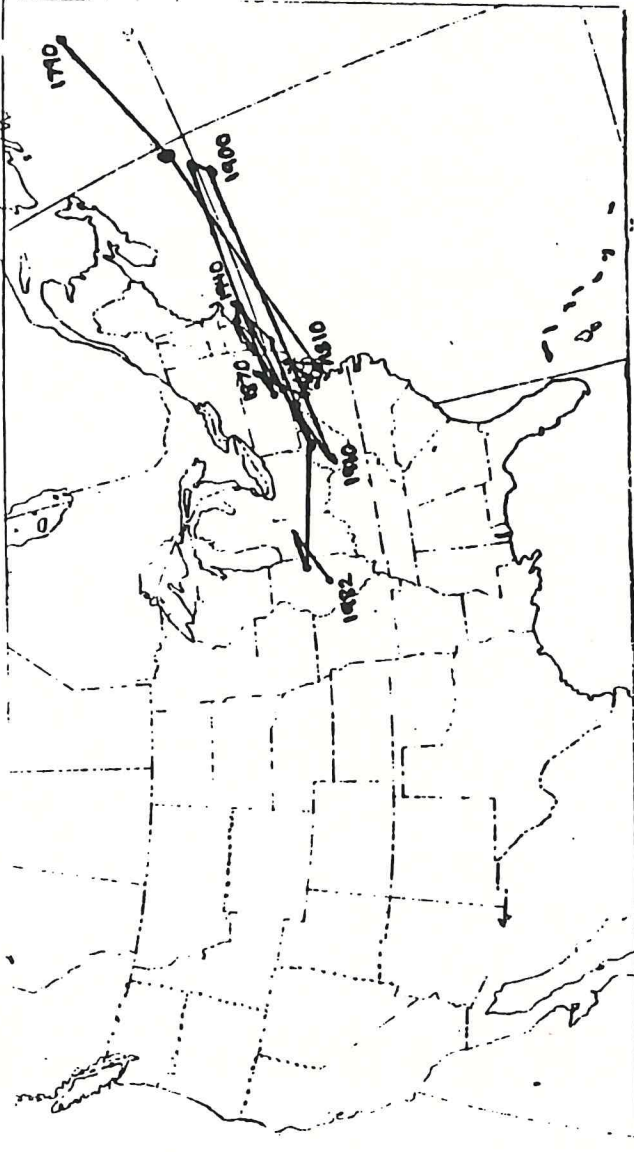


Figure 2
Mean Birthplaces of Supreme Court Justices, 1790-1982

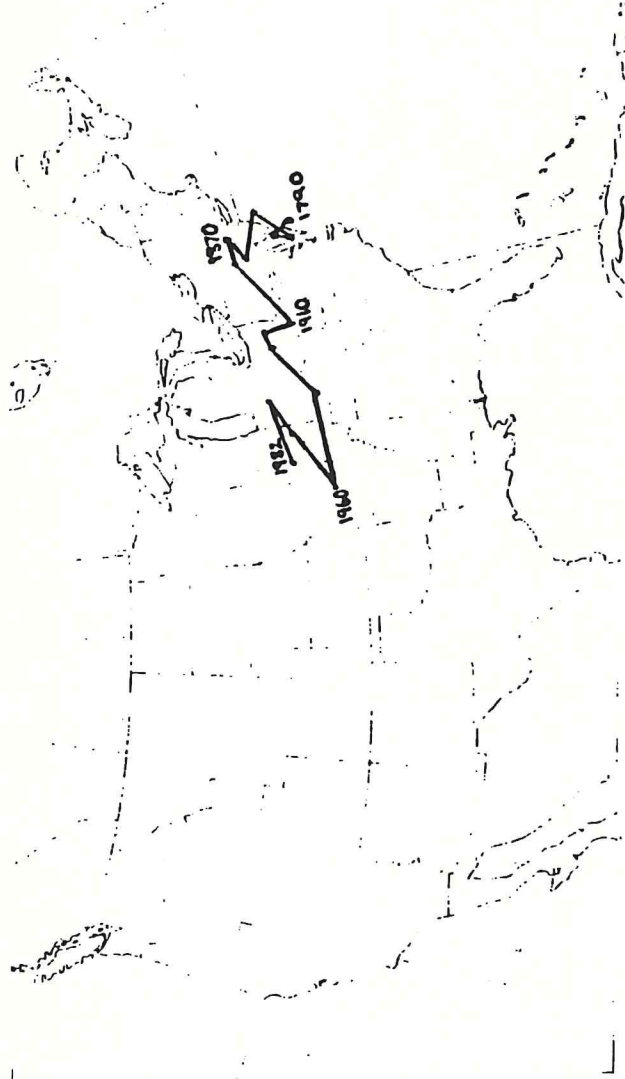


Figure 3
Mean Adjusted Birthplaces of Supreme Court Justices, 1790-1982

Rethinking *United States v. Detroit Timber & Lumber Co.*

J. David Kirkland, Jr.*

The reports of the opinions of the United States Supreme Court have been accompanied by syllabi for virtually the entire history of the Court.¹ In *United States v. Detroit Timber and Lumber Company*,² the Court announced that "the headnote is not the work of the court, nor does it state its decision. . . . It is simply the work of the reporter, gives his understanding of the decision, and is prepared for the convenience of the profession."³ The Court constantly reminds the world of this decision.⁴ Although this federal rule that "the syllabus is not the law of the case" is followed in most American jurisdictions,⁵ there are a few exceptions,⁶ Ohio⁷ being the most

* B.A., Yale College, 1980; J.D. candidate, Yale Law School, 1983.

1. See, e.g., *Talbot v. Seaman*, 5 U.S. (1 Cranch) 1, 1 (1801); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 137 (1803); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 304 (1816). These headnotes were prepared by the reporter who was not, at first, an employee of the United States but a private entrepreneur. See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834). This practice was in accord with English reporting of cases, and has left its mark in the early volumes of *United States Reports* named after their reporters.

2. *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321 (1906).

3. *Id.* at 337.

4. See, e.g., *University of Cal. Regents v. Bakke*, 438 U.S. 265, slip op. at 1 (1978); *Roe v. Wade*, 410 U.S. 113, slip op. at 1 (1973).

5. See, e.g., *Brown v. Railway Express Agency*, 134 Mo. 477, 100 A. 716 (1936); *Minnesota v. National Tea Co.*, 307 U.S. 551, 554 & n.6 (1940) (Minnesota law construed); *Burbank v. Ernst*, 232 U.S. 162, 165 (1914) (Holmes, J.) (Louisiana law construed); 20 Am. Jur. 2d Courts § 189 at 525.

6. See, e.g., *Forrester v. Forrester*, 155 Ga. 722, 726-27, 110 S.E. 373, 375 (1923); *Butt cf. Central R.R. & Banking Co. v. Wright*, 164 U.S. 327, 332-33 (1896) (U.S. Supreme Court rejects Georgia headnote).

7. *Engle v. Isaac*, 50 U.S.L.W. 4376, 4377 n.7 (April 5, 1982); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 565 & n.2 (1977); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 441-42 & n.3 (1952) (citing cases); *Hass v. State*, 103 Ohio St. 1, 7-8, 132 N.E. 158, 159-60 (1921); *State ex rel. Donahay v. Edmondson*, 89 Ohio St. 22, 30-10, 105 N.E. 269, 273 (1913) (not in syllabus, however). See also *and accompanying notes* 13-17 *infra*.

notable. Notwithstanding the long history of the majority rule, it is time to reconsider it, because changing circumstances have undercut the rationale which gave birth to the rule.

The *Detroit Lumber* decision was necessitated by an erroneous syllabus in an earlier case⁸ which did not state correctly the holding of the Court.⁹ That syllabus was prepared by the Court's reporter,¹⁰ and not by a Justice of the Court or, for that matter, any Article III judge.¹¹ To prevent the reporter from having final say on any legal question, the *Detroit Lumber* rule is mandated when a non-judicial employee prepares the syllabus.¹² This situation can be contrasted with the Ohio experience. Since 1858, a justice of the Ohio Supreme Court¹³ has prepared the syllabus, which must be drafted to the satisfaction of all justices concurring in the judgment.¹⁴ This judicial preparation lead to the current rule that the court "speaks as a court only through the syllabi";¹⁵

8. *Hawley v. Diller*, 170 U.S. 476 (1900).

9. *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337 (1906).

10. *Id.* See 20 U.S.C. § 673 (1976) (portion of reporter authorized, duties fixed); SUP. CT. R. 55(1) (clerk to furnish decisions handed down to reporter).

11. U.S. CONST. art. III, § 1, protects the independence of the federal judiciary by giving judges life tenure and preventing the reduction of their salary. See generally Neuberger, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1120-30 (1977).

12. Although the reporter can be discharged at will by the Court, 20 U.S.C. § 673(a) (1976), this extreme sanction may not serve as an effective deterrent.

13. The Ohio rule does not apply to lower Ohio courts, but only to the Ohio Supreme Court. *Royal Indem. Co. v. McFadden*, 65 Ohio App. 15, 29 N.E.2d 181 (1940); see also 14 U. CIN. L. REV. 573 (1940).

14. The Ohio rule dates to the adoption of Ohio Sup. Ct. R. VI, § Ohio St. vii (1858), which provided for the preparation of the syllabi by the court. A similar provision is now contained in OHIO REV. CODE ANN. § 25-1.20 (Page 1953). Before the promulgation of Rule VI, the syllabus was not deserving of special weight. *McGorray v. Sutter*, 80 Ohio St. 400, 409-10, 89 N.E. 10, 11 (1909) (refusing to follow syllabus of pre-Rule VI case). But preparation by the justice announcing the judgment of the court, along with the requirement that the concurring justices approve the syllabus, lead to the rule as it stands today: the syllabus is controlling, see *supra* note 7, although it must be read in light of the facts of the case and the questions before the court. See *Williamson Heater Co. v. Radich*, 120 Ohio St. 124, 190 N.E. 403 (1934); 14 Ohio Jur. 2d Courts §§ 246-249; Note, *Deceptive Certainty of the Ohio Syllabus*, 35 U. CIN. L. REV. 630, 637-43 (1966). See generally *id.* at 634-37 (history of rule).

15. *Beck v. Ohio*, 379 U.S. 89, 93 n.2 (1964) (emphasis added).

the written opinion is mere dictum.¹⁶ Because the syllabus is written and approved by the court, it is fitting that it be given special status.¹⁷

In the recent¹⁸ past it has become common for the Justices of the United States Supreme Court substantially to revise and redraft the syllabi in conjunction with writing the opinion of the Court.¹⁹ The changes made by the Justices to the reporter's draft often reflect a change in emphasis given various parts of the Court's opinion; but on some occasions a Justice may insert into the syllabus matter which he is unable to place in the opinion because the concurring Justices refuse to accept the language at issue.²⁰

While the extent of this editing is not publicly known,²¹ it is clear that the rationale for the Detroit Lumber rule is no longer valid. This compels a rejection of the rule and a rethinking of possible alternatives. The Ohio rule seems appealing; it would greatly reduce the reading required of members of the bar, which has increased dramatically as the number of clerks assigned to each Justice has grown. However, the appeal of the Ohio rule is deceptive, because the rule is based on a syllabus which a majority of the court must approve. Because at present only the Justice who drafts a United States Supreme Court opinion revises the syllabus, a rule which made the

syllabus controlling is unacceptable.²² However, a compromise between the current federal rule and the Ohio rule is obviously appropriate: the syllabus should be treated as one part of the Court's decision, not controlling but certainly not irrelevant.

16. State ex rel. Dozahey v. Edmondson, 89 Ohio St. 93, 109-10, 105 N.E. 269, 273 (1913).

17. But cf. Note, supra note 14, 35 U. CIN. L. REV. at 634-37 (recounting history of Ohio rule; concludes that point taken too far).

18. The reporter prepared the syllabus during October Term, 1930. Telephone interview with Robert W. Vales, Esq., Law Clerk to Justice O.W. Holmes, October Term, 1930 (April 27, 1982) (notes on file with Journal of Attenuated Subtleties).

19. Interview with Prof. Paul Gewirtz, Law Clerk to Justice T. Marshall, October Term, 1971 (April 22, 1982) (notes on file with Journal of Attenuated Subtleties); Interview with Prof. John C. Jeffries, Jr., Law Clerk to Justice L. Powell, October Term, 1973 (April 22, 1982) (notes on file with Journal of Attenuated Subtleties).

20. See, e.g., Michael H. v. Superior Court, 450 U.S. 464 (1981) (Rehnquist, J.). In this case, which involved an equal protection challenge to a California statutory rape which only applied to male defendants, the opinion cites both Reed v. Reed, 404 U.S. 71 (1971) ("fair and substantial relationship" test) and Craig v. Boren, 429 U.S. 190 (1977) (acknowledging a "sharper focus" when gender-based classifications are challenged). 450 U.S. at 468. The syllabus, however, cites only the less restrictive Reed standard. Id. at 464.

21. The Supreme Court is very secretive about almost all of its internal activities. See generally, R. WOODWARD & S. ARMSTRONG, THE BRETHREN (1979).

22. Cf. James, Instructions in Supreme Court Jury Trials, 1 J. ATTEN. SUBT. 5, 8 & n.17 (1982) (discussing "unarticulated yet powerful principle of equality among Justices").

The Nobility Clauses: Rediscovering the Cornerstone

Manley W. Roberts*

Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the cornerstone of republican government; for so long as they are excluded there can never be serious danger that the government will be any other than that of the people.

Alexander Hamilton¹

The framers of the United States Constitution recognized that the prohibition on titles of nobility was the fundamental source of a republican government. The prohibition appeared in the Articles of Confederation,² and the framers, making few comments but implying great reverence,³ included the prohibition in two clauses of the new Constitution (one applicable to the federal government⁴ and one applicable to the states⁵).

* A.B., University of North Carolina, Chapel Hill, 1980; J.D. candidate, Yale Law School, 1983. The author wishes to note that he is not a member of the Order of the Golden Fleece.

1. THE FEDERALIST No. 84, at 512 (A. Hamilton) (C. Rossiter ed. 1961).

2. U.S. ARTICLES OF CONFEDERATION art. VI, cl. 3.

3. "The prohibition with respect to titles of nobility is copied from the Articles of Confederation and needs no comment." THE FEDERALIST No. 44, at 283 (J. Madison) (C. Rossiter ed. 1961).

4. U.S. CONST. art. I, § 9, cl. 8: "No Title of Nobility shall be granted by the United States."

5. U.S. CONST. art. I, § 10, cl. 1: "No State shall . . . grant any Title of Nobility." The division of the prohibition into two clauses located in different parts of the Constitution has proven to be a blunder. The state version is located in the same clause as the frequently cited prohibition of impairment of contracts, making it difficult for researchers to locate headnotes pertaining to the Nobility Clause. See U.S.C.A. Const. art. I, § 10, cl. 1 (West 1981 Supp.). In this respect, at least, the Articles of Confederation were more intelligently constructed. See note 2 *supra* (federal and state prohibitions in same clause).

For two centuries the courts followed Hamilton's lead and said nothing about the Nobility Clauses.⁶ In the last two decades, however, the clauses have experienced a major renaissance, as courts have come to recognize a radical equality principle inherent in the clauses. Judges have invoked the Nobility Clauses to prevent a citizen from changing his name,⁷ to halt discrimination against illegitimates,⁸ and to cast doubt upon the constitutionality of Indian laws.⁹ Justice Stevens has championed the Nobility Clauses in the Supreme Court, authoring ringing dissents in *Fullilove v. Klutznick*¹⁰ and *Mathews v. Lucas*.¹¹

Yet the cases reveal ad hoc application of the clauses, and no scholar has developed a systematic framework for identifying violations. This Article proposes a multi-factored balancing test. The factors include: (i) whether the government has granted or recognized an actual title; (ii) whether that title

6. The only prominent cases call on the wording of the clauses to support broad generalities concerning the structure of the Constitution. See *Downes v. Bidwell*, 182 U.S. 244, 277 (1901) (Nobility Clause exemplifies a *per se* restriction on Congressional power); *Legal Tender Case*, 110 U.S. 421, 447 (1884) (Congress and states both prohibited from granting titles, unlike other prohibitions applying only to states).

7. *In re Jama*, 272 N.Y.S.2d 677 (Sup. Ct. 1966). Judge Maurice Wohl denied Robert Paul Jama's petition to change his surname to "von Jama." The court declared that for the state to authorize such a change would violate the Nobility Clause, since "von" is a prefix "occurring in many German and Austrian names, especially in the nobility." *Id.* at 678. However, Judge Wohl's reasoning was based on a xenophobic aversion to the German people, whom he described as morally reprehensible followers of "the philosophies of a monstrosity and his cohorts." *Id.* He continued: "An American should measure himself by the American standard, and paraphrasing the bold Romans of old, proudly proclaim himself *Civis Americanus Sum*." *Id.* See also Roberts, *The Sorry State of New York Name Change Law*, 1 J. ATTN. SUBT. (1982) (forthcoming).

8. *Esbra v. Norton*, 524 F.2d 9, 13 n.8 (7th Cir. 1975) (opinion of then-Circuit Judge Stevens); see also note 13 *infra*.

9. *Makah Indian Tribe v. Clallam County*, 73 Wash. 2d 677, 687 (1960) (en banc) (asking "whether the law has not conferred upon tribal Indians and their descendants what amounts [*sic*] to titles of nobility").

10. 100 S. Ct. 2750, 2803 n.1 (1980) (Stevens, J., dissenting) (affirmative action plan violates equality principle of Nobility Clause).

11. 427 U.S. 495, 522 n.3 (1976) (Stevens, J., dissenting) (discriminating against illegitimate children attacks "badge of ignobility"). Justice Stevens's argument is textually and historically unsound. The framers of the Constitution permitted certain badges of ignobility; see, e.g., U.S. CONST. art. IV, § 2, cl. 3 (states required to deliver up fugitive slaves). Bastardy, moreover, was certainly known to the founding fathers; see, e.g., F. BRODIE, THOMAS JEFFERSON: AN INTIMATE BIOGRAPHY (1976).

bears a relation to the noble orders of Europe;¹² (iii) whether the "noble" individual also receives the traditional trappings and perquisites of nobility; (iv) whether the noble receives a tenurial interest in such trappings and perquisites which clearly distinguish the noble and his progeny from the common man; and (v) whether the perquisites include civil or military power. This test would apply equally to a grant of nobility by a state or by the federal government.¹³

The effect of the test is demonstrated by application to two governmental actions which might be challenged as grants of titles of nobility. One is the policy of certain state universities to recognize an elite cadre of undergraduates. For example, the University of North Carolina officially recognizes and provides facilities for the Order of the Golden Fleece.¹⁴ The title derives directly from an order of eighteenth-century Austrian nobles, and membership insures unofficial but extraordinary influence in the University hierarchy.¹⁵ However, the University does not itself select the members; more importantly, it grants none of the trappings of nobility. Finally, the benefits of membership are not tenurial. Weighing all of these factors leads to the conclusion that official recognition of the order does not rise to the level of a constitutional violation.

By contrast, the federal government's grant of a Congressional Medal of Honor together with all its ancillary benefits does violate the Nobility Clause.

12. The framers were particularly concerned about titles bearing a relation to noble orders of Germany and England. See N. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* at 32-36 (rev. ed. 1937) (statement of Charles Pinckney).

13. One might speculate that the use of the passive voice in the federal clause, see note 4 *supra*, distinguishes it from the state clause, which uses the active voice, see note 5 *supra*. However, the Supreme Court has stated that "Congress and the States equally are expressly prohibited from . . . granting any title of nobility." *Legal Tender Case*, 110 U.S. 421, 447 (1884).

14. The University provides meeting rooms for the order, and all members are automatically invited to the annual banquet given by the Chancellor. Interview with B. Steven Toben, former head of the Order of the Golden Fleece (April 24, 1982) (notes on file with Journal of Attenuated Subtleties).

15. Order members have easy access to the Chancellor's office to express their views on university policy. Interview with Steven W. DeVine, member of the Order of the Golden Fleece (April 28, 1982) (notes on file with Journal of Attenuated Subtleties).

Although the medal does not derive explicitly from an Old World title, it does bear a resemblance to an elite military order. The medal itself is an elaborate trapping of nobility.¹⁶ Furthermore, legislation prevents both the medal and its concomitant pension from falling into the hands of common creditors.¹⁷ Most significantly, the medal brings with it a tenurial right of special access to the corridors of power: the children of medal winners may bypass the ordinary admission process and apply directly to the President for admission to the service academies.¹⁸ In sum, it is the exalting of military heroes and their families that currently poses the gravest threat to the republican form of government envisioned by the framers.

16. See 10 U.S.C. §§3741 (Army), 6241 (Navy), 8741 (Air Force) (1976) (medals authorized).

17. See, e.g., N.Y. CIV. PRAC. LAW § 520' a) (medal exempt from bankrupt's estate); 38 U.S.C. § 562(c) (1976) (pension not subject to attachment, levy, or seizure).

18. 10 U.S.C. §§4342(c) (Military Academy); 6954(c) (Naval Academy); 9342(c) (Air Force Academy) (1976).

DRAFT; December 14, 1989

Dear

This is in response to your recent letter (co-signed by ___ of your colleagues) in which you expressed concern about possible ties between Administration officials and advisory groups associated with foreign governments.

Your letter specifically inquired about the relationship between Council of Economic Advisors Chairman Michael J. Boskin and Council economist Gary R. Saxonhouse to boards associated with Japan's Ministries of Finance and International Trade and Industry. Perhaps the individual who drafted your letter was not aware that -- as recently reported by the New York Times -- that last December, before assuming his government position, Chairman Boskin resigned from his position as an associate member of an advisory group to the Institute of Fiscal and Monetary Policy of the Ministry of Finance.

As to Professor Saxonhouse, he is a part-time staff economist for the Council, who works two to three days a week. He has no responsibility for setting policy; all policy recommendations are the responsibility of the Council Chairman and other two Council members.

During the clearance process for his appointment, Professor Saxonhouse disclosed his affiliation with an advisory board to the Research Institute of International Trade and Industry (RITI), which is separate from but financed by Japan's Ministry of International Trade and Industry. RITI encourages academic research by Japanese and other researchers and publishes, in English and Japanese, a discussion paper series.

Professor Saxonhouse's advisory affiliation with RITI is unpaid, does not involve policy-making, and, in any case, has not and will not require any activity whatsoever during Professor Saxonhouse's Federal employment. In fact, the advisory board, which is made up of 22 economists from around the world, meets only once every two years. It met last before Professor Saxonhouse assumed his current position with the CEA and will not meet again until 1991, when his work for the CEA will be completed. His interaction -- prior to joining the CEA -- with the Institute included such matters as: commenting, at a public research conference, on a research paper presented by another economist; advising RITI on promising areas of economic research; and presentation, at a public conference, of a technical econometric paper.

In view of the fact that Professor Saxonhouse would have no

dealings with the Japanese government during his term on CEA staff, his minimal dealings with RITI after his term, and the non-policy-making nature of his CEA duties, CEA made the determination that no conflict of interest was posed by his continued affiliation with the RITI board. CEA stands by that determination, and on the basis of the facts presented to me, I have no reason to doubt the determination.

In considering this whole issue, it is important to recognize that Professor Saxonhouse is considered by many to be America's leading academic expert on the Japanese economy. The fact of his having provided past advice that may have in some way benefited Japan should not be cause to deny this country the benefit of his unique expertise. Indeed, many United States research agencies themselves encourage and/or fund joint cooperative research efforts involving the United States and Japan. The CEA depends for its success on its ability to hire from among the top economic talent in the United States. If all scholars who have previously provided advice to other countries were to be excluded from the pool of available talent, the CEA would be sorely handicapped.

Finally, you requested information about whether any senior level Administration officials serve in any unpaid or paid capacity for a foreign government, foreign-owned company, or foreign entity. There is no central repository for such information in the Executive Branch. You should be aware, however, that all Presidential appointees have been screened during the clearance process with a view toward ensuring that any outside affiliations are consistent with the full and proper performance of their duties.

Moreover, under Executive Order 12674, no full-time non-career Presidential appointee in the Executive Branch is permitted to have any outside earned income at all, during his or her federal service. In addition, we have enforced during the clearance process the President's general policy that full-time non-career Presidential appointees resign any positions they hold on the boards of all for-profit entities. The same is true of our clearance process for members of the White House staff. Each Executive Branch employee is also subject to 18 U.S.C. 208, which prohibits the employee from acting personally and substantially in any matter in which the employee, his or spouse or minor child, or an entity in which the employee serves as officer, director, trustee or employee, has a financial interest.

By contrast, as a matter of interest, Members of Congress and congressional staff are subject to far fewer restrictions than in the Executive Branch and have been much more free to accept outside earnings, honoraria and travel expenses from foreign sources.

In any event, Designated Agency Ethics Officials at each agency (and not the White House or the White House Counsel's Office) maintain and review the public financial disclosure reports for officials at each agency. These reports would provide more detailed information about any particular employee's outside sources of income, outside positions, and/or arrangements for employment.

I hope this has been helpful.

Sincerely,

C. Boyden Gray
Counsel to the President

Note: In letter to Kaptur, first sentence instead should refer to: "your letter to me and earlier letter to the President" instead of only "your letter to me."

THE CHAIRMAN OF THE
COUNCIL OF ECONOMIC ADVISERS
WASHINGTON

Dan Collins

December 15, 1989

MEMORANDUM FOR MICHAEL BOSKIN

FROM: STEVE LANDEFELD *SL*
SUBJECT: Titles of Nobility

Gary Saxonhouse has consulted a number of Constitutional scholars and many of them had the initial reaction that the Titles of Nobility clause in Section 8, Article 1 of the Constitution would not apply to Gary's unpaid membership on an advisory board to a part-time director of a Japanese research institute, especially given the nature of Gary's relationship with the U.S. Government and the nature of his relationship with the Japanese Government. Several felt that for this clause to be applicable would require a much broader definition than was intended in the Constitution and that invoking the clause might constitute selective application. Many of them said they would be willing to look into the issue further, particularly at the precedents that the Justice Department had cited. Among those whom Gary consulted for an initial reaction were:

John Van Dyke
Professor of Constitutional Law
University of Hawaii Law School

Lee Bollinger
Dean
University of Michigan Law School

Louis Henkin
Columbia University Law School
(Many of those consulted felt that he would be the most appropriate person to look into this matter further. He is currently out of the country, but would be willing to review the matter in more detail on Monday.)

John Armour
Private Attorney
Washington, D.C.
(He has argued 17 cases before the Supreme Court.)

Dinah Seever
Private Attorney
Michigan

Ken Greenwalt
Professor of Constitutional Law
University of Michigan

cc: Amy Schwartz

Congress of the United States
House of Representatives
Office of the Majority Leader
Washington, DC 20515-6502

December 12, 1989

Mr. C. Boyden Gray
Counsel to the President
Executive Office of the President
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. Gray:

We are deeply concerned about the declining competitiveness of the United States in the world economy. We are not better off than we were either four or eight years ago. During this decade, we have seen America's position erode from the largest creditor nation to the status of the world's largest debtor nation. We are continuing to run huge trade and current account deficits.

We must reverse this trend and reestablish America's place in the world economy. Reclaiming control of our economic destiny will require leadership and perseverance.

Given the increasing importance of trade, foreign policy and defense issues, it is vital that we have absolute confidence in the integrity of the processes through and by which decisions are made.

With this in mind, we are deeply troubled by reports that senior officials in the Administration may be serving in the dual capacity of advising the U.S. government while simultaneously providing counsel, advice or other services to foreign governments, foreign corporations or other foreign entities. For example, two officials of the Council of Economic Advisors -- Michael Boskin and Gary Saxonhouse -- have been listed as serving on boards of Japan's Ministries of Finance and International Trade and Industry, respectively. This raises serious questions about conflicts of interest. We would appreciate your comments on these apparent conflicts.

We also would appreciate your identifying those senior level officials in the Administration who serve in a dual capacity. This should include information on any individuals who serve in any capacity, either paid or unpaid, on any department, agency, board or instrumentality of a foreign government, foreign-owned company or foreign entity.

We and the President must ensure that the information and advice that we receive on important policy issues be in America's best interest.

We look forward to a prompt reply.

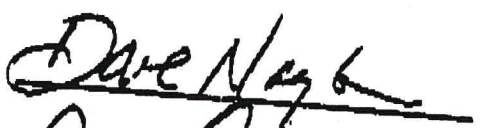
Yours very truly,

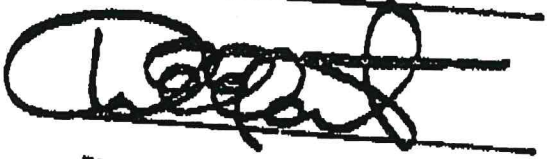














* Note: Senior level officials include: (1) the President of the United States; (2) the Vice President of the United States; (3) the head of each executive department defined in section 101 of title 5; (4) an individual who is appointed by the President or Vice President under sections 105(a)(2)(A) of title 3 and 106(a)(1)(A) of title 3 respectively; an individual serving in a position in level I, II, III, IV or V of the Executive Schedule; or, a member of a uniformed service in a pay grade of 0-7 or higher and is serving on active duty.

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P03

COMMITTEE ON
THE BUDGETCOMMITTEE ON
PUBLIC WORKS AND
TRANSPORTATION
(ON LEAVE)COMMITTEE ON
MERCHANT MARINE
AND FISHERIESSUBCOMMITTEES:
MERCHANT MARINE
PANAMA CANAL/OUTER
CONTINENTAL SHELF

COAST GUARD & NAVIGATION

SELECT COMMITTEE ON AGING

SUBCOMMITTEE ON HEALTH
AND LONG TERM CARE
TASK FORCE ON WOMEN
AND SOCIAL SECURITY

WASHINGTON OFFICE:

1810 LONGWORTH BUILDING
WASHINGTON, DC 20518
202-226-3081

DISTRICT OFFICES:

200 EAST JOFFA ROAD
TOWSON, MD 21204
301-337-72227488 GERMAN HILL ROAD
DUNDALK, MD 21222
301-346-37478 NORTH MAIN STREET
BEL AIR, MD 21014
301-878-2817

Congress of the United States

House of Representatives

Washington, DC 20515

November 21, 1989

The Honorable George Bush
President of the United States
The White House
Washington, D.C.

Dear Mr. President:

An article in New Technology Week is causing considerable consternation because it indicates that an important White House staff member is serving as an advisor to the Ministry of International Trade and Industry (MITI) in Japan.

We are writing to ask you to look into this matter because of our deep concern over the United States losing the race in the high technology field to Japan.

If there is a conflict, we urge you to act expeditiously to remove any possible embarrassment arising from this situation.

Gary Saxonhouse, a U.S. government economist to the Council of Economic Advisors' Chairman Michael Boskin, also sits on the advisory board for MITI's Research Institute. The concern is that Mr. Saxonhouse is responsible for U.S. policy recommendations regarding Japan. Therefore, a conflict of interest may exist.

It is difficult for us to understand how any U.S. government economist, making critical policy decisions on the future of this country, could participate as an advisor to any foreign government or foreign agency.

Promptness is vital on this crucial matter.

With warm regards,

Sincerely,

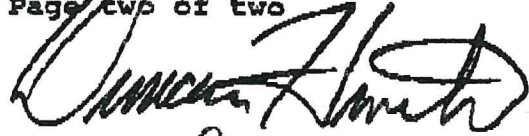
Helen Delich Bentley 23
Helen Delich Bentley, M.C.

Frank Horton 125
Frank Horton, M.C.

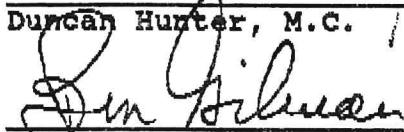
Doug Walgren
Doug Walgren, M.C. 4/18

Marcy Kaptur 201
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The Honorable George Bush
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Benjamin Gilman, M.C. 187



Norman Mineta, M.C. 266



Albert G. Bustamante, M.C. 47

DRAFT; December 14, 1989

Dear

This responds to your letter to me regarding possible ties between Administration officials and advisory groups associated with foreign governments. I am sending a similar response to each of the co-signers of your letter.

Your letter specifically inquired about the relationship between Council of Economic Advisors Chairman Michael J. Boskin and Council consultant Gary R. Saxonhouse to boards associated with Japan's Ministries of Finance and International Trade and Industry. Perhaps the individual who drafted your letter was not aware -- as already publicly reported by the New York Times in a recent article -- that last December, before assuming his government position, Chairman Boskin resigned from his position as an associate member of an advisory group to the Institute of Fiscal and Monetary Policy of the Ministry of Finance.

As to Professor Saxonhouse, he is a part-time staff economist for the Council, who works two to three days a week. He has no responsibility for setting policy; all policy recommendations are the responsibility of the Council Chairman and other two Council members.

During the clearance process for his appointment, Professor Saxonhouse disclosed his affiliation with an advisory board to the Research Institute of International Trade and Industry (RITI), which is separate from but financed by Japan's Ministry of International Trade and Industry. RITI encourages academic research by Japanese and other researchers and publishes, in English and Japanese, a discussion paper series.

Professor Saxonhouse's advisory affiliation is unpaid, does not involve policy-making, and does not require any activity whatsoever during Professor Saxonhouse's Federal employment. In fact, the advisory board, which is made up of 22 economic researchers from a range of countries, meets only once every two years. It met last before Professor Saxonhouse assumed his current position with the CEA and will not meet again until 1991, when his work for the CEA will be completed. His work for that board includes such matters as: commenting, at a public research conference, on a research paper presented by another economist; advising the director of RITI (a professor at a Japanese university) on promising areas of economic research; and presentation, at a public conference, of a paper on econometric analysis of trade structure.

In view of the minimal nature of Professor Saxonhouse's dealings

Executive Branch.

In any event, Designated Agency Ethics Officials at each agency maintain and review the public financial disclosure reports for officials at each agency. These reports would provide more detailed information about any particular employee's outside sources of income, outside positions, and/or arrangements for employment.

I hope this has been helpful.

Sincerely,

C. Boyden Gray
Counsel to the President



EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL OF ECONOMIC ADVISERS

Date: DECEMBER 13, 1989

Please deliver to: Mr. Boyden Gray

FAX number of addressee: 6279

Telephone number of addressee: _____

From: Michael J. Boskin

FAX number of sender: 6947

Telephone number of sender: 5042

Number of pages, including cover sheet: _____