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McIntosh IV

ONE HUNDRED FIFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6143

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March 13, 1998

BY FACSIMILE

The Honorable Janet Yellen
Chairman
Council of Economic Advisers
Old Executive Office Building
Washington, D.C. 20500

Dear Chair Yellen:

The Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs is conducting oversight of the Administration's global climate change policies and its initiatives to jump-start U.S. efforts to achieve the Kyoto Protocol greenhouse gas emissions reductions targets.

Pursuant to the Constitution and Rules X and XI of the United States House of Representatives, please provide the Subcommittee with detailed information in response to the questions in sections A and B of the attached inquiry, to the extent that they are applicable to your agency, and the questions in sections C through E. In responding to this inquiry, please restate each question and subpart with each of your answers, and follow the attached definitions and instructions concerning the production of records.

Please provide your responses to the written questions and requests for production of records not later than 12 noon, April 7, 1998 to the Subcommittee in Room B-377 Rayburn. In addition, please contact Larisa Dobriansky, Senior Counsel, at (202) 225-4407 as soon as practicable to coordinate the timely production of information to the Subcommittee.

Thank you in advance for your attention to this request.

Sincerely,

David McIntosh

David M. McIntosh
Chairman
Subcommittee on National Economic Growth,
Natural Resources, and Regulatory Affairs

cc: The Honorable Dan Burton
The Honorable John Tierney

Enclosure

Questions Regarding Global Climate Change Policies and Initiatives

A. Budget Information and Performance Measures

1. Please provide a table with Fiscal Year (FY) 89 - FY 99 historical budget authority for your agency for the various components of the President's "Climate Change Technology Initiative," including the previous "Climate Change Action Program/Plan" and any other new or previously authorized Research and Development (R&D) herein (except for the U.S. Global Change Research Program included in Question 3 below). For each component, please indicate each specific budget account, the specific legislative authority (including the specific statute, the section citation, and the language of the section) for the program, and a brief description of the program.

2. In Section 2 ("Programmatic Details") of OMB's February 2, 1998 handout, "Climate Change Technology Initiative - 1999 Budget Briefing Materials," please provide the following information associated with each paragraph description in which your agency has been funded or is requesting funding: the associated funding in FY 97, FY 98, and FY 99. Also, for each paragraph, for the requested funding in FY 99, please provide evidence of any accomplishments from the FY 93 - FY 97 funding, if any. Lastly, for each paragraph, please indicate any program performance measures for the requested funding, and, for each such measure, please provide data for the 1990 base year and annual data for the most recent three-year period for which data are available.

3. Please provide a table with FY 89 - FY 99 historical budget authority for your agency for the various components of the "U.S. Global Change Research Program" which were or are devoted exclusively to climate change R&D. For each component, please indicate each specific budget account, the specific legislative authority for the program (including the specific statute, the section citation, and the language of the section), and a brief description of the program.

- If funded in any of FY 93 - FY 97, please provide evidence of any accomplishments from these dollars. Also, for requested funding in FY 99, please indicate any program performance measures for the requested funding, and, for each such measure, please provide data for the 1990 base year and annual data for the most recent three-year period for which data are available.

4. Please provide a table with FY 89 - FY 99 historical budget authority for your agency for any other components of the Administration's climate change program (i.e., in addition to those included in answer to questions 1 and 2). For each component, please indicate each specific budget account, the specific legislative authority for the program (including the specific statute, the section citation, and the language of the section), and a brief description of the program.

5. For the FY 99 request, please provide a table showing what part is funding to continue initiatives funded in FY 98 or prior years and what part is brand new activity. For each component, please indicate each specific budget account, the specific legislative authority for the program (including the specific statute, the section citation, and the language of the section), and

a brief description of the program. For each brand new activity, please indicate expected requested funding annually through FY 03.

6. Please identify the full set of your agency-specific performance measures for the Administration's Climate Change proposal (besides those indicated in response to questions 2 and 3), including data for at least the 1990 base year, FY 97, FY 98, and FY 99. Also, please identify how any of your agency-specific measures (including those in response to questions 2 and 3) relate to those for any other Federal agency. Lastly, please describe any interagency efforts to identify and relate the entire set of climate change performance measures, including which agencies are involved and the names of the agency representatives.

7. Please provide a table for FY 93 - FY 97 identifying all assistance (including grants, cooperative agreements, and other transactions) and contract awards to non-profit and for-profit organizations for any climate change activity, including the date, amount of the award, name of the organization, purpose of the award, and a summary of any result(s) from the award. Please provide a copy of any final report from these awards.

B. Economic, Policy, and Legal Analyses

8. Since January 1993, has your agency participated in any interagency effort(s) relating to climate change in any of the following areas: (a) review of current legislation and/or the need for any new legislation; (b) review of current rules, any needed revisions to current rules, and/or any needed new rules; (c) production or review of any environmental data and/or analyses; (d) production or review of any cost-benefit data or analyses; and/or (e) production or review of any economic data and/or economic analyses? If so, please identify the interagency effort, its member agencies, its membership not only from your agency but also from other Federal agencies and/or any non-Federal parties, all drafts and analyses from the effort(s), and any comments from your agency on any drafts.

9. Has your agency either prepared or reviewed any environmental, cost-benefit, and/or economic data and analyses relating to the White House Initiative on Global Climate Change? If so, please provide a copy of all data, analyses, and any comments by your agency.

10. Did your agency comment on any of the draft testimony on climate change by Administration witnesses since the President's 1998 State-of-the-Union address? If so, please provide a copy of the draft testimony and any comments by your agency.

11. Has your agency suggested any alternative policy options for climate change? If so, please provide a copy of all drafts and supporting analyses and any comments from other Federal agencies on your alternatives.

12. Does your agency plan to revise any existing legislation or propose any new legislation relating to climate change (including legislation that will have the effect of reducing greenhouse

gas emissions whether or not that is the intended purpose of the legislation)? If so, please identify and describe all such initiatives, including a timetable for their development and submission to Congress. Also provide any and all legal and policy analyses regarding the applicability and availability of existing legislation to implement the Kyoto Protocol and any comments from other Federal agencies on the analyses.

13. Does your agency plan to revise any existing rules or propose any new rules relating to climate change (including regulatory actions that will have the effect of reducing greenhouse gas emissions whether or not that is the intended purpose of the regulatory action)? If so, please identify and describe all such initiatives, including any cost-benefit analysis, and a timetable for their development and promulgation. Also, provide any and all analyses that were prepared or considered of the cumulative effects on the U. S. economy and/or energy system of all or any combination of regulations that were issued since 1992, that were proposed, and that are being developed that have or will have such effects.

14. Has your agency participated in discussions or reviewed any documents relating to international emissions trading, joint implementation, and/or the Clean Development Mechanism? If so, please provide a copy of all drafts and any comment provided by your agency.

C. Dr. Yellen's Testimony before the House Commerce Committee on March 4, 1998

15. Please provide any and all analyses that support the Administration's conclusion that impacts on the U.S. economy of complying with the terms of the Kyoto Protocol "are likely to be modest." Also, explain fully how the Administration can make such a forecast responsibly when, as Dr. Yellen stated, "it is not yet possible to provide a full authoritative analysis" of the Kyoto Protocol. Among other things, Dr. Yellen noted that there is still "much that we do not know" because much has been left unresolved by this treaty (for example, implementation issues, the rules and procedures governing international emissions trading, joint implementation projects, and the Clean Development Mechanism, and future emissions reductions obligations). Moreover, Dr. Yellen asserted that, to her knowledge, " no [economic] model -- whether used inside the government or not -- has yet been set up to analyze the implications of the Kyoto Protocol, since this agreement is only a few months old. . . ."

16. In her testimony, Dr. Yellen supported the Administration's conclusion that "economic impacts are likely to be modest" with other optimistic conclusions about the effects of the Kyoto treaty "flexibility" mechanisms and U.S. electricity restructuring, and about the rate of technological progress. Please provide any and all analyses that support the following estimates:

16a. U.S. electricity restructuring "will offer approximately $20 billion in cost savings."

16b. Emissions trading among Annex I countries "can reduce the cost to the United States of achieving its targets for 2008-20012 emissions by about half."

16c. Emissions trading among a subset of Annex I countries (for example, the United States, Australia, Canada, New Zealand, and Russia) "can reduce costs by an estimated 60-70 percent." Also, based on the estimates presented in Dr. Yellen's testimony, please explain and fully document how more limited trading among this subset of countries would produce greater cost reductions than from either trading among all Annex I countries or trading with the full participation of non-Annex I countries.

16d. The Clean Development Mechanism "might shave costs by roughly another 20 to 25 percent."

16e. Overall costs "would reach roughly one tenth of one percent of projected GDP in 2010" (resource costs of achieving Kyoto targets for emissions reductions were estimated to be $7 to $12 billion per year in 2008 to 20012). Also, please explain how it is possible that compliance with the Kyoto Protocol, which has been projected by independent economists to be the most expensive environmental undertaking ever, could cost less than compliance with the recently issued U.S. air quality rules for particulate matter and ozone (the final Regulatory Impact Analysis for those rules estimated costs of $46 billion).

16f. The assumption that the rate of improvement in energy efficiency (Autonomous Energy Efficiency Index) will be 1.0 percent per year (which is greater than that assumed by the Energy Information Administration). In particular, please reconcile this assumption with the statement of the Council of Economic Advisers in its 1998 Annual Report that, "[u]ntil an emissions cap and trading system are in place, however, the economic incentive to use [technologies supported by the Administration's budget] may be low." Is the Administration assuming that such a system will be put into place in the short-term?

16g. The estimated effect on energy prices will range from "$14 to $23 per ton of carbon equivalent."

16h. "In energy-intensive sectors some employment reduction could occur, although given the very small predicted change in energy prices, impacts in most such sectors are apt to be minimal. Furthermore, a large number of jobs will be created in other sectors--many of them high-tech jobs paying high wages."

16i. As to each analysis, please indicate who prepared the analysis and provide all records of comments from other federal agencies.

17. Please provide any and all analyses that support the Administration's estimate that benefits relating to traffic congestion, highway accidents, and air pollution unrelated to climate change "could offset approximately a quarter of the resource cost of the climate change policy." As to each analysis, please indicate who prepared the analysis and provide all records of comments from other federal agencies.

18a. In her testimony, Dr. Yellen stated that, in evaluating the "likely net economic impact of the Kyoto Protocol," the Administration has "drawn upon a broad array of analytical tools" and a "wide range of models of the energy sector and economy over the next 25 years" to assess the various possible costs and non-climate benefits of the Administration's emissions reduction policy. Please specify all of the models and analytical tools that the Administration has used and describe in detail their strengths and weaknesses.

18b. According to the testimony, the Administration has relied particularly on the Second Generation Model (SGM) of Battelle Laboratories for many of its estimates. However, the Interagency Analytical Team report indicated that the SGM model "focuses on long-term transitions and measures the economy in five-year intervals," so that "it risks racing past short-term transition issues," such as GDP loss and impacts on specific industries. Specify all of the Administration's estimates that were derived by this model. Also, indicate why many of the Administration's key estimates were derived from this model? Finally, please identify the corresponding estimates derived from each model that the Administration has used in assessing the impacts of the Kyoto Protocol.

19. What are the 1990 baseline, the Fiscal Year 1997, 1998 and1998 data, and the annual outyear estimates until 2012 for the following outcome performance measures mentioned in Dr. Yellen's testimony: morbidity rates for some diseases, mortality rates for some causes, monetary damages from temperature increases, consequences from some catastrophes, traffic congestion, highway accidents, and air pollution unrelated to climate change?

20. Why does the Administration maintain that the U. S. acid rain program experience "clearly demonstrates how programs like international permit trading, joint implementation and the Clean Development Mechanism will lead firms to find cheaper ways of reducing emissions that can lead to unexpectedly low costs"? Why does the Administration believe that it is appropriate to extrapolate from that experience to the global arena? Won't the effectiveness of the international system, joint implementation, and the Clean Development Mechanism depend on different factors, such as the rules and procedures governing these mechanisms, the extent of participation by other countries, including developing countries, etc?

21a. In her testimony, Dr. Yellen stated that part of doing it smart (i.e., lowering the costs of reducing greenhouse gas emissions) under the Kyoto Protocol means "taking serious and responsible steps in the short run to prepare us to meet our obligations in the longer term." She indicated that these steps include a $6.3 billion program of tax cuts and R&D investments, industry-by-industry consultations to prepare emission reduction plans in key industrial sectors, and legislation to restructure the electrical industry. Under what authority is the Administration pursuing this unilateral executive branch course of action in furtherance of the treaty's emissions reductions targets and without Senate ratification?

21b. If the Administration is delaying the submission of the treaty to the Senate until it obtains "meaningful participation" by developing countries, doesn't that decision also require the

Administration to delay any unilateral executive branch action to address global warming until that cooperation is forthcoming?

21c. Given that the Kyoto Protocol seeks to address a global issue, isn't harmful to U.S. interests to proceed without the full participation of developing countries?

21d. Besides being unconstitutional, isn't it also premature and harmful to U.S. interests to take such unilateral actions, without ratification, when the Administration has characterized the Protocol as a "work in progress" -- a Protocol that "is not yet fully complete nor ready for the President's submission to the Senate"?

D. Cost/Benefit Analysis of the Kyoto Treaty

22a. Please provide any and all analyses that the Administration or any federal agency prepared (or had prepared) or is preparing (or is having prepared) of the costs and benefits of imposing on the U.S. the binding targets and timetables set forth in the Kyoto Protocol for reducing greenhouse gas emissions, taking into account the global implications of the way in which this agreement is structured. Also, please analyze and document the following:

22b. Whether the benefits of implementing this Protocol are justified by the costs;

22c. Evaluate the effectiveness of this agreement by comparing the marginal abatement costs of the most plausible alternative scenarios for meeting the Kyoto targets, given the way in which this agreement is structured, with the marginal costs of other reasonable alternative compliance schemes;

22d. With respect to each scenario that is analyzed, identify the assumptions used, explain any uncertainties concerning the assumptions, and examine the sensitivity of net effects to the different compliance strategies, using a range of plausible assumptions about future economic development and about fundamental climate processes;

22e. Evaluate the opportunity costs of pursuing the Administration's strategy for the abatement of greenhouse gas emissions under the terms of the treaty; and

22f. Evaluate how the benefits and burdens of complying with this treaty would be distributed on the national and household levels, describing, among other things, the disparate regional and industrial sector impacts, and the effects on different income levels.

23a. In evaluating alternative scenarios, please examine the following:

23b. Compare the economic and environmental effects of not including developing countries in the effort to reduce global emissions (with the potential for binding developed countries to even greater obligations, without limiting developing countries at all) against the effects of addressing greenhouse gas mitigation on a global scale by the international community.

23c. Compare the economic and environmental effects of complying within the timeframes set forth in the Kyoto Protocol with the effects of complying over a longer time period.

23d. Compare the impacts of reducing greenhouse gas emissions using international emissions trading, joint implementation, and the Clean Development Mechanism with the impacts of relying upon domestic emissions permit trading. In this regard, evaluate alternative international trading scenarios: trading only between Annex I countries, trading that extends to a number of "key" developing countries, and trading in which all countries are fully participating.

24. With respect to any analysis provided, please identify and explain the basis for assumptions used regarding such factors as the rate of improvement in energy efficiency, the effectiveness of market incentives in increasing the market share of fuels that emit less carbon, and economic and demographic growth. Also, explain fully any assumptions on how emissions reductions will be achieved as, for example, through the early retirement of coal plants or nuclear plant life extensions.

25. In considering the opportunity costs, evaluate the extent to which the Administration's climate change strategy will require the diversion of funds from savings and/or investments which would have provided other benefits, such as saving social security, or more funding for education, health care, etc.

26. In assessing the impacts on the U.S. of complying with the Kyoto targets and timetables, please explain in detail the potential effects on the following indicators of economic performance: gross domestic product (GDP), per capita GDP, unemployment, income and real wages, trade competitiveness, and energy prices.

27. In assessing the benefits of complying with the Kyoto treaty, please evaluate fully the potential offsetting negative effects of exempting developing countries and of "carbon leakage." Also, if the economies of developed countries experience reductions in economic growth, evaluate the impact that this will have on the ability of emerging countries with export markets to transition to more energy efficient technologies.

28. President Clinton has suggested that the U.S. economy can continue to grow under this agreement. Please indicate at what rate the Administration expects that the economy will continue to grow during the next ten to 20 years if the treaty is ratified and at what rate it is expected to grow if the treaty is not ratified.

29. Have any of the cost-benefit analyses performed by the Administration or any agency been peer-reviewed? If so, please identify the reviewers and provide their comments on all drafts of

the analyses. If not, does the Administration plan to do so? Please describe fully the steps that the Administration plans to take.

30. In connection with these cost-benefit analyses, fully explain how the baseline(s), against which costs and benefits were calculated, was determined.

31a. Please provide all records of written or oral comments from other federal agencies on each of the cost-benefit analyses that were performed.

31b. Please provide all records of comments submitted by federal agencies on Dr. Janet Yellen's draft testimony about the economics of Kyoto for the hearing before the House Commerce Committee on March 4, 1998.

32a. Given the significant economic costs projected by private sector studies, why did the Administration abandon a year and a half-long effort to develop cost estimates of the President's proposed policies to reduce greenhouse emissions?

32b. Please identify any and all private parties that are currently performing economic analyses of the Kyoto treaty or any aspect of it for the Administration. Describe their work and provide all products of their work in draft or final form.

E. International Emissions Trading

33a. Even assuming that effective rules and procedures can be developed for an international emissions trading system and for joint implementation projects and that key developing countries agree to participate, isn't there a real risk that these mechanisms could effect an enormous transfer of wealth and jobs out of this country overseas, especially to the countries of the former Soviet Union, China, India, South Korea, Brazil, and Mexico (i.e., that this system would be essentially a foreign aid program)? Some studies have estimated that more than 50% of our reductions would have to be purchased from other countries.

33b. Please provide and document estimates of the percentage of U.S. emissions reductions that might have to be purchased from other countries to minimize the costs of reducing emissions and which countries likely would be the beneficiaries.

34. What real incentives do developing countries have to participate in the international emissions trading system, which would require them to commit to mandatory reductions, when they can transfer emissions reductions credits in connection with joint implementation projects and obtain financing through the Clean Development Mechanism?

Definitions and Instructions for the Production of Records

1. When a request calls for the production of records, the Subcommittee requests all responsive records that are in the agency's possession, custody, or control through the date of the final submission of records to the Subcommittee, unless the request clearly states that the Subcommittee is only interested in records received during a particular time period.

2. Please sequentially number all records that you produce to the Subcommittee, and indicate the source of any record if the source is not accurately reflected on the record itself. Please submit all records on single-sided paper and submit an inventory of records produced if the volume is more than 100 pages.

3. To the extent practicable, please organize the records or documents in tabbed binders or folders that indicate which records are responsive to which requests for information.

4. For the purposes of this and related requests in the future, the "record" or "records" shall include any and all drafts, originals, and non-identical copies of any item whether written, typed, printed, electronically recorded, transcribed, punched, or taped, however produced or reproduced, and includes but is not limited to any writing, transcription, or recording, produced or stored in any fashion, including any and all computer entries, memoranda, notes, talking points, letters, journal entries, reports, studies, calendars, manuals, press releases, opinions, documents, analyses, messages, summaries, bulletins, e-mail messages (in hard copy and electronic forms), disks, the text of any alphanumeric messages or other electronic paging devices, briefing materials, cover sheets or routing cover sheets and any other machine readable material of any sort whether prepared by current or former officers and employees, agents, consultants or by any non-employee without limitation. "Record" or "records" shall also include redacted and unredacted versions of the same record.

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Committees
Commerce
Government Reform and Oversight

Philip M. Schiliro
Administrative Assistant

Congress of the United States
House of Representatives
Washington, DC 20515-0529

HENRY A. WAXMAN
29th District, California

April 5, 1995

The Honorable Abner J. Mikva
Counsel to the President
The White House
Washington, D.C. 20500

Dear Judge Mikva:

As you know, Representative David McIntosh has alleged that EPA Administrator Carol Browner has violated the Anti-Lobbying Act by distributing a fact sheet criticizing legislation passed by the House. As explained in your letter of March 4 to Mr. McIntosh, these allegations are groundless and, in my opinion, reckless.

I am writing to you because I now have evidence that indicates that Mr. McIntosh has engaged in precisely the same activities that he alleges violate the Anti-Lobbying Act.

The Energy and Commerce Committee's Subcommittee on Health and the Environment, which I chaired, held numerous hearings during the 102d Congress into the efforts of the Bush Administration's Council on Competitiveness to intervene in federal rulemaking actions. These hearings revealed evidence that the Council regularly intervened in federal rulemakings on behalf of corporate special interests in violation of legal and ethical constraints. As you may know, Mr. McIntosh served first as the Deputy Director and then as the Executive Director of the Council.

I have recently reviewed documents from this investigation. In so doing, I came across a press release and fact sheet issued by the Competitiveness Council under Mr. McIntosh's leadership. This press release and fact sheet harshly criticized pending federal legislation, with an obvious intent to generate opposition to the legislation.

Specifically, on April 23, 1991, the Competitiveness Council issued a press release and fact sheet on Senator Bryan's bill (S. 279) to increase motor vehicle fuel economy. The fact sheet calls S. 279 "a deadly exercise in futility." It further states that this legislation would (1) "mandate unrealistic and costly increases in Corporate Average Fuel Economy (CAFE)"; (2) "decrease highway safety" and "cause additional traffic fatalities"; (3) "take away American families' choices of safer family vehicles"; and (4) "harm U.S. competitiveness." (Exhibit 1)

There is an obvious and striking parallel between these Competitiveness Council documents and the EPA fact sheet that is the basis of Mr. McIntosh's current allegations. On March 2, 1995, Mr. McIntosh wrote Administrator Browner as follows:

> Recently, I received a copy of the attached EPA document titled "FACTS ABOUT THE CONTRACT WITH AMERICA PROVISIONS ON RISK ASSESSMENT AND REGULATORY REFORM." ... I am deeply concerned that <u>the distribution of the EPA fact sheet may be in violation of federal laws, including the criminal provisions of the Anti-Lobbying Act</u>. It seems plain that this document was designed to influence the legislative consideration of H.R. 9 in precisely the manner prohibited by the Act. (Exhibit 2)

On March 21, 1995, Mr. McIntosh sent a second letter to Administrator Browner. In a legal analysis appended to the letter, Mr. McIntosh explains his view that the Anti-Lobbying Act prohibits "<u>press releases which condemn pending legislation</u> and are intended to incite the listener or recipient to pressure Members of Congress about the legislation." (Exhibit 3)

There appears to be no difference, legal or practical, between the Competitiveness Council press release and fact sheet and the EPA fact sheet cited by Mr. McIntosh as potential criminal activity. In his words, both are "press releases which condemn pending legislation." If we accept the interpretation of the Anti-Lobbying Act that Mr. McIntosh is now using, it would appear that Mr. McIntosh and the Competitiveness Council have engaged in criminal activity.

It seems clear that Mr. McIntosh is applying a different standard to himself than to Administrator Browner. This double standard is fundamentally unfair. In effect, Mr. McIntosh is saying that the Anti-Lobbying Act should be read to prevent the expression of only those views with which he disagrees. Such censorship is abhorrent to our system of government.

For the reasons set forth in your March 4 letter, I doubt that either the Competitiveness Council press release and fact sheet or the EPA fact sheet violate the Anti-Lobbying Act. Rather, both the actions of the Competitiveness Council under Mr. McIntosh and those of EPA under Administrator Browner appear to be legitimate efforts to inform the public of Administration views on important legislation.

I remain concerned, however, that the public does not know the full extent of Mr. McIntosh's lobbying activities during his tenure with the Competitiveness Council. For instance, the public knows very little about the efforts of Mr. McIntosh and the Competitiveness Council to defeat legislation to defund the Council. Such legislation was passed by the House in 1992.

I request that you determine whether the Administration retains documents relating to the Council's activities. If such documents have been retained, I request copies of those documents relating to its efforts to influence federal legislation, such as S. 279 and the defunding legislation. If Council documents have not been retained, I request your guidance on how I may obtain copies of such documents.

Thank you for your attention to this important matter.

Sincerely,

Henry A. Waxman

Henry A. Waxman

Encls.

cc: The Honorable William F. Clinger, Jr.
The Honorable Cardiss Collins
The Honorable David M. McIntosh
The Honorable Collin C. Peterson

THE VICE PRESIDENT'S OFFICE

Office of the Press Secretary

FOR IMMEDIATE RELEASE

APRIL 23, 1991

COMPETITIVENESS COUNCIL ISSUES FACT SHEET ON SENATOR BRYAN'S CAFE BILL

Vice President Quayle, as chairman of the President's Council on Competitiveness, released a Fact Sheet today criticizing Senator Bryan's Corporate Average Fuel Economy (CAFE) bill.

"It is difficult to imagine what the Bryan bill was designed to remedy," the Vice President said in releasing the Competitiveness Council Fact Sheet. "What S. 279 will give us is more of what we need less of -- highway fatalities and serious injuries -- and less of what we need more of -- fuel savings and competitiveness."

The Fact Sheet points out that studies of passenger car crashes by the National Highway Traffic Safety Administration (NHTSA) conclude that the 1970's and early 1980's downsizing of cars results in increases of about 2,000 deaths and 20,000 serious injuries each year. NHTSA estimates that weight reductions needed to meet S. 279 could result in additional 900 to 1700 deaths to 9,000 to 17,000 injuries each year. The Fact Sheet includes expected state-by-state increases in highway fatalities each year if S. 279 were enacted.

Furthermore, the National Energy Strategy proposed by the President and the Clean Air Act will generate greater fuel savings and a cleaner environment than the Bryan bill. Finally, S. 279 will weaken U.S. competitiveness in markets in which we currently dominate and consequently threaten jobs in those sectors of the economy.

If S. 279 were presented for the President's signature, his Senior Advisers, including Transportation Secretary Skinner and Energy Secretary Watkins, have recommended that he veto S. 279.

For more information please contact Bill Burrow at (202) 456-6222.

# # #

OFFICE OF THE VICE PRESIDENT

WASHINGTON

COUNCIL ON COMPETITIVENESS FACT SHEET ON: CORPORATE AVERAGE FUEL ECONOMY (CAFE)

(April 22, 1991)

"My goal is to make travel safer, more efficient, and less expensive for the American consumer."

-- George Bush

"It is difficult to imagine what the Bryan bill was designed to remedy. What S. 279 will give us is <u>more</u> of what we want <u>less</u> of -- highway fatalities and serious injuries -- and <u>less</u> of what we want <u>more</u> of -- fuel savings and competitiveness."

-- Dan Quayle

<u>The Bryan Bill (S. 279) -- A Deadly Exercise in Futility</u>

The Bryan Bill would mandate unrealistic and costly increases in Corporate Average Fuel Economy (CAFE) standards that harm U.S. competitiveness. It would: decrease highway safety, impose high costs on car buyers, fail to address the transportation sector's near total reliance on oil, and harm U.S. competitiveness. If it were presented for the President's signature, his Senior Advisers, including Transportation Secretary Skinner and Energy Secretary Watkins, would recommend that he veto S. 279.

<u>S. 279 Would Decrease Highway Safety</u>.

- Increasing CAFE standards to levels beyond those currently attainable through improved technology means that cars must be downsized substantially.

- <u>Downsizing Causes Traffic Deaths</u>. Studies of passenger car crashes by the National Highway Traffic Safety Administration (NHTSA) conclude that the 1970s and early 1980s <u>downsizing of cars results in increases of about 2,000 deaths and 20,000 serious injuries each year</u>.

- <u>Other Studies Confirm a Negative Relationship Between Vehicle Size and Safety</u>. During the past 12 years, studies by the Office of Technology Assessment of the United States Congress, the National Safety Council, the Brookings Institution, the Insurance Institute for Highway Safety, and General Motors Research Laboratories all agreed that reductions in size and weight pose a safety threat.

- S. 279 Would Cause Additional Traffic Fatalities. Preliminary NHTSA estimates indicate that the weight reductions needed to meet S. 279's requirements could result in an additional 900 to 1,700 deaths and 9,000 to 17,000 serious injuries each year.

- All States could expect to see increased passenger highway fatalities each year if S. 279 were enacted. For example:

Arizona	13 - 25	deaths
California	91 - 171	deaths
Florida	57 - 108	deaths
Kentucky	17 - 33	deaths
Louisiana	15 - 29	deaths
Massachusetts	14 - 26	deaths
Michigan	38 - 72	deaths
Mississippi	16 - 30	deaths
Missouri	22 - 41	deaths
Montana	2 - 4	deaths
Nebraska	6 - 11	deaths
New York	44 - 82	deaths
Nevada	6 - 11	deaths
Pennsylvania	43 - 80	deaths

S. 279 Would Displace Less Oil at a Higher Cost Than Initiatives in the Clean Air Act and the National Energy Strategy.

- S. 279 is estimated to save about 1 million barrels per day in 2010. The alternative fuels provisions of the Clean Air Act and the National Energy Strategy combined are estimated to save 2.2 million barrels per day by 2010.

- It would cost more than $90 per barrel of oil (in today's dollars) for the marginal increase required by the second phase of the Bryan bill. This does not compare favorably with the cost of other actions the Administration is taking that reduce oil consumption through the Clean Air Act and the National Energy Strategy.

- For example, under Administration Clean Air Act estimates of the cost of reformulated gasoline, which is primarily intended to reduce emissions of hydrocarbons, carbon monoxide, and nitrogen oxides, the cost of oil displaced ranges between $29.40 and $54.40 per barrel.

- Other Clean Air Act initiatives, such as the allowance trading program for sulfur dioxide emissions, will displace petroleum at low cost while contributing to environmental quality.

- Vehicle and infrastructure costs for the alternative fuels programs in the National Energy Strategy analysis are estimated to cost about $12 (present value) per barrel of oil displaced through 2020. (This assumes alternative fuels are cost competitive with gasoline. If alternative fuels are not cost competitive, and therefore used less widely, oil displacement would be lower, and cost per barrel of oil displaced would be higher.)

- Even a program that compelled the use of alternative fuels having a significant cost disadvantage would displace petroleum far more cheaply than S. 279. For example, if the alternative fuel equivalent of gasoline engendered a $.50 per gallon cost penalty, a pessimistic projection, a methanol use mandate would displace oil at a cost of $33 per barrel (fixed cost of $12 per barrel plus fuel penalty cost of $21 per barrel).

- National Energy Strategy proposals outside the transportation sector, such as the removal of regulatory barriers to the approval of new natural gas pipelines, will displace petroleum at a very low cost.

<u>S. 279 Takes Away American Families' Choice of Safer Family Vehicles.</u>

- S. 279 greatly restricts individual or family choices. Parents who choose a minivan or station wagon for safety reasons or to accommodate the space needed for children are penalized by CAFE.

- Most family minivans and station wagons are substantially heavier (over 450 lbs) than the average vehicle. To meet higher CAFE standards, these vehicles will be made smaller or priced so they are unaffordable for many families. S. 279 could well eliminate the large station wagon entirely.

<u>S. 279 Would Harm U.S. Competitiveness.</u>

- S. 279 would most likely hurt the market sectors in which the U.S. predominates - - inexpensive large vehicles. Currently, U.S. companies account for about 90 percent of mid- and full-size cars and 97 percent of standard-size light trucks.

- <u>U.S. auto manufacturing job losses could be substantial</u>, depending upon the extent to which U.S. sales are affected.

EXPECTED INCREASES IN ANNUAL HIGHWAY FATALITIES DUE TO THE BRYAN BILL (S. 279)[1]

STATE	ADDITIONAL DEATHS PER YEAR
Alabama	23 - 43
Alaska	1 - 3
Arizona	13 - 25
Arkansas	12 - 22
California	91 - 171
Colorado	10 - 18
Connecticut	8 - 15
Delaware	3 - 5
Florida	57 - 108
Georgia	32 - 61
Hawaii	3 - 5
Idaho	4 - 8
Illinois	38 - 72
Indiana	22 - 42
Iowa	11 - 20
Kansas	9 - 17
Kentucky	17 - 33
Louisiana	15 - 29
Maine	4 - 8
Maryland	15 - 27
Massachusetts	14 - 26
Michigan	38 - 72
Minnesota	13 - 25
Mississippi	16 - 30
Missouri	22 - 41

STATE	ADDITIONAL DEATHS PER YEAR
Montana	2 - 4
Nebraska	6 - 11
Nevada	6 - 11
New Hampshire	4 - 8
New Jersey	18 - 34
New Mexico	8 - 14
New York	44 - 82
North Carolina	32 - 60
Ohio	40 - 75
Oklahoma	12 - 23
Oregon	12 - 22
Pennsylvania	43 - 80
Rhode Island	2 - 4
South Carolina	20 - 39
South Dakota	3 - 6
Tennessee	23 - 44
Texas	56 - 106
Utah	6 - 11
Vermont	3 - 5
Virginia	21 - 40
Washington	15 - 29
West Virginia	11 - 20
Wisconsin	19 - 36
Wyoming	2 - 3
Washington, DC	1 - 2
TOTAL	**900 - 1,700**

[1]Excludes effects on light trucks and minivans which could be substantial but have not been estimated.

WILLIAM F. CLINGER, JR., PENNSYLVANIA
CHAIRMAN

CARDISS COLLINS, ILLINOIS,
RANKING MINORITY MEMBER

ONE HUNDRED FOURTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6143
(202) 225–5074

March 2, 1995

Via facsimile 202-260-0279

The Honorable Carol M. Browner
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Re: Possible Violation of Anti-Lobbying Laws

Dear Administrator Browner:

Recently, I received a copy of the attached EPA document titled "FACTS ABOUT THE CONTRACT WITH AMERICA PROVISIONS ON RISK ASSESSMENT AND REGULATORY REFORM" (EPA fact sheet). We have learned from EPA employees in the Office of Public Affairs and the Office of Congressional and Legislative Affairs that this fact sheet was sent to over 150 non-governmental organizations, almost all of which are special interest groups or industries that EPA regulates.

As Chairman of the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, I am deeply concerned that the distribution of the EPA fact sheet may be in violation of federal laws, including the criminal provisions of the Anti-Lobbying Act, 18 U.S.C. § 1913. It seems plain that this document was designed to influence the legislative consideration of H.R. 9 in precisely the manner prohibited by the Act. Section 1913 of the United States Criminal Code provides that:

> No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or any other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress . . . .

Violation of this section is punishable by removal from office or employment, a fine, and up to one year imprisonment. Although section 1913 permits direct communications from agency officials to Members of Congress made "through proper official channels," the EPA fact sheet does not fall within this narrow exception.

Over the course of the past few days, the Subcommittee staff has been in contact with EPA employees to try to determine the extent of the problem. Initially, my staff was informed that, except for public speeches that were sent "mostly" in response to individual requests, the EPA fact sheet was the only document sent to the press or other non-governmental organizations. I now know that this is not true. Indeed, at the same time the EPA was supposedly conducting an investigation of its distribution of the EPA fact sheet, it also was distributing an EPA Environmental News Press Release dated February 28, 1995 (EPA press release).

In addition, we recently received a copy of an EPA press release concerning H.R. 9[1] dated February 9, 1995 and one concerning H.R. 450 dated February 24, 1995. We also received copies of several purported "speeches," letters, and other EPA documents opposing these and other pending bills. We were told that most of these documents were sent to the same list of outside organizations that received the EPA fact sheet. It simply is not plausible that over 150 special interest organizations simultaneously requested copies of these "speeches" and other documents, nor would that be a defense to violation of the anti-lobbying laws.

Press releases are not excluded from the coverage of the anti-lobbying laws merely because they contain the title "Statement of Carol M. Browner." Moreover, the exception in the anti-lobbying laws for direct communication with Members of Congress "through proper official channels" cannot be used as an excuse to circumvent the plain meaning of the law and mass produce copies of "official" letters. Based on the content of the EPA fact sheet and the EPA press release, the means and timing of their mass distribution, and other EPA actions, it appears that the EPA effort was carefully calculated to have the maximum impact on the legislative debate. The same appears true for many of the other documents that were delivered to us late yesterday.

Thus, I am even more concerned about the possible, continued violation of the anti-lobbying laws by EPA and about the ability of career EPA employees to provide my staff with complete information in response to my informal requests. Because of these concerns, I would like you to answer in writing the

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[1] Although the House of Representatives actually considered and engrossed H.R. 1022 in lieu of title III of H.R. 9, references in this letter and the attached addendum to H.R. 9 include references to H.R. 1022 and substitute bills for other provisions of H.R. 9.

requests for information in the attached addendum. Please answer the first four requests for information within seven days. Please answer the remaining requests within 30 days.

The possible violation of the federal criminal laws by officers and employees in the executive branch is a serious matter. It should be clear that actions by EPA or other executive agencies that appear to violate the anti-lobbying laws will be investigated by the Subcommittee and/or the General Accounting Office, and where appropriate, referred to the Attorney General for criminal investigation.

Sincerely,

David M. McIntosh
Chairman
Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs

cc: Honorable Janet Reno
Honorable Abner Mikva
Honorable John Martin

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FACTS ABOUT THE CONTRACT WITH AMERICA PROVISIONS ON RISK ASSESSMENT AND REGULATORY REFORM

H.R. 9, a new legislative proposal currently under consideration by the U.S. House of Representatives, purports to reform the regulatory process by applying sound science and risk assessment to environmental decisions so that we make most efficient use of our nation's resources for public health protection. No one could disagree with those goals, but this bill would not accomplish those goals. In fact, H.R. 9 would block the protections that Americans demand and deserve -- from safe toys to clean air, land, and water -- by complicating the very thing it claims it will reform: the federal regulatory process.

APPLYING SOUND SCIENCE TO ENVIRONMENTAL DECISIONS

The supporters of this legislation say it will apply sound science to environmental decisions. In reality, the bill relies on complex economic calculations in determining who can receive public health protections, and how much protection they can receive.

- *Fine print will roll back protection:* The fine print of the bill shows that it will effectively repeal 25 years of rules that provide our nation's public health protections. It mandates a cost/benefit balancing test, coupled with a petition process to roll back existing rules under the Clean Water Act, the Safe Drinking Water Act, the Superfund law, and the Clean Air Act, and many more.

- *Supersedes existing laws:* This cost/benefit test would supersede standards in all other laws in two ways. For existing law, it sets up a petition process through which anyone can present new data to force a rollback of the existing standards. In prospective decisions, a cost/benefit analysis and a certification of that analysis are required. But even then, no new rule to protect public health can be made without substantial evidence on the record -- and if any one piece of that conflicts with existing law, the existing law is superseded.

- If these provisions of the bill recently marked up by the House were already in effect, EPA could not have banned lead from gasoline, cancer-causing benzene from our drinking water, or dangerous pesticides like DDT -- actions that are among the most important public health protections of our time.

- *Peer review:* Instead of using impartial, scientific peer review -- as EPA does now -- this bill would add reviews by additional "expert" panels, and would allow the reviewers to include individuals or companies affected by the outcome. That's hardly impartial, and flies in the face of sound science.

- *Spending more, not less:* H.R. 9 would force all federal agencies to spend more taxpayer dollars on extensive analyses, no matter how significant or insignificant the issue. It flies in the face of advice from the National Academy of Sciences, which says that the level of assessment should be related to the magnitude of the problem.

- *Putting science in the courts:* Even though the law currently provides well-accepted rights that allow citizens to challenge public health decisions in court, H.R. 9 would add new rights so that scientific decisions could be challenged in court further, leaving environmental protections open to more lawsuits and judicial reviews. That goes against the best thinking in scientific principles and ethics and unnecessarily delays public health protection.

The National Academy of Sciences recognizes EPA as a world leader in risk assessment -- we've done thousands of them in the past 20 years. The Clinton Administration has improved science at EPA, increasing our use of impartial peer review, providing research grants to the best scientists in the U.S., and focusing on the nation's greatest public health problems.

SIMPLIFYING THE REGULATORY PROCESS

The supporters of this legislation say it will bring relief -- lower costs, less paperwork, less bureaucracy -- by simplifying the regulatory process, particularly for those affected directly by regulations. But many provisions of the bill would create a convoluted maze that would prevent Federal agencies from protecting public health, putting our actions through an intricate bureaucratic system that would add red tape and delay progress.

- *Doubles federal staff:* At a time when President Clinton is reinventing government so it can work better and cost less, H.R. 9 would, at a minimum, require EPA to double the number of Federal personnel needed to do this work -- for little benefit.

- *Adds red tape and delays:* The bill would add many new steps to the existing review and analysis process, with many options throughout for judicial review -- options that will result in a full employment act for lawyers, and will delay by months and years much-needed public health protections in all Federal agencies.

- *Stalls de-regulation:* The proposed moratorium on regulatory action would actually be counterproductive, instead of simplifying the system. It would not only delay public health protection, but would stall de-regulatory actions.

The Clinton Administration has already put in motion many significant initiatives to reinvent regulation, including the President's Executive Order on regulatory review, the National Performance Review, and EPA's Common Sense Initiative. EPA Administrator Carol M. Browner wants to work with Congress to find common sense, cost effective environmental policies that work for real people in real communities.

At a time when we're moving away from a one-size-fits-all approach in environmental protection, we don't think the American people want another rigid, bureaucratic system locked into place. As a result of H.R. 9, our efforts would be replaced by a system that is more convoluted, more expensive, more time-consuming -- and less protective of public health and the environment.

THE ANTI-LOBBYING ACT

Congressional oversight of agency lobbying is common. Countless times during the past 30 years Congress has begun inquiries into the executive branch's compliance with the Anti-Lobbying Act and similar laws that restrict the use of appropriated funds for grass roots lobbying, publicity, and propaganda activities. Many of these inquiries were later referred to the General Accounting Office (GAO), which conducted its own investigation into whether any federal laws were violated. The GAO's authoritative treatise on appropriations law describes dozens of reported GAO rulings on alleged violations of the Anti-Lobbying Act and similar laws. Indeed, several of the Anti-Lobbying Act inquiries were serious enough that they were referred to the Attorney General for a criminal investigation.

The text of the Anti-Lobbying Act. The Act permits direct communications by agency officials to Members of Congress made "through proper official channels." Section 1913 of the United States Criminal Code provides further that:

> No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or any other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress . . . .
>
> Whoever, being an officer or employee of the United States or any department or agency thereof, violates or attempts to violate this section, shall be fined nor more than $500 or imprisoned not more than one year, or both; and after notice and hearing by the superior officer vested with the power of removing him, shall be removed from office or employment.

The dual purposes of the Act. One purpose of the Act is to prevent agency officials from squandering public money in attempts to increase their budgets or protect their jobs. In a free society, the Act serves an even more important purpose of preventing executive branch agencies from using tax dollars to disseminate propaganda and "reeducate" the public about pending legislation.

What the Anti-Lobbying Act permits and prohibits. The Department of Justice's Office of Legal Counsel (OLC) and the GAO draw a distinction between direct and indirect lobbying efforts. OLC and GAO have interpreted the Act to permit several types of direct communications by agency officials to Members of Congress made "through proper official channels." However, the Act prohibits the use of any appropriated funds for indirect lobbying efforts "designed to influence **in any manner** a Member of Congress" on pending legislation. Moreover, there is a distinction that EPA intentionally blurs between public speeches intended to inform the American people about most issues, which the Act permits, and speeches or press releases which condemn pending legislation and are intended to incite the listener or recipient to pressure Members of Congress about the legislation. That is why the Subcommittee is disturbed by the EPA claims that grass roots lobbying against pending legislation (what Administrator Browner characterizes as "[k]eeping the American people informed and educated") "is an essential part of EPA's duties." The EPA is a creature of Congress and the Administrator's sole duty is to execute the law -- all of the law -- including the law against grass roots lobbying designed to thwart the will of the people.

Public officials should not attempt to evade the law. Despite the express terms of the Act that "[n]o ... money" may be used in any attempt to influence a Member of Congress "in any manner" on pending legislation, EPA asserts that the Act prohibits almost no indirect lobbying activity. For support, EPA relies on the fact that no one yet has been prosecuted for violating the Act, and that its acts were normal and customary. We simply cannot accept at face value EPA's claim that its lobbying activity was typical; our experience and the initial evidence suggests otherwise. More importantly, the American people demand a higher respect for the law from government officials than merely remaining unindicted. The criminal law is not a game. Public officials should not attempt to skirt the line or avoid the law through creative interpretation.

EPA admits that attempted "grass roots lobbying" is a crime. Even EPA admits that grass roots lobbying is prohibited by the Act in its March 13 letter. EPA relies heavily on a 1989 OLC opinion in its argument that no one at EPA could possibly have violated the law. But the 1989 OLC opinion defines "grass roots lobbying" as "communications by executive officials directed to members of the public at large, **or particular segments of the general public**, intended to persuade them in turn to communicate with their elected representatives on some issue of concern to the Executive." 13 Op. O.L.C. 361, 365 (1989) (Preliminary Print) (emphasis added). This OLC opinion refutes the notion that only grass roots lobbying directed at the general public violates the statute. The opinion also refutes EPA's suggestion that the law only prohibits explicit requests to third parties to contact Members of Congress. **Indeed, no respected authority supports that suggestion, and the language of the Act is to the contrary. Thus, any communication designed to persuade a particular segment of the general public to communicate with their elected representatives is prohibited.**

The facts the Subcommittee knew prior to our first written request for information: (1) EPA officials used taxpayer funds to create non-public advocacy material strongly condemning pending regulatory reform legislation; (2) an objective reader would interpret these documents as a call to action, or in the words of one newspaper, "a call to arms;" (3) EPA used taxpayer funds to fax these documents to more than 150 grass roots lobbying organizations and industry groups that are active in lobbying Members of Congress on these legislative proposals; (4) most of the documents, including the strongest advocacy pieces, were not solicited; (5) the mass-faxing of these documents was carefully timed to coincide with important votes in the House of Representatives; and (6) such action was consistent with a pattern of other EPA contacts with grass roots lobbying organizations to defeat the reform legislation.

The admitted facts appear to constitute a violation of the Act. The concerted EPA actions appear to fit the definition of prohibited grass roots lobbying precisely. There may be even more direct evidence of intent, but the prima facie case is strong that some EPA officials may have violated the criminal law. The Subcommittee has a duty to find out if that is the case, and if so, how widespread the problem might be.

New evidence. The Subcommittee recently has obtained additional evidence which suggests that the EPA lobbying activity may be unprecedented in its scope and design. Part of this evidence is in the few documents EPA has produced, including troubling memoranda on EPA's "outreach activities on H.R. 9." Other evidence has come from third parties. In short, there is further evidence that EPA's lobbying activity was not normal agency conduct as claimed. Administrator Browner states that she has "personally emphasized ... [the] imperative" that public officials "comply fully with both the letter and spirit of the [Anti-Lobbying] Act," and "have provided for training of [her] staff on these issues on repeated occasions." If that is true, then any violation of the letter or spirit of the Act by EPA officials was not accidental.

More Unanswered Questions. EPA's assurances that it was not attempting to influence the legislative debate in its communications with outside lobbying organizations and industry groups begs the question of what it was trying to do.

1. Why did EPA create the lobbying materials?
2. Why did EPA send the advocacy material out when it did?
3. Did EPA think its advocacy material would be ignored by the grass roots lobbying organizations?
4. Why did EPA send out its advocacy material if it thought it would be ignored?
5. Did EPA think that its advocacy material would help the lobbying groups lobby more effectively?
6. Why did EPA want to make its views on pending legislation known to industry groups that it regulates?
7. Was EPA sending implied threats to industry groups that they better support (or at least not oppose) EPA's lobbying efforts?

Other arguments by EPA about the Anti-Lobbying Act. The following responds to other erroneous arguments by EPA that no one could possibly have violated the Act:

1. The Subcommittee rejects the notion that the Act does not prohibit any lobbying activity as long as agency officials do not spend "significant" amounts of money on such activities. The legislative history EPA cites for this proposition does not support

such an interpretation. More to the point, the express terms of the Act could not be more clear on this matter. The Act begins: "[n]o part of the money appropriated by any enactment of Congress shall ...be used ...." If Congress wanted to ensure that no money would be spent on indirect lobbying activity, how could it have been more clear? As an aside, however, we wonder what amount of money EPA considers "significant." We also would like to know if this amount of money was spent on prohibited lobbying activity. In fact, this was one of the questions we posed that EPA refused to answer. (Request 7.) If EPA continues to withhold this information, GAO can conduct its own investigation into the amount of appropriated money that was spent by EPA officials on prohibited lobbying activities.

2. EPA is wrong that the Subcommittee is not entitled to information about meetings, conversations, and memoranda between EPA officials on (1) their plans to encourage outside parties to lobby Members of Congress, and (2) their plans to send advocacy material to outside lobbying organizations. The Anti-Lobbying Act is an intent crime, and such information is highly relevant to the officials' intent.

3. EPA's reasons for engaging in questionable activity are not excuses under the law or justifications for refusing the Subcommittee relevant information. EPA claims (1) that it "conducted its ...outreach in the face of sweeping pending legislation," and (2) that it "did not have the opportunity to testify on significant portions of the 'Contract with America' legislation." The Act permits many types of direct communications with Members of Congress, which EPA engaged in up until the day the House passed the regulatory reform legislation. There are no other exceptions for (1) sweeping legislation or (2) neglecting to testify.

4. Officials who imply that our investigation was "undertaken lightly or for political purposes" do not know the facts. These same officials concluded at the onset of our investigation (more than a week before EPA provided us with any response) that no wrongdoing could possibly have occurred in mass-faxing the EPA advocacy documents to over 150 grass roots organizations and industry groups on the eve of important votes in the House. That leads us to think that they reached their conclusion without troubling to learn the facts. The Subcommittee has been extremely careful in its investigation and has attempted to obtain information through informal requests. Only when that effort failed did the Subcommittee pursue other means to obtain the information. The Subcommittee intends to uncover the facts before it comes to any firm conclusion.

<u>Administrator Browner's disrespect for the law</u>. In her public statements and in letters to the Subcommittee, Administrator Browner has shown a shocking disrespect for the anti-lobbying laws, which she asserts prohibit almost nothing. The Subcommittee also is troubled by intemperate statements that the Administrator is "going to keep on doing what [she has] been doing." Such statements do not instill confidence that EPA takes the Subcommittee's investigation seriously, and it provokes suspicion in the minds of citizens who have no choice but to conform their conduct to the law.

QUESTIONS FOR THE RECORD SUBMITTED BY MR. SKAGGS

White House Office

What criteria is used in determining whether a Presidential trip is for "official business" or political/campaign purposes? Who makes this decision? Is there any independent oversight of this decision?

White House officials evaluate each proposed trip to determine whether it is official or political in nature. Among the criteria considered are the individual(s) or group(s) making the invitation, those individuals or groups meeting with the President or First Lady, and the nature of the remarks.

Following the trip, the actual schedule of the trip and remarks by the President are reviewed to ensure that events occurred as planned. This final review determines the actual designation of the trip (ie. official vs. political). Since itineraries may change once a trip begins, the final review is critical. When the trip is designated as political or mixed (official and political), a trip summary is approved and is signed-off by the appropriate official with the White House Counsel's Office, Advance Office, Political Affairs Office, and White House Operations. The Deputy Assistant to the President for White House Operations approves and signs a trip summary for trips designated as 100% official.

Regardless of the nature of the trip, certain individuals are designated as official travellers at all times. In addition, a travel authorization form for each traveller is prepared and signed by the Deputy Assistant to the President for White House Operations for each and every trip.

The General Accounting Office (GAO) periodically reviews the White House travel expenses and trip summaries for the accounting of official charges. In the past, GAO has found the methods in accounting for travel expenses to be appropriate.

Special Assistance to the President

How many of the Office's requested 26 FTEs are assigned to the Council on Competitiveness? How much are you requesting to fund these FTES?

There are no full-time staff dedicated to the Council. Two of the twenty-six FTEs requested by the Office of the Vice President would devote a substantial amount of their duty hours (approximately 70 to 80 percent) to supporting the Council. The funding required is $86,000.

Please submit a complete list of regulatory proposals or other cases in which the Council on Competitiveness has been involved. What criteria does the Council use in choosing which cases to work on?

The Council is involved in a wide range of regulatory and competitiveness issues. Among the more significant are those described in the attached fact sheets and press releases that discuss the Council's activities to date. The President has directed that the Council serve as the coordinating body for regulatory review under Executive Orders 12291 and 12498. These executive orders also contain the criteria that the Office of Management and Budget (OMB) and the Council use in reviewing regulations and discussing regulatory policy.

The Council's regulatory review activities involve working closely with OMB in carrying out that agency's regulatory review program. Normally, the items it considers are those that present difficult issues requiring Cabinet-level attention, and particularly where there is a policy disagreement among agencies who have an interest in the regulatory issues. The Council recently acted to coordinate activities during a 90-day regulatory review period for all Federal regulations. In requesting agencies to undertake this review, the President also established criteria to be used in evaluating regulations. The relevant executive orders and a copy of the President's memoranda are attached.

Please describe each regulatory proposal as it came before the Council or its staff and then describe the position advocated by the Council or its staff regarding the regulation. Finally, please describe all changes in proposed regulations, as they were finalized, reflecting the comments of the Council and its staff.

The broad scope of this request would require by its literal terms a description of every proposed regulation reviewed by the OMB since the inception of the Council in its present form on March 31, 1989. Under the process established by Executive Orders 12291 and 12498, the Office of Information and Regulatory Affairs (OIRA) reviews approximately 2,200 regulations each year, although the figure reached 2,523 in 1991. This request also encompasses various drafts of the regulations and a description of positions taken by various agencies during the review process. The process of identifying, gathering and reviewing these materials for release would impose an extraordinary burden on the limited staff resources of the Council and OMB. The Council would be happy to respond to particular questions about particular regulations that may be of interest to the subcommittee.

Please submit a copy of all written communications made by the Council or its staff to all departments and agencies on any of these proposals.

Council staff frequently meets with OIRA on regulatory issues that are being coordinated and these meetings often involve interested agency staff. No detailed records are kept of communications that occur on these occasions, particularly where oral deliberations are involved. In addition, telephone conversations take place during the review process, and no records are kept of routine communications of staff members.

Those written documents that are generated in the course of deliberations on a regulatory issue are pre-decisional and deliberative in nature. Disclosure of these communications would inhibit the candor of those participating in the process and, as a consequence, injure the quality of agency decision making. Consistent with Administration policy, these types of communications involving Cabinet-level bodies are not disclosed except in extraordinary circumstances. However, if the subcommittee has specific questions concerning particular regulatory issues, the Council will seek to provide responsive information.

For each of the regulatory cases that the Council has considered, please list all communications that the Council has received -- oral or written -- from outside interests. Please provide the Committee a copy of any written materials received.

Council staff frequently meet with interests outside the government on regulatory issues that are being coordinated. No detailed records are kept of communications that occur on these occasions, particularly where oral deliberations are involved. In addition, telephone conversations take place during the review process and no

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When the Council reviews regulations and receives communications from outside parties during that review, are the factual communications included in the rulemaking docket? Are the Council's own comments to the regulatory agency included in the docket? If not, why not?

It should be emphasized that the Council itself does not engage in rulemaking. Instead, it assists in the coordination of the Administration's review of regulations being promulgated by Executive Branch agencies and departments. The agencies and departments involved retain the statutory responsibility for making their decisions based upon the record that is developed. The Council works with them to ensure compliance with all of the relevant provisions of the Administrative Procedure Act that are required for implementing regulations. Where meetings with outside parties are involved as a result of the Vice President's policy to be available to all members of the public who wish to communicate with him or his staff on policy matters, Council staff is available to work with the agency. This helps ensure that the rules issued by the agency are based on information and data placed in the rulemaking docket where required as of the date of promulgation.

OMB's practice is to invite the rulemaking agency to all meetings that OMB staff has with outside interests. Does the Council follow this practice? If not, why not?

The practice of the Council is to invite staff of the rulemaking agency to participate in deliberations when the agency has an interest in the regulatory agency being discussed. When Council staff meets with persons outside of government, they may or may not invite representatives from various agencies. Agency representatives may not be invited on some occasions simply because it would be inconvenient or inappropriate. This practice is consistent with the general policy followed for all meetings in the Office of the Vice President.

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The practice of the Council is to invite staff of the rulemaking agency to participate in deliberations when the agency has an interest in the regulatory agency being discussed. When Council staff meets with persons outside of government, they may or may not invite representatives from various agencies. Agency representatives may not be invited on some occasions simply because it would be inconvenient or inappropriate. This practice is consistent with the general policy followed for all meetings in the Office of the Vice President.

SUMMARY OF AND COMMENTS ON VICE PRESIDENT'S RESPONSE TO REPRESENTATIVE SKAGGS

On June 8, 1992, Rep. Skaggs wrote to the Vice President requesting more detailed responses to questions about the operation of the Council on Competitiveness than had previously been provided. Mr. Skaggs requested information with respect to respect eight ares of interest to his subcommittee. On August 3, 1992, the Vice President's Office, through the Counsel to the Vice President John L. Howard, responded by essentially rejecting the validity of each and every request. A summary of and brief commentary on the letter follows.

BLOWOFF 1: REQUEST FOR COMPLETE LIST OF REGULATORY PROPOSALS REVIEWED

Mr. Skaggs asked "for a complete list of regulations in which the Council or its staff have had significant involvement," noting that a Washington Post article had quoted Council staff as saying that "'council staff limit the interventions to about 50 cases a year, tending to choose those with major economic impact'"

VP Response: "[I]t seems unproductive to engage in debates over propositions advanced by the media about the frequency and degree of Council involvement in agency regulation formulation. Moreover, the full list of regulations that were reviewed pursuant to Executive Order 12291 and coordinated by the Council can be obtained from the Office of Management and Budget docket. In any case, we hope our offer to provide additional information in response to your particular questions about particular questions is a reasonable accommodation to your interest in Council activities."

COMMENT: The request for a list of rulemakings in which the Council was "significantly involved" was ignored, apparently because Mr. Skaggs did not identify with particularity a rulemaking he was interested in. However, subsequent responses indicate that "particularity" will not in itself suffice to elicit information.

BLOWOFF 2: COMMUNICATIONS WITH OUTSIDE PARTIES

Mr. Skaggs asked for all written communications to the Council from parties outside the Government, noting that the 1986 Gramm memo imposed on OIRA the obligation to disclose such communications, and that FOIA case law has established that the FOIA exemption for "predecisional" or "deliberative process" memos did not cover communications from interested non-governmental persons.

VP Response: The response was four-fold: (a) The disclosure requirements of the Gramm Memo do not apply to the Office of the Vice President or the Council. (b) When the Council is engaged in reviewing proposed agency regulations it is not engaging in rulemaking but is rather "assisting in the coordination of the Administration's review of regulations being promulgated by Executive Branch agencies and departments" and thus is not subject to any administrative or statutory requirements for disclosure that apply to agencies involved in "rulemaking." (c) The July 14, 1992 decision of the Court of Appeals for the District of Columbia Circuit in *New York v. Reilly* legally ratifies the Council's coordinating and advisory role in the regulatory review process. (d) Under the law, citizens have a greater legal access to non-governmental communications to agencies under the FOIA than a congressional committee because the separation of powers doctrine imposes greater restrictions on Congressional access to executive branch communications ("[T]he issue here is Congressional access to Executive Branch information, not access by the public to that information by the public under the FOIA. Also, our initial response indicated Executive Branch confidentiality interests are protected by reparation of powers principles, not the FOIA.")

COMMENT: The utilization of *New York v. Reilly* evidences the true purpose of this letter: to announce that it now has legal authority to challenge is inappropriate any claim that Council interventions in agency decisionmaking, *absent any congressional restriction to the contrary*. Also, by its other reasons, it is setting up the alternate defense to pending and future court challenges that it is neither an "agency" when it is performing its regulatory review functions nor is it engaged in the rulemaking process when its engages in review activities. This is directly contrary to the holding in *Meyers v. Bush*, which is now on appeal before the D.C. Circuit, which held that the direct predecessor to the Council, Bush's Commission on Regulatory Relief, was an "agency" subject to the FOIA.

BLOWOFF 3: WRITTEN COMMUNICATIONS FROM THE COUNCIL

Mr. Skaggs asked for copies of communications between the Council on its staff and agencies whose rules were under review, noting that existing case law makes its clear that FOIA-like exemptions are not applicable to Congressional requests for access to agency information because it has "a special right of access to privileged information not shared by others," quoting from *Murphy v. Dept. of the Army* a in FOIA case, and that statutory provisions, such as that in the

Clean Air Act, require disclosure of all written communications during a rulemaking proceeding.

VP Response: (a) Since the Council has not invoked any FOIA exemption "a discussion of FOIA case law serves no useful purpose." (b) The Clean Air Act disclosure requirements don't apply to the Council because it is not on "agency." (c) The OIRA disclosure policy under the Gramm Memo is not applicable to the Council; (d) The Supreme Court's decision in *U.S. v. Nixon* cloaks such communications as a matter of executive privilege.

COMMENT: (a), (b) and (c) are simply evasions of the issue raised and have been addressed previously. *U.S. v. Nixon,* of course, is not authority for such a withholding. The Court there specifically rejected any claim of presidential executive privilege that "depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations ... Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is diminished by production of such materials." *U.S. v. Nixon,* 418 U.S. 683, 706 (1974). Moreover, the court made it clear that only communications by the President <u>himself</u> to his closest advisors would be covered by the constitutional privilege.

4: EXCLUSION OF THE RULEMAKING AGENCY FROM COUNCIL MEETINGS WITH INTERESTED PARTIES

Mr. Skaggs asked whether the Council invites agencies to meetings with outside parties regarding rulemaking proceedings that are being conducted by the particular agency, as is required by the Gramm Memo.

VP Response: There is no legal requirement applicable to the Council to invite agencies to any its meetings with outside interested parties.

COMMENT: Again, the Council divorces itself from even the minimal openness requirements that OIRA has imposed on itself.

BLOWOFF 5. INCLUSION OF COUNCIL COMMUNICATIONS IN THE DOCKET

Mr. Skaggs asked whether communications from outside parties to the Council that contain factual matter, and Council policy comments on regulations under Council review are placed in agency rulemaking dockets.

VP Response: The Council is not an "agency" and therefore does not have to comply with disclosure requirements of E.O. 12291 or the Administrative Procedure Act.

COMMENT: The "non-agency" status of the Council has obviously become a critical aspect of the Council's defensive posture which can only be trumped by legislation specifically defining it as an "agency" when it engages in regulatory review activities.

BLOWOFF 6. ALLEGATIONS OF ILLEGAL AND UNETHICAL CONDUCT

Mr. Skaggs asked for substantive comment on testimony by witnesses before his Subcommittee alleging that actions by former Council Executive Director Allan Hubbard violated conflict of interests rules, and that secret meetings held by the Council staff and representatives of regulated industries violates "the Administrative Procedure Act, the Clean Air Act, and the Executive Branch's own commitments."

VP Response: The U.S. Office of Government Ethics, (OGE) cleared Mr. Hubbard of any wrongdoing.

COMMENT: OGE did not actually rule on the propriety of Mr. Hubbard's conduct; it said that it never investigated the issue because it never had been presented with "sufficient information" to engage in such an investigation. The response does not address the question of the legality of secret meetings at all.

BLOWOFF 7: PARTICULAR QUESTIONS ABOUT PARTICULAR ALLEGATIONS

Mr. Skaggs identified a "particular" interest in four types of regulations that the Council had been specially involved with, *i.e.*, Clean Air Act, Clean Water Act, and Occupational Safety and Health Act, and the draft policy reviewed by the Council involving the Secretary of Energy's National Energy Policy, and requested that the Vice President detail "(1) contacts with outside parties, (2) descriptions of Council positions and their regulatory influence, and (3) disclosure of written communications between the Council and rulemaking agencies for each of the regulations identified."

VP Response: The question posed was not particular enough: "Although you have identified four general sets of regulations or regulatory policy in which you are interested, you have not indicated the questions you want answered concerning the items identified."

COMMENT: There is apparently no degree of particularity or specificity that will meet the threshold for Council response.

BLOWOFF 8. STAFFING LEVEL OF THE COUNCIL

Mr. Skaggs asked for identification of full time staff on the Vice President's staff who are devoted to Council regulatory review functions.

VP Response: Only the Executive Director, David McIntosh, and one other full-time staffer devote time to regulatory review activities, and then only

70-80% of their time is so devoted. Also, four other professional staff members were identified as having been "assigned" from other other agencies.

COMMENT: The $86,000 in salaries for the time devoted to Council work was the subject of recent work was the subject of recent House defunding action. It may be noted that "assignees" from other agencies to the Vice President's Office are paid fully by the *assigning* agency, as opposed to detailees who are paid, through reimbursements, by the agency to whom the people are detailed. In the most recent year for which statistics are available, FY 1988, the Vice President's Office had 8 detailees and 37 assignees. The question may be raised how many detailees and assignees are currently on board, and whether in fact only 4 assignees do Council work.

pleased that its result was unanimous, or overwhelmingly approved tonight. We hope it is a step in the right direction. We hope that it is a step to bring the parties to the negotiating table, which we all want, once the violence ceases and international borders are recognized.

HOW MANY TIMES DID CLINTON AND BUSH RAISE TAXES?

(Mr. JONES of Georgia asked and was given permission to address the House for 1 minute and to revise and extend his remarks and include extraneous matter.)

Mr. JONES of Georgia. Mr. Speaker, there's an interesting column in this morning's Post called "Anatomy of a Smear." Why, just yesterday a Member from the Republican side attacked Governor Clinton for raising taxes in Arkansas 128 times.

I imagine we'll be hearing that number a lot next week down in Houston. A whole lot. But, there's one big problem with that—it just ain't so.

A fair accounting shows 55 to 59 revenue increases in 11 years, 7 of which have expired, and 48, I repeat 48, tax cuts.

Now, by the Bush campaigns' means of reckoning, the President himself has raised taxes 133 times in just 4 years.

So, when you hear this misinformation coming from the G.O.P. convention, consider the source, and then just switch the channel to Murphy Brown.

[From the Washington Post]

ANATOMY OF A SMEAR

(By Michael Kinsley)

HOW MANY TIMES DID CLINTON—AND BUSH—RAISE TAXES?

Massachusetts Gov. William Weld repeatedly referred to the 43 tax increases Clinton signed during 11 years as governor.—USA Today

Bill Clinton as governor of Arkansas raised taxes something like 128 different times.—Dan Quayle

Well, take taxes. We're mad at George Bush because he raised taxes once. Bill Clinton has signed 121 tax increases. A hundred and twenty-one!—Rep. Newt Gingrich

Like Joe McCarthy counting communists in the State Department, Republicans have had a hard time deciding exactly how many tax increases to accuse Bill Clinton of. They have settled on the number 128, and the Bush-Quayle campaign has issued a list.

The exact number of tax increases in Arkansas while Clinton was governor is a meaningless question in any event, but the Republicans obviously think it's a telling point. As McCarthy understood, a number lends phony precision that gives weight to the general indictment—in this case, that Clinton is a "tax raiser." So the accuracy of the number is important, not for what it says about Clinton but for what it says about Bush. Bush has decided to campaign on the theme of "trust." Bear with me while we analyze the "128 tax increases," and see if you can trust George Bush.

The Bush-Quayle list is hilariously shoddy. My favorite items are three (numbers 31, 86 and 91), which aren't items at all. They are just places where the description of an alleged tax increase took more than one line. Similarly, number 78 is a verbatim repetition of number 74 (a 25-cent tax increase per gallon on "light wine"). "Tax increase" number 92 is a $1 per-conviction court costs fee imposed on criminals. One dollar, and the Bushies are complaining! These people are supposed to be tough on crime?

Item number 46 is a 1987 law lengthening the season for dog racing. This is apparently a "tax increase" on the theory that a longer season increases state gambling tax revenues. Other supposed tax increases either never actually took effect (number 71) or replaced another tax of equal size (number 117). A fuel tax increase is counted as two because it applies to both gasoline and diesel. A general booze tax increase weighs in at five if you count such categories as wine coolers separately—as they do.

Dick Alexander, an Arkansas law professor working for the Clinton campaign, figures a true count would be 55 or 59 increases in various taxes and fees while Clinton was governor, depending on how you figure. He even includes 10 the Republicans somehow overlooked.

But in the real world, as opposed to Republican propaganda fantasies, taxes go down, too. Alexander has produced a list of 48 tax cuts during Clinton's governorship. These include such George Bush favorites as tax breaks for enterprise zones and capital gains. They also include a general cut last year that reduced or eliminated income taxes on 374,000 low-income Arkansas citizens. Since seven of Clinton's 55 (or 59) tax increases have expired or been repealed, the actual number of tax "increases" and the number of tax "cuts' are about equal. If you care.

Arkansas is a very low-tax state. It ranks 49th in per capita state and local taxes and 50th in per capita expenditures. Even measuring taxes as a share of personal income, Arkansas ranks 47th.

A "Factsheet" put out by the Bush-Quayle committee augments the "128 tax increases" canard with the assertion that: "Taxes are $397.1 million higher on an annual basis than when Clinton took office." This figure reflects inflation and growth as well as real tax increases. By the same moronic calculus, federal taxes are $476.4 billion higher than when Ronald Reagan and George Bush took office.

In fact, the absurdity of this whole count-the-taxes exercise is illustrated by applying it to George Bush's tenure as president. Just one tax increase? Forget it. The notorious 1990 tax increase was 73 separate increases. And Bush signed tax bills in 1989 and 1991 as well, each one with multiple provisions. Who can forget his decision in 1989 to "limit nonrecognition treatment when securities are received in certain Section 351 transactions"? That one was a $1.4 billion tax increase over five years.

There have been dozens of federal excise tax increases during Bush's reign. For example, in 1990 he imposed a two-stage tax increase on both small and large cigars—distinct categories in the statute. By the Bush-Quayle rules, that counts as four separate tax increases.

Overall, by my count using his rules, Bush has raised taxes 133 times—more often in just four years than Clinton did in 11. And that doesn't even include increased fees for government services such as National Parks. Nor does it include criminal fines.

Every day the Bush-Quayle machine puts out stuff like this malarkey about "128 tax increases," and every day Republican sound-bite artists fan out to spread the word. The Clinton-Gore machine is no less efficient, but I believe it is less dishonest. If anyone has a counterexample, I would like to hear of it. Meanwhile, when Bush talks of "trust," I am reminded of Reagan's old mantra about negotiating arms control with the Soviets: "Trust, but verify."

QUAYLE THUMBS NOSE AT CONGRESS

(Mr. SKAGGS asked and was given permission to address the House for 1 minute and to revise and extend his remarks and include extraneous matter.)

Mr. SKAGGS. Mr. Speaker, the Quayle Council has done it again. The Council, in its imperial style, has thumbed its nose at Congress and said quite clearly, "We don't care, we don't have to—we're the Quayle Council."

For more than 3 months I waited for a response to questions submitted to the Council at an appropriations hearing on its budget. Basic questions about who staffs the Council, how they operate, and what regulations they review. The response I got back last week was nothing more than artfully written bunk—in short, they said, "Congress, what we do is none of your business, and we won't cooperate."

Why does the Council insist on keeping its actions and operations secret? Because they know that if the American people knew how the Council gives special breaks to corporate contributors and political allies, the American people just would not stand for it. This is exactly the kind of thing that breeds distrust and disgust with Government.

The Senate will soon vote on whether to eliminate funds for the Council. Congress has no business spending taxpayer dollars to fund a secret agency that's totally unaccountable to the American public. We should put this rogue operation out of business.

At this time, I am inserting into the RECORD a copy of my letter to Vice President QUAYLE, the response, and a staff analysis of how far it falls short.

HOUSE OF REPRESENTATIVES,
Washington, DC, June 8, 1992.

Hon. J. DANFORTH QUAYLE,
The White House, 1600 Pennsylvania Ave., Washington, DC.

DEAR MR. VICE PRESIDENT: After the hearing of the Subcommittee on Treasury, Postal Service, and General Government on March 17, 1992, the Subcommittee submitted several questions for the record on my behalf regarding the operations of the Council on Competitiveness, which you chair. Your office sent answers to these questions on April 29, 1992. Unfortunately, the answers submitted were in most respects not responsive or adequate.

LISTING OF REGULATIONS REVIEWED

I asked for a "complete list" of the specific regulatory proposals the Competitiveness Council has reviewed. The response failed to provide this list. Instead, the Subcommittee was given "fact sheets and press releases" that describe selective issues "among" the "wide range of regulatory and competitiveness issues" handled by the Council. However, the staff to the Competitiveness Council has told The Washington Post (Jan. 9, 1992) that they operate under a "no fingerprints" policy, under which they seek to prevent public disclosure of their intervention in important federal regulations. For instance, in one case involving regulation of airline noise discussed in the Post story, Council staff made a deliberate decision not to publicize the Council's decisive role because the issue was a "political loser." Indeed, in that story, you are said to "prefer that most of their interventions, like that on aircraft noise, leave no fingerprints," because, "in this town, especially, you don't want that to come out" (emphasis added). Given this, an attempt to limit congressional oversight to only the selected issues disclosed in press releases and fact sheets would give Congress only an unacceptably partial and misleading picture of the Council's activities. For that reason, I again ask for a complete list of the regulations in which the Council or its staff have had significant involvement, not those where the involvement has been merely peripheral. Your staff told the Post that "council staff limit the interventions to about 50 cases a year, tending to choose those with major economic impact." Identifying those cases should not be that difficult, and the Subcommittee has a right to this information.

COMMUNICATIONS WITH OUTSIDE PARTIES

I also asked for details of communications that the Council has received from outside parties on regulatory matters and for copies of all written communications received from these parties. The Council's reply stated that "Council staff frequently meet with interests outside the government on regulatory issues," but that "it is Administration policy that these types of communications are not disclosed."

My understanding, however, is that it is not Administration policy to treat communications from interested parties on regulatory matters as confidential. To the contrary, the procedures for regulatory review under Executive Order 12291 specifically provide that "written materials received from anyone not employed by the Federal Government are *made available* * * * *for review by the public.*" In the case of rules from the Environmental Protection Agency and any other Department or agency requesting similar treatment, the disclosure extends to "oral communications concerning . . . rules, e.g. meetings, telephone calls, * * * with persons who are not employees of the Federal Government" (Office of Management and Budget, "Additional Procedures Concerning OIRA Reviews" at 2, 3 (June 13, 1986) emphasis added).

There is no "pre-decisional" or "deliberative" process exception to disclosure requirements for communications with interested third parties when members of the public seek these documents. *NAACP Legal Defense Fund* v. *U.S. Dept. of Justice*, 612 F. Supp. 1143 (D.D.C. 1985); *Center for Auto Safety* v. *Dept. of Justice*, 576 F. Supp. 739 (D.D.C. 1983). There is no question that the Council is legally obliged to provide records of these communications to this subcommittee.

DESCRIPTION OF COUNCIL POSITIONS AND INFLUENCE

I asked for a description of the positions advocated by the Council or its staff during each regulatory review and the influence of these positions on the final regulations. In response, I was told that this would impose an "extraordinary burden," because it would require a description of each of the over 6,000 regulations reviewed by the Office of Management and Budget since the Council was established in March 1989. As noted above, your staff told The Washington Post that the Council examines in detail only about 50 regulations each year. It should not be an "extraordinary burden" to describe the Council's role in this limited number of regulations.

DISCLOSURE OF WRITTEN COMMUNICATIONS FROM THE COUNCIL

I asked for a copy of all written communications between the Council or its staff and rulemaking agencies on regulatory matters. The reply was that these documents cannot be disclosed because they are "predecisional and deliberative in nature."

No court has ever withheld executive branch documents from Congress on the basis of a deliberative process privilege. Indeed, the Freedom of Information Act expressly provides that the deliberative process privilege that applies when a private citizen seeks certain federal documents "is *not* authority to withhold from Congress." 5 U.S.C. sec. 522(d) (emphasis added). It is well-recognized that Congress has "a special right of access to privileged information not shared by others." *Murphy* v. *Dept. of the Army*, 612 F.2d 1151, 1155-56 (D.C. Cir. 1979.) This "special right" includes a constitutional right of access to documents sought in my request.

The Supreme Court addressed disclosure of "confidential communications between a President and his close advisors" in *United States* v. *Nixon*, 418 U.S. 683 (1974). The court held that when a presidential claim of privilege: depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. *Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is diminished by production of such materials. Id.* at 706 (emphasis added). Under this precedent, because the Council has made no claim that military, diplomatic, or national security secrets are at risk, disclosure of the documents is clearly required.

The confidentiality claim is also inconsistent with explicit statutory requirements and long-standing Administration practice. The Clean Air Act, which has been a major focus of Council intervention, expressly requires disclosure of "all written comments by other agencies" on clean air regulations. 42 U.S.C. sec. 7607(d)(4)(B)(ii). There is no question that the Council is an "agency" subject to the Act's disclosure requirements. *Meyer* v. *Bush*, Civ. No. 88-3112 (D.D.C. Sept. 30, 1991).

In addition, Administration procedures specifically provide that the Office of Information and Regulatory Affairs (OIRA), which has responsibility for White House review for the Office of Management and Budget, "will make available * * * all written correspondence concerning the draft submitted for * * * review under Executive Order No. 12291 that is *exchanged between OIRA and the agency head*" (Office of Management and Budget, *supra*, at 3 (emphasis added)).

EXCLUSION OF THE RULEMAKING AGENCY FROM MEETINGS WITH INTERESTED PARTIES

I asked whether the Council invites the rulemaking agency to meetings between Council staff and interested third parties, as is required during regulatory review under Executive Order 12291 (Office of Management and Budget, *supra*, at 3). The reply—that Council staff "*may or may not* invite representatives from various agencies" (emphasis added)—is not especially informative. It provides no explanation of the views of the Council on participation by the rulemaking agency.

At a hearing of the Health and the Environment Subcommittee of the Committee on energy and Commerce on November 14, 1991, EPA officials testified that no EPA air official had ever been invited to a meeting between Council staff and a regulated industry. Indeed, despite the Council's regular intervention in regulations implementing the Clean Air Act, EPA air officials testified that they had "no direct knowledge that such meetings have even happened" (transcript at 170). This seems to contradict the Council's response and suggests that the Council actually has a policy of excluding at least certain regulatory officials from its meetings with outside interests. I'd appreciate your clarification of this issue.

INCLUSION OF COUNCIL COMMUNICATIONS IN THE DOCKET

Finally, I asked whether factual communications received by the Council on pending regulations, and the policy comments of the Council on these regulations, are included in the rulemakings docket. The Council's answer indicates that it does not add these materials to the docket, because "the Council itself does not engage in rulemaking."

In an op-ed published in The Washington Post on December 8, 1991, you stated that, "the President and I . . . are elected by the people," while "the iron triangle—special interest groups, bureaucrats and Congressional staff—are elected by nobody." You pointed out that "Congress enacts laws, and the executive branch . . . implements them." You than concluded that "it is entirely proper that these executive branch functions *be controlled* by officials accountable to the voters and by nobody else" (emphasis added). This "control" of regulations by the Council necessarily engages the Council in the rulemaking process.

Your op-ed goes on to cite several instances of indisputable regulatory action by the Council. For instance, you concede that "the council has attempted to bring balance to our nation's 'wetlands' policy" by "putting the 'wet' back into 'wetlands'"—which is an overtly regulatory effort. You assert that "some interest groups that didn't win everything they wanted" in the 1990 Clean Air Act "are now pressuring the regulatory process to achieve what they they failed to get in Congress." You then reveal the Council's "determination" to intervene in this "regulatory process" in order to "protect the carefully considered compromise." These examples certainly demonstrate the Council's vigorous intervention in the rulemking proc

Ultimately, there is a basic logical inconsistency in the position that the Council need not comply with disclosure requirements because it is not engaged in rulemaking. The Council's role is to "serve as the coordinating body for regulatory review under Executive Order 12291." This regulatory review under Executive Order 12291 is inherently part of the rulemaking pro That is why officials at the Office of Management and Budget who are engaged in such review must follow detailed procedures for insuring that their communications become part of the public record (see Office of Management and Budget, supra). When the Council interjects itself into this process, it is necessarily interjecting itself into the regulatory process. Thus, like all others involved in the rulemaking process, the Council has an obligation to adhere to the rules for public disclosure that lie at the heart of our administrative system.

ALLEGATIONS OF ILLEGAL AND UNETHICAL CONDUCT

The failure to reply fully and candidly to the Subcommittee's questions is particularly troubling in light of the serious allegations of illegal and unethical conduct that have been raised regarding the activities of the Competitiveness Council.

At a hearing of the Health and the Environment Subcommittee on December 10, 1991, experts on legal ethics commented on several instances of unethical conduct by the Council and its staff. Professor Monroe Freedman of Hofstra University, a former chairman of the Committee on Professional Disciplinary Standards and Procedures of the Federal Bar Association, and Professor Robert Aronson of the University of Washington, who is the chair of the Professional Responsibility Section of the Association of American Law Schools, questioned the activities of Allan Hubbard, the former executive director of the Council, who participated in clean air rulemakings that directly affected an electric utility company in which he held stock and potentially affected a small chemical company which he owned. Hubbard's actions were said to be "clearly subject to criminal prosecution" (Hearings on Clean Air Act Implementation (Part 2), supra, at 349 (testimony of Professor Freedman)) and "an unethical conflict of interest" (id. at 290 (testimony of Professor Aronson)).

At the same hearing, other legal experts challenge the legality of the secret meetings held by Council staff and representatives of regulated industries. Professor Cass Sunstein of the University of Chicago, who drafted Executive Order 12291 for the Reagan Justice Department, testified that "if the Council is influencing rules on the basis of substantive presentations that are not disclosed to courts or the public, it is probably violating the Administrative Procedures Act, the Clean Air Act, and the executive branch's own public commitments" (id. at 300). Likewise, Professor Robert Percival of the University of Maryland, testified that "the activities of the Competitiveness Council represent an unprecedented intrusion into agency decisionmaking that threatens to undermine principles of separation of powers and the open model of regulatory decisionmaking embodied in the Administrative Procedures Act" (id. at 329).

Professor Freedman characterized your own role in the decision to kill an EPA proposal to recycle newspapers as "the common alley cat breed of conflict of interest," because of your personal holdings in newspaper companies and a virgin paper mill (id. at 332). Professor Aronson agreed (id.).

These allegations are serious and substantial. They demand full investigation by this Subcommittee as part of its responsibility to insure that duly appropriated funds are properly expended. Unfortunately, you have failed to respond in a manner that permits the Subcommittee to conduct this vital investigation.

PARTICULAR QUESTIONS ABOUT PARTICULAR REGULATIONS

While not answering my original questions, the Council did indicate a willingness to provide additional information in response to "particular questions about particular regulations." At this time I am able to identify a "particular" interest in the following four types of regulations: (1) the regulations reviewed by the Council under the Clean Air Act; (2) the regulations reviewed by the Council under the Clean Water Act; (3) the regulations reviewed by the Council under the Occupational Health and Safety Act; and (4) the draft policy reviewed by the Council involving the Secretary of Energy's proposed National Energy Policy.

In addition, I request again that you fully answer my inquiries regarding (1) contacts with outside parties, (2) descriptions of council positions and their regulatory influence, and (3) disclosure of written communications between the Council and rulemaking agencies for each of the regulations identified in the preceding paragraph. I would also like full answers to my questions regarding (1) listing of regulations reviewed by the Council and (2) exclusion of rulemaking agencies from Council meetings. I would also appreciate a response to the points I have raised regarding the rulemaking role of the Council.

The Supreme Court has recognized:

The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws * * *. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste. *Watkins* v. *United States*, 354 U.S. 178, 187 (1957) (emphasis added).

The matters raised in this letter are of utmost importance to the integrity of the regulatory process. I would greatly appreciate more candid and thorough responses to the questions I have raised. Please respond no later than June 22, 1992.

Thank you in advance for your attention to this request.

Sincerely yours,

DAVID E. SKAGGS.

OFFICE OF THE VICE PRESIDENT,
Washington, DC, August 3, 1992.

Hon. DAVID E. SKAGGS,
Subcommittee on Treasury, Postal Service and General Government, Committee on Appropriations, House of Representatives, Washington, DC.

DEAR CONGRESSMAN SKAGGS: This responds to your letters to the Vice President concerning the President's Council on Competitiveness and questions you have raised about information we provided to you in earlier inquiries. We have attempted to respond to your questions according to the categories of issues you have identified as needing additional explanation.

COMPLETE LIST OF REGULATORY PROPOSALS REVIEWED

In connection with your criticism that we did not furnish a "complete list" of all regulations in which the Council has been involved, you have cited an article in The Washington Post and rely upon the newspaper as authority for your proposition that Council staff has influenced the outcome of certain regulations without leaving "fingerprints" on the regulatory process. According to the newspaper, interventions by staff are limited to about 50 cases a year. Thus, the article also serves as the basis for your view that providing a complete list of regulations in which the Council or its staff had "significant involvement" should not be that difficult. The same argument is applied to disclosure of what positions were advocated by the Council or its staff during each regulatory review and how these positions influenced the final regulation.

Although the cited article did contain a conclusion containing the number of "interventions" you have referenced, the Vice President also declined to provide a specific number. Under the circumstances, it seems unproductive to engage in debates over propositions advanced by the media about the frequency and degree of Council involvement in agency regulation-formulation. Moreover, the full list of regulations that were reviewed pursuant to Executive Order 12291 and coordinated by the Council can be obtained from the Office of Management and Budget docket.

In any case, we hope our offer to provide additional information in response to your particular questions about particular regulations is a reasonable accommodation to your interest in Council activities.

In an additional attempt to be responsive to your request, we are enclosing a letter that was sent to Chairman Conyers of the Committee on Government Operations identifying some of the regulatory issues in which the Council participated. We are also furnishing you a letter from the Office of White House Counsel to Chairman Waxman of the House Committee on Energy and Commerce. That letter addresses certain conflict of interest allegations concerning Council activities of Allan B. Hubbard, former Executive Director.

COMMUNICATIONS WITH OUTSIDE PARTIES

You again request details of communications that the Council had with outside parties on regulatory matters and ask for copies of all written communications received from these parties. You maintain that it is not Administration policy to treat communications from interested parties as confidential; that this is so because Executive Order 12291 specifically provides that such written materials will be made available for review by the public. You point out, as well, that when EPA rules are involved, even oral communications concerning rules are available for review when made by persons who are not Federal employees. Finally, you have cited two Federal district court decisions from the District of Columbia for the proposition that there is no "pre-decisional" or "deliberative" process exception to disclosure requirements for communications with interested third parties when members of the public seek these documents.[1]

It is correct that communications from outside parties concerning rulemakings are made available to the public as part of the Office of Information and Regulatory Affairs (OIRA) review policy under Executive Order 12291. However, that policy applies to OIRA review and not the Office of the Vice President or the Council. In any event, the Council's activities in the regulatory arena are fully consistent with those provisions. As we emphasized in our earlier response, the Council itself does not engage in rulemaking as part of its participation in the regulatory process. Instead, it assists in the coordination of the Administration's review of regulations being promulgated by Executive Branch agencies and departments. As required by statute, agencies and departments remain responsible for making their decisions based upon the record that is developed. Whether the rules pertain to EPA or another agency, Council staff assist the agencies to ensure that the rules issued are based on information placed in the rulemaking docket and not based on information presented only to the Council staff or its members.

The process of Council participation in agency rulemaking was recently examined by the D.C. Circuit of the U.S. Court of Appeals in State of New York and State of Florida versus EPA, et al. (July 14, 1992). The plaintiffs had claimed that EPA acted improperly in relying on the opinion of the Council rather than exercising its own expertise. The court held, however, that the Council's role was appropriate and clearly rejected the plaintiffs' contentions that Council involvement somehow tainted the rulemaking process: "(t)he fact that EPA reevaluated its conclusions in light of the Council's advice * * * does not mean that EPA failed to exercise its own expertise in promulgating the final rule."

You have stated that there is no "predecisional" or "deliberative" process exception to disclosure requirements concerning government communications with outside parties when members of the public seek these documents. However, the issue here is Congressional access to Executive Branch information, not access by the public to that information under the FOIA. Also, our initial response indicated Executive Branch confidentiality interests that are protected by separation of powers principles, not the FOIA. For these reasons, we believe the FOIA is irrelevant to this discussion.

[1] *NAACP Legal Defense Fund* v. *U.S. Dep't of Justice*, 612 F. Supp. 1143 (D.D.C. 1985); *Center for Auto Safety* v. *Dep't of Justice*, 576 F. Supp. 739 (D.D.C.

Requiring disclosure of all communications received by the Council from outside the government during the regulatory review process would substantially impair the ability of the President and his principal advisors to receive confidential advice from private citizens. Again, this does not mean that we would not respond to any particular questions you have concerning the Council's role in coordinating specified regulations.

DISCLOSURE OF WRITTEN COMMUNICATIONS FROM THE COUNCIL

You have repeated your request for a copy of all written communications between the Council or its staff and rulemaking agencies on regulatory matters. You have again contended that these records cannot be withheld even if they are pre-decisional and deliberative in character. You note that the FOIA specifically provides that the deliberative process privilege applicable when a citizen seeks agency records is not authority to withhold information from Congress. However, no exemption under the FOIA is invoked as authority to deny records you have requested so a discussion of FOIA case law serves no useful purpose.

Citing provisions of the Clean Air Act does not strengthen the argument that Council records of communications must be placed in the public docket in the course of rulemaking. Although the Clean Air Act, as amended, provides by section 307(d)(4)(B)(ii) and EPA policy that agency comments be placed in the public docket, EPA does not consider various White House components and entities "agencies" for purposes of that section. As we have noted previously, whatever policy may be followed by OIRA does not necessarily extend to White House components or bind those components as Administration policy.

Requiring disclosure of all written communications by the Council or its staff would severely encroach upon the President's constitutional authority to protect the confidentiality of Executive Branch deliberations. A unanimous Supreme Court in *United States* v. *Nixon*, 418 U.S. 683, 708 (1974) found that the deliberative process privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." The Court recognized that "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Ibid.*

EXCLUSION OF THE RULEMAKING AGENCY FROM COUNCIL MEETINGS WITH INTERESTED PARTIES

You have noted that EPA officials have testified that "no EPA air official had ever been invited to a meeting between Council staff and a regulated industry." That observation is not true; moreover, it is irrelevant because there is no legal requirement that agencies or particular agency employees be invited to meetings between outside parties and the Council.

INCLUSION OF COUNCIL COMMUNICATIONS IN THE DOCKET

You have pointed to an "op-ed" piece in The Washington Post by the Vice President describing Council involvement in coordination of regulations. In your view, this points out a "basic logical inconsistency" in the Council's position that it need not comply with disclosure requirements under E.O. 12291. There is no logical inconsistency between Council participation in the process as coordinator of Administration policy and not applying Administrative Procedures Act requirements applicable to communications between "agencies" and outside parties to that participation. The Council is not an "agency" and, therefore, the APA and E.O. 12291 procedures are not applicable.

ALLEGATIONS OF ILLEGAL AND UNETHICAL CONDUCT

Your letter indicates particular concern about non-responsiveness in light of what you have characterized as "serious allegations of illegal and unethical conduct" that have been raised about Mr. Hubbard and staff of the Competitiveness Council. The foundation for these allegations is apparently testimony by certain persons before your subcommittee.

Those who testified before the subcommittee—not one of which could claim experience with Federal ethics statutes—were able to postulate violations of criminal law without having conducted any inquiry concerning the underlying facts giving rise to the alleged violations. Simply put, they were building theoretical cases based on hypothetical facts. Moreover, these witnesses had no authority to conclude that a criminal law may have been violated.

The U.S. Office of Government Ethics (OGE), the very agency with authority to provide guidance on Executive Branch ethics laws, concluded that the Office had not investigated Mr. Hubbard's activities nor asked anyone else to do so, either before or after the issuance of his waiver, because OGE "had no reason to question his activities before it was issued nor have we seen or heard sufficient information that would lead us to believe that he has engaged in any prohibited activities since its issuance." In reference to comments by one of the witnesses and the allegations concerning Mr. Hubbard, the Director of OGE noted:

Before an individual's reputation is sullied by accusations of criminal conduct, great care should be exercised to ascertain the pertinent facts and apply them to the applicable statute with an understanding of the letter and spirit of the law. Unfortunately, these time-honored principles have been violated in Mr. Hubbard's case.

We are enclosing a copy of OGE's letter containing the above commentary.

PARTICULAR QUESTIONS ABOUT PARTICULAR ALLEGATIONS

We hope this additional explanation of our position is responsive to your request for further information on Council activities. Although you have identified four general sets of regulations or regulatory policy in which you are interested, you have not indicated the questions you want answered concerning the items identified. As in the past, we are prepared to work with you concerning reasonable requests for information involving specific questions on the Administration's position on specific regulations that were coordinated by the Council as part of the rulemaking process.

STAFFING LEVEL OF THE COUNCIL

In a separate letter, you have requested clarification of the staffing level of the Council. Your questions for the record in connection with appropriations requests for the Executive Office of the President included an inquiry regarding how many of the Office of the Vice President's requested 26 FTEs were assigned to the Council and how much we were requesting to fund the FTEs. We responded:

There are no full-time staff dedicated to the Council. Two of the twenty-six FTEs requested by the Office of the Vice President would devote a substantial amount of their duty hours (approximately 70 to 80 percent) to support the Council. The funding is $86,000.

The Council has six members, the Secretary of the Treasury, the Attorney General, the Secretary of Commerce, the Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisers, and the Chief of Staff to the President as an ex officio member. The Vice President is Chairman of the Council.

The Council is currently supported by a staff, headed by an Executive Director, David McIntosh. Mr. McIntosh and another full-time staff member paid from the Executive Office of the President, Office of the Vice President, appropriation devote approximately 70 to 80 percent of their duty hours to Council-related functions.

Four professional staff members who assist the Council by performing functions related to the mission of their agencies are currently assigned full-time from other agencies. Two of the staff members are from the Department of Health and Human Services and provide assistance with health care and biotechnology issues, and another from the Department of Education assists with issues relating to that agency; the fourth staff member is from the Department of Justice and assists with legal, environmental and regulatory matters. The Council also receives secretarial assistance and support services from employees assigned to the Office of the Vice President.

We hope this information is responsive to your questions about Council staff.

Sincerely,

JOHN L. HOWARD,
Counsel to the Vice President.

SUMMARY OF AND COMMENTS ON VICE PRESIDENT'S RESPONSE TO REPRESENTATIVE SKAGGS

On June 8, 1992, Rep. Skaggs wrote to the Vice President requesting more detailed responses to questions about the operation of the Council on Competitiveness than had previously been provided. Mr. Skaggs requested information with respect to eight areas of interest to his subcommittee. On August 3, 1992, the Vice President's Office, through the Counsel to the Vice President John L. Howard, responded by essentially rejecting the validity of each and every request. A summary of and brief commentary on the letter follows.

BLOWOFF 1: REQUEST FOR COMPLETE LIST OF REGULATORY PROPOSALS REVIEWED

Mr. Skaggs asked "for a complete list of regulations in which the Council or its staff have had significant involvement," noting that a Washington Post article had quoted Council staff as saying that "council staff limit the interventions to about 50 cases a year, tending to choose those with major economic impact.".

VP Response: "[I]t seems unproductive to engage in debates over propositions advanced by the media about the frequency and degree of Council involvement in agency regulation formulation. Moreover, the full list of regulations that were reviewed pursuant to Executive Order 12291 and coordinated by the Council can be obtained from the Office of Management and Budget docket. In any case, we hope our offer to provide additional information in response to your particular questions about particular regulations is a reasonable accommodation to your interest in Council activities."

Comment: The request for a list of rulemakings in which the Council was "significantly involved" was ignored, apparently because Mr. Skaggs did not identify with particularity a rulemaking he was interested in. However, subsequent responses indicate that "particularity" will not in itself suffice to elicit information.

BLOWOFF 2: COMMUNICATIONS WITH OUTSIDE PARTIES

Mr. Skaggs asked for all written communications to the Council from parties outside the Government, noting that the 1986 Gramm memo imposed on OIRA the obligation to disclose such communications and that FOIA case law has established that the FOIA exemption for "predecisional" or "deliberative process" memos did not cover communications for interested non-governmental persons.

VP Response: The response was four-fold: (a) The disclosure requirements of the Gramm Memo do not apply to the Office of the Vice President or the Council. (b) When the Council is engaged in reviewing proposed agency regulations it is not engaging in rulemaking but is rather "assisting in the coordination of the Administration's review of regulations being promulgated by Executive Branch agencies and departments" and thus is not subject to any administrative or statutory requirements for disclosure that apply to agencies involved in "rulemaking." (c) The July 14, 1992 decision of the Court of Appeals for the District of Columbia Circuit in New York versus Reilly legally ratifies the Council's coordinating and advisory role in the regulatory review process. (d) Under the law, citizens have a greater legal access to nongovernmental communications to agencies under the FOIA than a congressional committee because the separation of powers doctrine imposes greater restrictions on Congressional access to executive branch communications ("[T]he issue here is Congressional access to Executive Branch information, not access by the public to that information under the FOIA. Also, our initial response indicated Executive Branch confidentiality interests are protected by separation of powers principles, not the FOIA.")

Comment: The utilization of New York versus Reilly evidences the true purpose of this letter: to announce that it now has legal authority to challenge any claim that Council interventions in agency decisionmaking are improper, absent any congressional restriction to the contrary. Also, by its other reasons, it is setting up the alternate defense to pending and future court challenges that it is neither an "agency" when it is performing its regulatory review functions nor is it engaged in the rulemaking process when it engages in review activities. This is directly contrary to the holding in Meyers versus Bush, which is now on appeal before the D.C. Circuit, which held that the direct predecessor to the Council, Bush's Commission on Regulatory Relief, was an "agency" subject to the FOIA.

BLOWOFF 3: WRITTEN COMMUNICATIONS FROM THE COUNCIL

Mr. Skaggs asked for copies of communications between the Council and its staff and agencies whose rules were under review, noting that existing case law makes it clear that FOIA-like exemptions are not applicable to Congressional requests for access to agency information because it has "a special right of access to privileged information not shared by others," quoting from Murphy versus Dept. of the Army in FOIA case, and that statutory provisions, such as that in the Clean Air Act, require disclosure of all written communications during a rulemaking proceeding.

VP Response: (a) Since the Council has not invoked any FOIA exemption "a discussion of FOIA case law serves no useful purpose." (b) The Clean Air Act disclosure requirements don't apply to the Council because it is not on "agency." (c) The OIRA disclosure policy under the Gramm Memo is not applicable to the Council; (d) The Supreme Court's decision in U.S. versus Nixon cloaks such communications as a matter of executive privilege.

Comment: (a), (b) and (c) are simply evasions of the issue raised and have been addressed previously. U.S. versus Nixon, of course, is not authority for such a withholding. The Court there specifically rejected any claim of presidential executive privilege that "depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations . . . Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is diminished by production of such materials." U.S. versus Nixon, 418 U.S. 683, 706 (1974). Moreover, the court made it clear that only communications by the President himself to his closest advisors would be covered by the constitutional privilege.

BLOWOFF 4: EXCLUSION OF THE RULEMAKING AGENCY FROM COUNCIL MEETINGS WITH INTERESTED PARTIES

Mr. Skaggs asked whether the Council invites agencies to meetings with outside parties regarding rulemaking proceedings that are being conducted by the particular agency, as is required by the Gramm Memo.

VP Response: There is no legal requirement applicable to the Council to invite agencies to any of its meetings with outside interested parties.

Comment: Again, the Council divorces itself from even the minimal openness requirements that OIRA has imposed on itself.

BLOWOFF 5. INCLUSION OF COUNCIL COMMUNICATIONS IN THE DOCKET

Mr. Skaggs asked whether communications from outside parties to the Council that contain factual matter, and Council policy comments on regulations under Council review are placed in agency rulemaking dockets.

VP Response: The Council is not an "agency" and therefore does not have to comply with disclosure requirements of E.O. 12291 or the Administrative Procedure Act.

Comment: The "non-agency" status of the Council has obviously become a critical aspect of the Council's defensive posture which can only be trumped by legislation specifically defining it as an 'agency" when it engages in regulatory review activities.

BLOWOFF 6. ALLEGATIONS OF ILLEGAL AND UNETHICAL CONDUCT

Mr. Skaggs asked for substantive comment on testimony by witnesses before an Appropriations Subcommittee alleging that actions by former Council Executive Director Allan Hubbard violated conflict of interests rules, and that secret meetings held by the Council staff and representatives of regulated industries violates "the Administrative Procedure Act, the Clean Air Act, and the Executive Branch's own commitments."

VP Response: The U.S. Office of Government Ethics, (OGE) cleared Mr. Hubbard of any wrongdoing.

Comment: OGE did not actually rule on the propriety of Mr. Hubbard's conduct; it said that it never investigated the issue because it never had been presented with "sufficient information" to engage in such an investigation. The response does not address the question of the legality of secret meetings at all.

BLOWOFF 7: PARTICULAR QUESTIONS ABOUT PARTICULAR ALLEGATIONS

Mr. Skaggs identified a "particular" interest in four types of regulations that the council had been specially involved with, i.e., Clean Air Act, Clean Water Act, and Occupational Safety and Health Act, and the draft policy reviewed by the Council involving the Secretary of Energy's National Energy Policy, and requested that the Vice President detail "(1) contacts with outside parties, (2) descriptions of Council positions and their regulatory influence, and (3) disclosure of written communications between the Council and rulemaking agencies for each of the regulations identified."

VP Response: The question posed was not particular enough: "Although you have identified four general sets of regulations or regulatory policy in which you are interested, you have not indicated the questions you want answered concerning the items identified."

Comment: There is apparently no degree of particularity or specificity that will meet the threshold for Council response.

BLOWOFF I. STAFFING LEVEL OF THE COUNCIL

Mr. Skaggs asked for identification of full time staff on the Vice President's staff who are devoted to council regulatory review functions.

VP Response: Only the Executive Director, David McIntosh, and one other full-time staffer devote time to regulatory review activities, and then only 70–80% of their time is so devoted. Also, four other professional staff members were identified as having been "assigned" from other agencies.

Comment: The $86,000 in salaries for the time devoted to Council work was the subject of recent work was the subject of recent House defunding action. It may be noted that "assignees" from other agencies to the Vice President's Office are paid fully by the assigning agency, as opposed to detailees who are paid, through reimbursements, by the agency to whom the people are detailed. In the most recent year for which statistics are available, FY 1988, the Vice President's Office had 8 detailees and 37 assignees. The question may be raised how many detailees and assignees are currently on board, and whether in fact only 4 assignees do Council work.

NEEDED REFORM IN THE SPORT OF BOXING

(Mr. CARPER asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

Mr. CARPER. Mr. Speaker, during today's 1-minute speeches we have heard Members address several of the critical issues of our day. Among them: hometowns, the deficit, our environment, and this year's elections.

Mr. Speaker, before the memories of the 1992 Summer Olympics fade entirely from our memories, I am gong to invite the attention of my colleagues to one area of athletic competition that needs to be addressed and reformed, and that is boxing; not amateur boxing, but professional boxing, whose oversight and demeanor bear little resemblance to the competition we witnessed in Barcelona, Spain during last month.

Several Members of this body, among them the gentleman from New Mexico [Mr. RICHARDSON], the gentleman from North Dakota [Mr. DORGAN], and the gentleman from Montana [Mr. WILLIAMS], previously have offered legislation to overhaul the way the fighting game is run. As I speak, in the other body today a hearing is taking place that could hopefully help bring some changes that are needed.

Later today, several of us in the House will be introducing legislation

UNITED STATES
HOUSE OF REPRESENTATIVES

SELECT COMMITTEE ON CHILDREN, YOUTH AND FAMILIES

June 8, 1992

The Honorable J. Danforth Quayle
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear Mr. Vice President:

After the hearing of the Subcommittee on Treasury, Postal Service, and General Government on March 17,1992, the Subcommittee submitted several questions for the record on my behalf regarding the operations of the Council on Competitiveness, which you chair. Your office sent answers to these questions on April 29, 1992. Unfortunately, the answers submitted were in most respects not responsive or adequate.

Listing of Regulations Reviewed

I asked for a "complete list" of the specific regulatory proposals the Competitiveness Council has reviewed. The response failed to provide this list. Instead, the Subcommittee was given "fact sheets and press releases" that describe selective issues "among" the "wide range of regulatory and competitiveness issues" handled by the Council. However, the staff to the Competitiveness Council has told The Washington Post (Jan. 9, 1992) that they operate under a "no fingerprints" policy, under which they seek to prevent public disclosure of their intervention in important federal regulations. For instance, in one case involving regulation of airline noise discussed in the Post story, Council staff made a deliberate decision not to publicize the Council's decisive role because the issue was a "political loser." Indeed, in that story, you are said to "prefer that most of their interventions, like that on aircraft noise, leave no fingerprints," because, "in this town, especially, you don't want that to come out" (emphasis added). Given this, an attempt to limit congressional oversight to only the selected issues disclosed in press releases and fact sheets would give Congress only an unacceptably partial and misleading picture of the Council's activities. For that reason, I again ask for a complete list of the regulations in which the Council or its staff have had significant involvement, not those where the involvement has been merely peripheral. Your staff told the Post that "council staff limit the interventions to about 50 cases a year, tending to choose those with major economic impact." Identifying those cases should not be that difficult, and the Subcommittee has a right to this information.

Communications with Outside Parties

I also asked for details of communications that the Council has received from outside parties on regulatory matters and for copies of all written communications received from these parties. The Council's reply stated that "Council staff frequently meet with interests outside the government on regulatory issues," but that "it is Administration policy that these types of communications are not disclosed."

My understanding, however, is that it is not Administration policy to treat communications from interested parties on regulatory matters as confidential. To the contrary, the procedures for regulatory review under Executive Order 12291 specifically provide that "written materials received from anyone not employed by the Federal Government are made available . . . for review by the public." In the case of rules from the Environmental Protection Agency and any other Department or agency requesting similar treatment, the disclosure extends to "oral communications concerning...rules, e.g. meetings, telephone calls, . . . with persons who are not employees of the Federal Government" (Office of Management and Budget, "Additional Procedures Concerning OIRA Reviews" at 2, 3 (June 13, 1986) emphasis added).

There is no "pre-decisional" or "deliberative" process exception to disclosure requirements for communications with interested third parties when members of the public seek these documents. NAACP Legal Defense Fund v. U.S. Dept. of Justice, 612 F. Supp. 1143 (D.D.C. 1985); Center for Auto Safety v. Dept. of Justice, 576 F. Supp. 739 (D.D.C. 1983). There is no question that the Council is legally obliged to provide records of these communications to this subcommittee.

Description of Council Positions and Influence

I asked for a description of the positions advocated by the Council or its staff during each regulatory review and the influence of these positions on the final regulations. In response, I was told that this would impose an "extraordinary burden," because it would require a description of each of the over 6,000 regulations reviewed by the Office of Management and Budget since the Council was established in March 1989. As noted above, your staff told The Washington Post that the Council examines in detail only about 50 regulations each year. It should not be an "extraordinary burden" to describe the

Council's role in this limited number of regulations.

<u>Disclosure of Written Communications from the Council</u>

I asked for a copy of all written communications between the Council or its staff and rulemaking agencies on regulatory matters. The reply was that these documents cannot be disclosed because they are "pre-decisional and deliberative in nature."

No court has ever withheld executive branch documents from Congress on the basis of a deliberative process privilege. Indeed, the Freedom of Information Act expressly provides that the deliberative process privilege that applies when a private citizen seeks certain federal documents "is <u>not</u> authority to withhold from Congress." 5 U.S.C. sec. 522(d) (emphasis added). It is well-recognized that Congress has "a special right of access to privileged information not shared by others." <u>Murphy v. Dept. of the Army,</u> 612 F.2d 1151, 1155-56 (D.C. Cir. 1979.) This "special right" includes a constitutional right of access to documents sought in my request.

The Supreme Court addressed disclosure of "confidential communications between a President and his close advisors" in <u>United States v. Nixon</u>, 418 U.S. 683 (1974). The court held that when a presidential claim of privilege:

> depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. <u>Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is diminished by production of such materials.</u>

<u>Id.</u> at 706 (emphasis added). Under this precedent, because the Council has made no claim that military, diplomatic, or national security secrets are at risk, disclosure of the documents is clearly required.

The confidentiality claim is also inconsistent with explicit statutory requirements and long-standing Administration practice. The Clean Air Act, which has been a major focus of Council intervention, expressly requires disclosure of "all written comments by other agencies" on clean air regulations. 42 U.S.C. sec. 7607(d)(4)(B)(ii). There is no question that the Council is an "agency" subject to the Act's disclosure requirements. Meyer v. Bush, Civ. No. 88-3112 (D.D.C. Sept. 30, 1991).

In addition, Administration procedures specifically provide that the Office of Information and Regulatory Affairs (OIRA), which has responsibility for White House review for the Office of Management and Budget, "will make available . . . all written correspondence concerning the draft submitted for . . . review under Executive Order No. 12291 that is exchanged between OIRA and the agency head" (Office of Management and Budget, supra, at 3 (emphasis added)).

Exclusion of the Rulemaking Agency from Meetings with Interested Parties

I asked whether the Council invites the rulemaking agency to meetings between Council staff and interested third parties, as is required during regulatory review under Executive Order 12291 (Office of Management and Budget, supra, at 3). The reply -- that Council staff "may or may not invite representatives from various agencies" (emphasis added) -- is not especially informative. It provides no explanation of the views of the Council on participation by the rulemaking agency.

At a hearing of the Health and the Environment Subcommittee of the Committee on Energy and Commerce on November 14, 1991, EPA officials testified that no EPA air official had ever been invited to a meeting between Council staff and a regulated industry. Indeed, despite the Council's regular intervention in regulations implementing the Clean Air Act, EPA air officials testified that they had "no direct knowledge that such meetings have even happened" (transcript at 170). This seems to contradict the Council's response and suggests that the Council actually has a policy of excluding at least certain regulatory officials from its meetings with outside interests. I'd appreciate your clarification of this issue.

Inclusion of Council Communications in the Docket

Finally, I asked whether factual communications received by the Council on pending regulations, and the policy comments of the Council on these regulations, are included in the rulemaking docket. The Council's answer indicates that it does not add these materials to the docket, because "the Council itself does not engage in rulemaking."

In an op-ed published in The Washington Post on December 8, 1991, you stated that, "the President and I . . . are elected by the people," while "the iron triangle -- special interest groups, bureaucrats and Congressional staff -- are elected by nobody." You pointed out that "Congress enacts laws, and the executive branch . . . implements them." You then concluded that "it is entirely proper that these executive branch functions be controlled by officials accountable to the voters and by nobody else" (emphasis added). This "control" of regulations by the Council necessarily engages the Council in the rulemaking process.

Your op-ed goes on to cite several instances of indisputable regulatory action by the Council. For instance, you concede that "the council has attempted to bring balance to our nation's 'wetlands' policy" by "putting the 'wet' back into 'wetlands'" -- which is an overtly regulatory effort. You assert that "some interest groups that didn't win everything they wanted" in the 1990 Clean Air Act "are now pressuring the regulatory process to achieve what they failed to get in Congress." You then reveal the Council's "determination" to intervene in this "regulatory process" in order to "protect the carefully considered compromise." These examples certainly demonstrate the Council's vigorous intervention in the rulemaking process.

Ultimately, there is a basic logical inconsistency in the position that the Council need not comply with disclosure requirements because it is not engaged in rulemaking. The Council's role is to "serve as the coordinating body for regulatory review under Executive Order 12291." This regulatory review under Executive Order 12291 is inherently part of the rulemaking process. That is why officials at the Office of Management and Budget who are engaged in such review must follow detailed procedures for insuring that their communications become part of the public record (see Office of Management and Budget, supra). When the Council interjects itself into this process, it is necessarily interjecting itself into the regulatory process. Thus, like all others involved in the rulemaking process, the Council has an obligation to adhere to the rules for public disclosure that lie at the heart of our administrative system.

Allegations of Illegal and Unethical Conduct

The failure to reply fully and candidly to the Subcommittee's questions is particularly troubling in light of the serious allegations of illegal and unethical conduct that have been raised regarding the activities of the Competitiveness Council.

At a hearing of the Health and the Environment Subcommittee on December 10, 1991, experts on legal ethics commented on several instances of unethical conduct by the Council and its staff. Professor Monroe Freedman of Hofstra University, a former chairman of the Committee on Professional Disciplinary Standards and Procedures of the Federal Bar Association, and Professor Robert Aronson of the University of Washington, who is the chair of the Professional Responsibility Section of the Association of American Law Schools, questioned the activities of Allan Hubbard, the former executive director of the Council, who participated in clean air rulemakings that directly affected an electric utility company in which he held stock and potentially affected a small chemical company which he owned. Hubbard's actions were said to be "clearly subject to criminal prosecution" (Hearings on Clean Air Act Implementation (Part 2), supra, at 349 (testimony of Professor Freedman)) and "an unethical conflict of interest" (id. at 290 (testimony of Professor Aronson)).

At the same hearing, other legal experts challenge the legality of the secret meetings held by Council staff and representatives of regulated industries. Professor Cass Sunstein of the University of Chicago, who drafted Executive Order 12291 for the Reagan Justice Department, testified that "if the Council is influencing rules on the basis of substantive presentations that are not disclosed to courts or the public, it is probably violating the Administrative Procedures Act, the Clean Air Act, and the executive branch's own public commitments" (id. at 300). Likewise, Professor Robert Percival of the University of Maryland, testified that "the activities of the Competitiveness Council represent an unprecedented intrusion into agency decisionmaking that threatens to undermine principles of separation of powers and the open model of regulatory decisionmaking embodied in the Administrative Procedures Act" (id. at 329).

Professor Freedman characterized your own role in the decision to kill an EPA proposal to recycle newspapers as "the common alley cat breed of conflict of interest," because of your personal holdings in newspaper companies and a virgin paper mill (id. at 332). Professor Aronson agreed (id.).

These allegations are serious and substantial. They demand full investigation by this Subcommittee as part of its responsibility to insure that duly appropriated funds are properly expended. Unfortunately, you have failed to respond in a manner that permits the Subcommittee to conduct this vital investigation.

Particular Questions about Particular Regulations

While not answering my original questions, the Council did indicate a willingness to provide additional information in response to "particular questions about particular regulations." At this time I am able to identify a "particular" interest in the following four types of regulations: (1) the regulations reviewed by the Council under the Clean Air Act; (2) the regulations reviewed by the Council under the Clean Water Act; (3) the regulations reviewed by the Council under the Occupational Health and Safety Act; and (4) the draft policy reviewed by the Council involving the Secretary of Energy's proposed National Energy Policy.

In addition, I request again that you fully answer my inquiries regarding (1) contacts with outside parties, (2) descriptions of council positions and their regulatory influence, and (3) disclosure of written communications between the Council and rulemaking agencies for each of the regulations identified in the preceding paragraph. I would also like full answers to my questions regarding (1) listing of regulations reviewed by the Council and (2) exclusion of rulemaking agencies from Council meetings. I would also appreciate a response to the points I have raised regarding the rulemaking role of the Council.

The Supreme Court has recognized:

The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws. . . . It comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste.

Watkins v. United States, 354 U.S. 178, 187 (1957) (emphasis added).

The matters raised in this letter are of utmost importance to the integrity of the regulatory process. I would greatly appreciate more candid and thorough responses to the questions I have raised. Please respond no later than June 22, 1992.

Thank you in advance for your attention to this request.

Sincerely yours,

David E. Skaggs

DES:jml

DAVID E. SKAGGS

COMMITTEE ON APPROPRIATIONS

SUBCOMMITTEE ON ENERGY AND
WATER DEVELOPMENT

SUBCOMMITTEE ON TREASURY, POSTAL
SERVICE AND GENERAL GOVERNMENT

SELECT COMMITTEE ON CHILDREN,
YOUTH AND FAMILIES

UNITED STATES
HOUSE OF REPRESENTATIVES

July 10, 1992

The Honorable J. Danforth Quayle
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear Mr. Vice President:

On Wednesday, July 8, 1992, I had the privilege of debating Mr. David McIntosh, Executive Director of your Council on Competitiveness, on WAMU's Diane Rehm show.

During the course of the discussion, Mr. McIntosh referred to the Council's "six" staff members. This puzzled me because in response to a question about the Council's staffing level I submitted for the record when the Appropriations Subcommittee on Treasury, Postal Service and General Government held hearings on the Executive Office of the President fiscal year 1993 budget request, your office responded that, "There are no full-time staff dedicated to the Council. Two of the twenty-six FTEs requested by the Office of the Vice President would devote a substantial amount of their duty hours (approximately 70 to 80 percent) to supporting the Council. The funding required is $86,000."

There is an apparent contradiction between what Mr. McIntosh said on Wednesday and what was represented to the Committee earlier this year.

I would greatly appreciate your clarification of the actual staffing level of the Council on Competitiveness, including all full-time staff members, all part-time staff members, and all staff members who have been detailed from other Executive agencies or offices.

I would also appreciate a response to my June 8, 1992 letter, requesting full responses to questions submitted to your office during the appropriations hearing.

Thank you in advance for your attention to these requests.

Sincerely yours,

David Skaggs

David E. Skaggs

OFFICE OF THE VICE PRESIDENT

WASHINGTON

August 3, 1992

The Honorable David E. Skaggs
Subcommittee on Treasury, Postal Service
and General Government
Committee on Appropriations
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Skaggs:

This responds to your letters to the Vice President concerning the President's Council on Competitiveness and questions you have raised about information we provided to you in earlier inquiries. We have attempted to respond to your questions according to the categories of issues you have identified as needing additional explanation.

Complete List of Regulatory Proposals Reviewed

In connection with your criticism that we did not furnish a "complete list" of all regulations in which the Council has been involved, you have cited an article in The Washington Post and rely upon the newspaper as authority for your proposition that Council staff has influenced the outcome of certain regulations without leaving "fingerprints" on the regulatory process. According to the newspaper, interventions by staff are limited to about 50 cases a year. Thus, the article also serves as the basis for your view that providing a complete list of regulations in which the Council or its staff had "significant involvement" should not be that difficult. The same argument is applied to disclosure of what positions were advocated by the Council or its staff during each regulatory review and how these positions influenced the final regulation.

Although the cited article did contain a conclusion containing the number of "interventions" you have referenced, the Vice President also declined to provide a specific number. Under the circumstances, it seems unproductive to engage in debates over propositions advanced by the media about the frequency and degree of Council involvement in agency regulation-formulation. Moreover, the full list of regulations that were reviewed pursuant to Executive Order 12291 and coordinated by the Council can be obtained from the Office of Management and Budget docket.

In any case, we hope our offer to provide additional information in response to your particular questions about particular regulations is a reasonable accommodation to your interest in Council activities.

In an additional attempt to be responsive to your request, we are enclosing a letter that was sent to Chairman Conyers of the Committee on Government Operations identifying some of the regulatory issues in which the Council participated. We are also furnishing you a letter from the Office of White House Counsel to Chairman Waxman of the House Committee on Energy and Commerce. That letter addresses certain conflict of interest allegations concerning Council activities of Allan B. Hubbard, former Executive Director.

Communications with Outside Parties

You again request details of communications that the Council had with outside parties on regulatory matters and ask for copies of all written communications received from these parties. You maintain that it is not Administration policy to treat communications from interested parties as confidential; that this is so because Executive Order 12291 specifically provides that such written materials will be made available for review by the public. You point out, as well, that when EPA rules are involved, even oral communications concerning rules are available for review when made by persons who are not Federal employees. Finally, you have cited two Federal district court decisions from the District of Columbia for the proposition that there is no "pre-decisional" or "deliberative" process exception to disclosure requirements for communications with interested third parties when members of the public seek these documents.[1]

It is correct that communications from outside parties concerning rulemakings are made available to the public as part of the Office of Information and Regulatory Affairs (OIRA) review policy under Executive Order 12291. However, that policy applies to OIRA review and not the Office of the Vice President or the Council. In any event, the Council's activities in the regulatory arena are fully consistent with those provisions. As we emphasized in our earlier response, the Council itself does not engage in rulemaking as part of its participation in the regulatory review process. Instead, it assists in the coordination of the Administration's review of regulations being promulgated by Executive Branch agencies and departments. As required by statute, agencies and departments remain responsible for making their decisions based upon the record that is developed. Whether the rules pertain to EPA or another agency, Council staff assist the agencies to ensure that the rules issued are based on information placed in the rulemaking docket and not

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[1] NAACP Legal Defense Fund v. U.S. Dep't of Justice, 612 F. Supp. 1143 (D.D.C. 1985); Center for Auto Safety v. Dep't of Justice, 576 F. Supp. 739 (D.D.C. 1983).

based on information presented only to the Council staff or its members.

The process of Council participation in agency rulemaking was recently examined by the D.C. Circuit of the U.S. Court of Appeals in State of New York and State of Florida v. EPA, et. al. (July 14, 1992). The plaintiffs had claimed that EPA acted improperly in relying on the opinion of the Council rather than exercising its own expertise. The court held, however, that the Council's role was appropriate and clearly rejected the plaintiffs' contentions that Council involvement somehow tainted the rulemaking process: "(t)he fact that EPA reevaluated its conclusions in light of the Council's advice...does not mean that EPA failed to exercise its own expertise in promulgating the final rule."

You have stated that there is no "pre-decisional" or "deliberative" process exception to disclosure requirements concerning government communications with outside parties when members of the public seek these documents. However, the issue here is Congressional access to Executive Branch information, not access by the public to that information under the FOIA. Also, our initial response indicated Executive Branch confidentiality interests that are protected by separation of powers principles, not the FOIA. For these reasons, we believe the FOIA is irrelevant to this discussion.

Requiring disclosure of all communications received by the Council from outside the government during the regulatory review process would substantially impair the ability of the President and his principal advisors to receive confidential advice from private citizens. Again, this does not mean that we would not respond to any particular questions you have concerning the Council's role in coordinating specified regulations.

Disclosure of Written Communications from the Council

You have repeated your request for a copy of all written communications between the Council or its staff and rulemaking agencies on regulatory matters. You have again contended that these records cannot be withheld even if they are pre-decisional and deliberative in character. You note that the FOIA specifically provides that the deliberative process privilege applicable when a citizen seeks agency records is not authority to withhold information from Congress. However, no exemption under the FOIA is invoked as authority to deny records you have requested so a discussion of FOIA case law serves no useful purpose.

Citing provisions of the Clean Air Act does not strengthen the argument that Council records of communications must be placed in the public docket in the course of rulemaking. Although the Clear Air Act, as amended, provides by section

307(d)(4)(B)(ii) and EPA policy that agency comments be placed in the public docket, EPA does not consider various White House components and entities "agencies" for purposes of that section. As we have noted previously, whatever policy may be followed by OIRA does not necessarily extend to White House components or bind those components as Administration policy.

Requiring disclosure of all written communications by the Council or its staff would severely encroach upon the President's constitutional authority to protect the confidentiality of Executive Branch deliberations. A unanimous Supreme Court in United States v. Nixon, 418 U.S. 683, 708 (1974) found that the deliberative process privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." The Court recognized that "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." Ibid.

Exclusion of the Rulemaking Agency from Council Meetings with Interested Parties

You have noted that EPA officials have testified that "no EPA air official had ever been invited to a meeting between Council staff and a regulated industry." That observation is not true; moreover, it is irrelevant because there is no legal requirement that agencies or particular agency employees be invited to meetings between outside parties and the Council.

Inclusion of Council Communications in the Docket

You have pointed to an "op-ed" piece in The Washington Post by the Vice President describing Council involvement in coordination of regulations. In your view, this points out a "basic logical inconsistency" in the Council's position that it need not comply with disclosure requirements under E.O. 12291. There is no logical inconsistency between Council participation in the process as coordinator of Administration policy and not applying Administrative Procedures Act requirements applicable to communications between "agencies" and outside parties to that participation. The Council is not an "agency" and, therefore, the APA and E.O. 12291 procedures are not applicable.

Allegations of Illegal and Unethical Conduct

Your letter indicates particular concern about non-responsiveness in light of what you have characterized as "serious allegations of illegal and unethical conduct" that have been raised about Mr. Hubbard and staff of the Competitiveness Council. The foundation for these allegations is apparently testimony by certain persons before your subcommittee.

Those who testified before the subcommittee--not one of which could claim experience with Federal ethics statutes--were able to postulate violations of criminal law without having conducted any inquiry concerning the underlying facts giving rise to the alleged violations. Simply put, they were building theoretical cases based on hypothetical facts. Moreover, these witnesses had no authority to conclude that a criminal law may have been violated.

The U.S. Office of Government Ethics (OGE), the very agency with authority to provide guidance on Executive Branch ethics laws, concluded that the Office had not investigated Mr. Hubbard's activities nor asked anyone else to do so, either before or after the issuance of his waiver, because OGE "had no reason to question his activities before it was issued nor have we seen or heard sufficient information that would lead us to believe that he has engaged in any prohibited activities since its issuance." In reference to comments by one of the witnesses and the allegations concerning Mr. Hubbard, the Director of OGE noted:

> Before an individual's reputation is sullied by accusations of criminal conduct, great care should be exercised to ascertain the pertinent facts and apply them to the applicable statute with an understanding of the letter and spirit of the law. Unfortunately, these time-honored principles have been violated in Mr. Hubbard's case.

We are enclosing a copy of OGE's letter containing the above commentary.

Particular Questions about Particular Allegations

We hope this additional explanation of our position is responsive to your request for further information on Council activities. Although you have identified four general sets of regulations or regulatory policy in which you are interested, you have not indicated the questions you want answered concerning the items identified. As in the past, we are prepared to work with you concerning reasonable requests for information involving specific questions on the Administration's position on specific regulations that were coordinated by the Council as part of the rulemaking process.

Staffing Level of the Council

In a separate letter, you have requested clarification of the staffing level of the Council. Your questions for the record in connection with appropriations requests for the Executive Office of the President included an inquiry regarding how many of the Office of the Vice President's requested 26 FTEs were assigned to the Council and how much we were requesting to fund the FTEs. We responded:

> There are no full-time staff dedicated to the Council. Two of the twenty-six FTEs requested by the Office of the Vice President would devote a substantial amount of their duty hours (approximately 70 to 80 percent) to support the Council. The funding is $86,000.

The Council has six members, the Secretary of the Treasury, the Attorney General, the Secretary of Commerce, the Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisers, and the Chief of Staff to the President as an ex officio member. The Vice President is Chairman of the Council.

The Council is currently supported by a staff, headed by an Executive Director, David McIntosh. Mr. McIntosh and another full-time staff member paid from the Executive Office of the President, Office of the Vice President, appropriation devote approximately 70 to 80 percent of their duty hours to Council-related functions.

Four professional staff members who assist the Council by performing functions related to the mission of their agencies are currently assigned full-time from other agencies. Two of the staff members are from the Department of Health and Human Services and provide assistance with health care and biotechnology issues, and another from the Department of Education assists with issues relating to that agency; the fourth staff member is from the Department of Justice and assists with legal, environmental and regulatory matters. The Council also receives secretarial assistance and support services from employees assigned to the Office of the Vice President.

We hope this information is responsive to your questions about Council staff.

Sincerely,

John L. Howard
Counsel to the Vice President

Enclosures

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE

SUBCOMMITTEE ON HEALTH AND THE ENVIRONMENT

2415 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
PHONE (202) 225-4952

June 29, 1992

Dear Colleague:

When we consider the Treasury, Postal Service, and General Government appropriations bill tomorrow, Rep. Tom DeLay will offer an amendment to restore funding for Vice President Quayle's Council on Competitiveness. I urge you to oppose this amendment.

Mr. Quayle and his allies argue that cutting off funding for the Council is "partisan politics" and "harassment." They could not be more wrong. Tomorrow's debate isn't about political advantage. It's about whether the Council respects basic tenants of open government, the rule of law, and separation of powers.

Over the past year and a half, the Subcommittee on Health and the Environment has held six oversight hearings into the activities of the Competitiveness Council, collecting nearly a thousand pages of testimony from Administration officials and outside experts. These hearings documented four major abuses of process and law by the Council:

1. <u>Although the Council acts as a regulatory agency, it conducts its regulatory review in secret, in violation of long-standing public-disclosure laws and policies.</u>

2. <u>Council members and staff have refused to comply with ethical restrictions against conflicts of interest.</u>

3. <u>The Council has ignored its constitutional responsibility to implement duly enacted laws, sometimes forcing agency officials to issue regulations that violate express statutory mandates.</u>

4. <u>The Council has refused to be accountable for its actions before Congress.</u>

These abuses violate the law and erode public confidence in government. They warrant vigorous congressional condemnation, including the funding cut-off adopted by the Appropriations Committee.

To provide further background on the activities of the Council on Competitiveness, I have asked my staff to prepare one-page fact sheets on the Council's record on each issue summarized above. These are enclosed, along with a fifth fact sheet listing instances of Council intervention in agency rulemaking. I hope you find them useful.

Sincerely,

Henry A. Waxman

HENRY A. WAXMAN
Chairman, Subcommittee on
Health and the Environment

REGULATORY REVIEW PROCEDURES AT THE COUNCIL

Principles of Regulatory Review

It is a fundamental tenet of administrative law that agency decisions must be the product of an open public process. Interested parties on either side influence regulations by submitting written comments to the agency decisionmaker. These comments are included in a public docket, allowing others to review and rebut them.

Regulatory review in the White House by the Office of Management and Budget follows principles of public disclosure similar to those applicable to rulemaking agencies. Specifically, OMB is required to (1) disclose all written material received from interested parties concerning agency rules; (2) disclose all meetings with interested parties concerning agency rules; (3) disclose all agency rules reviewed by OMB; and (4) disclose all written recommendations made by OMB to the rulemaking agency.

The Council's Procedures for Regulatory Review

The Council and its staff, however, follow none of these procedures for public disclosure when they review regulations. To the contrary, as Council staff told The Washington Post (Jan. 9, 1992), they operate under an explicit "no fingerprints" policy. Specifically, the Council:

1. Refuses to disclose Council intervention. Council staff examine about 50 major regulations each year. However, the Council will not identify what these regulations are.

2. Refuses to disclose ex parte communications. During the course of its regulatory review, the Council admits that its staff "frequently meets with interests outside the government on regulatory issues." However, the Council refuses to disclose who these outside interests are, what they tell Council staff, or what impact these communications have on the content of regulations.

3. Refuses to disclose the Council's impact. Although intervention by the Council often results in relaxation of regulations, the Council refuses to identify and be held accountable for these changes.

Violations of Disclosure Laws and Policies

The review procedures followed by the Council are illegal under the Administrative Procedure Act and the Freedom of Information Act, which require disclosure of substantive contacts between regulatory officials and interested parties. They are also inconsistent with the principles of open government that have traditionally characterized U.S. administrative procedures.

CONFLICTS OF INTEREST AT THE COUNCIL

The Requirements of the Ethics in Government Act

The Ethics in Government Act prohibits regulatory officials from participating "personally and substantially" in any "particular matter" in which they have "a financial interest." The law is designed to avoid situations that could cause the public to doubt the objectivity of federal decisionmakers.

Conflicts of Interest by Council Staff

The staff of the Council on Competitiveness, however, has ignored this prohibition on conflicts of interest. In June 1991, Allan B. Hubbard, then executive director of the Council, sought and obtained from Vice President Quayle an illegal blanket waiver from the Ethics in Government Act. Both prior to and after receiving the waiver, Mr. Hubbard regularly participated in regulatory decisions affecting his financial holdings. Specifically, Mr. Hubbard:

1. Chaired a White House meeting in October 1991 at which the Environmental Protection Agency was directed to relax a regulation curbing emissions that cause acid rain. The regulation in question was opposed by an Indiana utility company, Public Service of Indiana (PSI), that wrote it would be "greatly impacted" by EPA's "punitive" proposal. Mr. Hubbard owned over $15,000 in stock in PSI at the time.

2. Chaired or attended 20 meetings at the White House during 1991 on implementation of the Clean Air Act. During this period, Mr. Hubbard owned a small chemical company in Indiana, World Wide Chemicals, Inc., that is potentially subject to regulation under numerous provisions of the Clean Air Act for its emissions of smog-forming, toxic, and ozone- depleting chemicals.

3. Intervened in May and June 1991 in an EPA rulemaking relaxing the liability of banks to clean up toxic wastes left behind by bankrupt borrowers. Mr. Hubbard owned over $18,000 in bank stocks at the time.

Conflicts of Interest by Vice President Quayle

Vice President Quayle has also ignored conflict-of- interest limitations during Council activities. Indeed, at one hearing of the House Health and the Environment Subcommittee, the former chairman of the Committee on Disciplinary Standards of the Federal Bar Association called Mr. Quayle's actions "the common alley cat breed of conflict of interest."

Specifically, in December 1990, Mr. Quayle personally intervened to quash an EPA rulemaking that would have triggered widespread recycling of newspapers. This action benefitted newspapers in Indiana controlled by the Quayle family trust, which had formed a task force to fight mandatory newspaper recycling requirements. It also benefitted the Ponderay Newsprint Paper Company, a virgin paper mill in Washington State that competes with manufacturers of recycled newsprint. The Quayle family trust had a multimillion dollar investment in the Ponderay mill at the time.

THE COUNCIL'S FAILURE TO EXECUTE LAWS

The Constitutional Responsibilities of the Executive Branch

Under the Constitution, the President must pledge to "faithfully execute" the laws of the United States. The President has the option to veto any law passed by Congress, but if the President chooses to sign the law, the President must implement it faithfully.

The Council's Efforts to Rewrite the Clean Air Act of 1990

Contrary to its constitutional role, the Council has sought to revise duly enacted laws. The most striking case in point is the Clean Air Act of 1990.

The Clean Air Act expressly requires "opportunity for public comment and a hearing ... of permit actions, including ... revisions." Within the last 15 months, three legal opinions -- from the Department of Justice, the Environmental Protection Agency, and the General Accounting Office -- have interpreted the Act to require public comment prior to all permit revisions that increase emissions.

Nevertheless, last week the Council forced EPA to issue permitting regulations that allow major polluters to increase allowable emission levels in their permits without any form of public notice. In light of the prior legal opinions, this action is a knowing violation of the Clean Air Act.

The Council's Illegal Efforts to Displace Agency Decisionmaking

The Council has also illegally sought to assume the authority to make regulatory decisions entrusted by Congress to administrative officials. Under our constitutional system, the President has the authority to appoint agency heads, subject to Senate confirmation. He may also remove these officials from office. But the President does not have the authority to dictate the content of specific regulatory decisions to officials who have undergone Senate confirmation and been directed to make these decisions by Congress.

The Council violates these principles. Indeed, Vice President Quayle has written that "it is entirely proper that these executive branch functions be controlled by officials accountable to the voters and by nobody else." In the permit regulation discussed above and numerous other instances, the Council has illegally wrested control of regulatory decisions from agencies vested with the decisionmaking authority by Congress.

The Council Illegally Delays Regulations

Finally, the Council has illegally delayed regulations long past their statutory deadlines. For instance, Council review delayed the clean air permit regulation over six months past the deadline in the Clean Air Act.

THE COUNCIL'S FAILURE TO BE ACCOUNTABLE TO CONGRESS

Congress's Constitutional Oversight Authority

As the United States Supreme Court has long recognized, "the power of Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws. ... It comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste." Watkins v. United States, 354 U.S. 178, 187 (1957).

The Council's Refusal to Appear before Congress

The Council has refused to recognize Congress's broad oversight authority, however. It has resisted all attempts by committees to hold the Council accountable for its actions. Neither Vice President Quayle nor any staff of the Competitiveness Council has agreed to testify before a committee of Congress.

The experience of the Subcommittee on Health and the Environment exemplifies how congressional efforts to obtain the testimony of the Council have been improperly frustrated. Over the last year and a half, the Subcommittee has held six oversight hearings to explore the Council's role in implementation of the Clean Air Act. In each case, the Subcommittee has invited Mr. Quayle or Council staff, to appear before the Subcommittee to explain the Council's activities. In each case, the Council has refused to send a representative to explain its actions before the Subcommittee.

The Council's Refusal to Answer Congressional Inquiries

Not only has the Council refused to appear before congressional committees, the Council has wrongly refused to answer written inquiries. At least three different House committees or subcommittees (the Health and the Environment Subcommittee of the Committee on Energy and Commerce; the Treasury, Postal Service, and General Government Subcommittee of the Committee on Appropriations; and the Committee on Government Operations) have asked the Council to identify the regulations it has reviewed. In each instance, the Council has refused to identify these regulations.

Likewise, the Council has refused to answer inquiries by these committees regarding its ex parte contacts with interested parties, potential conflicts of interest involving members and staff of the Council, and its regulatory impact.

The Council's Refusal to Produce Documents for Congressional Review

Finally, the Council has also wrongly refused the request of these congressional committees for production of documents relating to its regulatory review, such as copies of correspondence from outside interests to the Council.

LIST OF COUNCIL ACTIONS

Because the Council of Competitiveness operates under a "no fingerprints" policy, there is no complete list of the regulatory interventions of the Council. It is possible, however, to piece together a partial list based on press accounts and other sources.

Incineration of Lead Batteries. The Council quashed an EPA proposal to ban the burning of lead batteries in municipal incinerators (Council Fact Sheet (Dec. 19, 1990)).

Recycling. The Council quashed an EPA proposal to implement the President's campaign pledge to achieve 25% recycling of municipal waste (Council Fact Sheet (Dec. 19, 1990)).

Handicap Access. The Council forced HUD to relax standards providing handicapped access in multifamily housing (The Washington Post (Jan. 9, 1992)).

Airline Noise. The Council forced the FAA to issue regulations delaying noise control requirements for aircraft (The New York Times (Sep. 24, 1991)).

Formaldehyde Exposure. The Council sought to kill an OSHA regulation protecting workers from formaldehyde exposure (OMB Watch/Public Citizen Congress Watch (Sep. 1991)).

Women's Clothing. The Council directed the Department of Labor to propose regulations lifting a ban on work done at home in the women's clothing industry (The Washington Post (Jan. 9, 1992).

Childcare. The Council forced HHS to relax reporting regulations applicable to certain childcare facilities (The Washington Post (Jan. 9, 1992)).

Nutrition Labeling. The Council is pressuring FDA to delay nutrition labeling regulations (The Washington Post (June 17, 1992)).

Drug Review. The Council forced FDA to turn review of certain drug applications over to private research groups (The New York Times (Mar. 19, 1992)).

Wetlands. The Council forced EPA to propose a new definition of wetlands that eliminates protection for nearly half of the nation's wetlands (The Washington Post (Aug. 8, 1991)).

Acid Rain Controls. The Council forced EPA to relax monitoring regulations for emissions causing acid rain (The Washington Post (Dec. 6, 1991)).

Clean Air Permits. The Council forced EPA to issue regulations allowing major sources to revise permit conditions without public notice (The New York Times (June 25, 1991)).

WSJ - 7/15/97 WSJ A19
The Wall Street Journal

Tuesday, July 15, 1997

Business World: Fly First Class (With the Other Criminals)
By Holman W. Jenkins Jr.

From the perspective of a Martian now being chased around that planet by NASA, one Washington travel-perk "scandal" probably looks pretty much like another.

However, congressmen and journalists on this planet are nearer the problem, one would think near enough to make the distinctions that are the mark of intelligent life-forms.

One would think.

Rep. David M. McIntosh has been chasing SEC Chairman Arthur Levitt Jr. all over Planet Washington. He does so in pursuit of a "scandal" that, when we press our x-ray spectrometer up against it, seems to consist of the substance of interstellar space, which is to say, nothing.

Mr. Levitt is accused of flying first class and staying in nice hotels, and digging into his own pocket to pay for it.

It takes a special kind of ingenuity to find something to get outraged about here, but Mr. Levitt did use legitimate government-paid upgrades to defray the cost of upgrading even further. If you stand back and twist your head at a funny angle, you can pretend this means taxpayers "paid" for Mr. Levitt to fly first class.

Such allegations are padded together by junior subcommittee staffers, the sort who find the magic phrase "government rate" works wonders with the airlines when scheduling their own travel. Their work is passed on to senior staffers and the congresspersons themselves, for whom "fact-finding missions" to interesting and attractive parts of the world seem to be a daily necessity.

Then, no doubt reading from something somebody handed him, Mr. McIntosh pronounces, "It's clear to me that taxpayers have been subsidizing Mr. Levitt's first-class lifestyle. While taxpayer-subsidized French wine . . . and stays at luxury hotels may draw approval from Wall Street, that kind of lifestyle offends average Americans on Main Street." Voila, a soundbite is born.

Mr. McIntosh added that all this troubles him "deeply," an adverb it wouldn't normally occur to us to apply to anything connected with Congress.

Strange as it may seem, though, we have gotten the feeling over the years that Mr. Levitt does care deeply about the honor and fairness of the securities markets, and about whether the people who labor in them are worthy of public trust. In an administration that oozes false sincerity about many things, he's at least a novel sensation.

As with any federal agency, the SEC does things that defy our understanding from time to time, but less so than most. He hasn't shut down the bull market by trying to put its perpetrators in jail, as some of his predecessors did. Yet he has shown a willingness to wade into an authentic garbage dump, the municipal finance racket.

He has also taken steps, prophylactically, to make sure the mutual fund industry performs as advertised. He has sermonized about conflicts of interest, and worked to correct its habit of wandering far and wide from the published investing strategies of particular funds. What the heck, it's a useful, if incremental, application of the SEC, which, after all, is there to be useful. And he just got a nice pat on the head from the generally cynical General Accounting Office.

Most of all, he has seen fit to leave well enough alone, unlike a lot of Clinton regulators who seize on the "activism" theme to muck things up in their portfolios and keep their names in the paper.

By way of research, we examined an Institutional Investor article about the "Washington-Wall Street shuffle." Putting two and two together, we noticed the one place where the Clinton administration has been an unalloyed, scandal-free success is the economy, which has rested firmly in the hands of Wall Street rejects like Mr. Levitt, Bob Rubin and Alan Greenspan.

Perhaps there is a secret McIntosh method here -- a plan to disable the Clinton administration by hassling one of its few grown-ups. But Republicans should remember that someday, perhaps within the lifetimes of our grandchildren, they could conceivably end up the party of government again.
Then they might want to coax some grown-ups into service too. The precedent here is not an inviting one.

Mr. Levitt has been around a long time, too long to let the silliness of congressmen ruffle him unduly. He was one of the saviors of Roll Call, the Capitol Hill newspaper and chronicler of silliness without end.

Yet one or two people have noticed the stock market going up lately. This it has done on the basis of lots of middle class people wanting to invest for their retirements. There was some $4 trillion in mutual funds as of last week.

Apropos of these people, there is not a Lion's Club or trade association in the land that Mr. Levitt won't show up at in order to make a speech assuring the small investor that the SEC is on the job.

As the Washington Post reported in ripping the lid off what somebody somewhere told them was a "scandal," the SEC chairman took 153 official trips in 175 weeks between September 1993 and November 1996 at a cost of about $111,000 -- or $725.49 a trip.

We would say the taxpayer is getting his money's worth out of Mr. Levitt.
Traveling every week to give a speech really isn't a barrel of fun, even if the hotel is nice and the wine is French.

On taking the job he informed his staff that he wanted to fly first class. This strikes us as a wise precaution. At 66, he would have to be considered at high risk for coach aneurysm.

He's also a rich guy, having made his bundle by founding a Wall Street firm. But instead of acting like those jerks who keep piling up money as a way of "keeping score," he tried his hand at things where he could be useful to society -- head of the American Stock Exchange, resurrecting Roll Call, and for the last four years, head of the SEC, a job that by his standards doesn't pay all that well.

Life being short, Mr. Levitt entered into a plea bargain with Mr. McIntosh's subcommittee and has agreed to suffer in business class at taxpayer expense rather than loll in first class at his own. We are honestly at a loss to understand what principle of good government is served by this outcome, but that's par for the course. It would be interesting, though, to get a full accounting of how much of the taxpayer's money Rep. McIntosh spent to bring about this heroic denouement. The SEC calculates it alone has spent $187,000
responding to Mr. McIntosh's request for documents and accounting of Mr. Levitt's every limo ride.

Disclosure: Chairman Levitt once bought us breakfast, and we wrote a column making fun of him for threatening to nationalize the accounting profession.

(See related letter: "Letters to the Editor: Odd Ailments" -- WSJ July 23, 1997)