FOIA Number: 2017-1095-F

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Divider Title: **16**

SENATE REQUESTS FOR CLIMATE CHANGE MATERIALS:
Requests for new analysis or existing documents

[checked w/ NEC, CEA, CEQ, OMB, OSTP, State, Treasury, Commerce, Energy]

Lugar, Harkin, Cochran, Daschle, et al -- AGRICULTURE
to Vice President from 14 Senate Agriculture Committee Members

- analysis of the potential effects of climate change on US agriculture and livestock production

- analysis of the estimated greenhouse gas emissions resulting from the production of crops and livestock in the US

- analysis of the net contribution of US forests and crops in the sequestration of greenhouse gases

- analysis of the actions or controls necessary to reduce agricultural greenhouse gas emissions to comply with obligations that may arise under the treaty and an economic analysis of their impact on US farmers and ranchers

- analysis of whether and to what extent greenhouse gas emission controls would disadvantage agricultural producers in this country compared to producers in other countries with less stringent emission controls or no controls at all.

Hagel/Helms -- FOREIGN RELATIONS
to Eizenstat from Hagel/Helms

- provide a list of all climate change programs in the Executive Branch, with a description of each program and how they relate to the Kyoto Protocol

- provide the US global greenhouse gas inventory used by negotiators in Kyoto, on a country-by-country specific basis, for the six greenhouse gases listed in Annex A of the Kyoto Protocol

- provide the 1990 baseline and projections at least through 2030 for carbon dioxide , methane and nitrous oxide

- provide the 1995 baseline and projections at least through 2030 for hydroflurocarbons, perflurocarbons and sulphur hexafluoride

- provide the assumptions, data and calculation methodology that support the Administration's assertion that the impact of carbon sinks on the US greenhouse gas reduction commitment will reduce the actual reduction to 2 or 3 percent below 1990 levels, rather than 7 percent.

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Divider Title: **17**

United States Senate

COMMITTEE ON
AGRICULTURE, NUTRITION, AND FORESTRY
WASHINGTON, DC 20510-6000
202-224-2035

March 14, 1997

The Honorable Al Gore
Vice President
The White House
Washington, D.C.

Dear Mr. Vice President:

Farm state members of Congress have become increasingly concerned with the lack of adequate attention given to agricultural concerns as the Administration works on the United Nations Framework Convention on Climate Change (UNFCC). As you know, this treaty, if ratified, could affect U.S. agricultural production and competitiveness.

American agricultural interests must be adequately represented during the upcoming negotiations. This representation will ensure the continued success of farmers and ranchers and allow them to maintain their productivity, which ultimately benefits consumers. We believe we can address the global greenhouse gas issue and protect the environment while carefully considering the interests of America's farmers, ranchers and consumers. However, before the United States is committed to a final international agreement to limit greenhouse gases, it is essential that we know more about the treaty's impact on our nation's largest employer and the world's most efficient producers of food and fiber.

We will be closely monitoring the negotiations as work continues on the final agreement before its submission to the Senate for ratification. We request an analysis and briefing by the Administration on the following issues as soon as possible:

1) The potential effects of climate change on U.S. agriculture and livestock production.

2) The estimated greenhouse gas emissions resulting from the production of crops and livestock in the U.S.

3) The net contribution of U.S. forests and crops in the sequestration of greenhouse gases.

4) Actions or controls necessary to reduce agricultural greenhouse gas emissions to comply with obligations that may arise under the treaty and an economic analysis of their impact on U.S. farmers and ranchers.

The Honorable Al Gore
March 14, 1997
page 2

5) Whether and to what extent greenhouse gas emission controls would disadvantage agricultural producers in this country compared to producers in other countries with less stringent emission controls or no controls at all.

We understand that serious discussions in preparation for the Kyoto meeting may commence during July and August of this year. We firmly believe this information, as well as the Administration's formal economic analysis, should be submitted to Congress well before then so that the various options for U.S. policy may be understood and their impact on American agriculture and the American economy may be carefully assessed.

We look forward to working with you on this important issue.

Sincerely,

Dick Lugar — Tom Harkin
Thad Cochran — Tom Daschle
Rick Santorum — Jesse Helms
Max Baucus — Tim Johnson
Kent Conrad — Pat Roberts
Larry E. Craig — Chuck Grassley
Mitch McConnell — [illegible]

cc: The Honorable Madeleine Albright
The Honorable Dan Glickman

Jeff Berman

OFFICE OF THE VICE PRESIDENT

WASHINGTON

May 22, 1997

The Honorable Richard G. Lugar
Chairman
Committee on Agriculture, Nutrition, and Forestry
United States Senate
Washington, D.C. 20510-6000

Dear Mr. Chairman:

Thank you for the letter from you and other members of the Senate Committee on Agriculture, Nutrition and Forestry regarding the climate change negotiations and the potential impacts of climate change on U.S. agricultural production and competitiveness.

The issue of global climate change is an important one for agriculture. Over the next 50 years, U.S. food and fiber producers face major challenges in keeping pace with the ever increasing demands of a growing world population. Climate changes, environmental degradation, and increasing competition for land and freshwater supplies will make these challenges even greater. Based on current trends the Intergovernmental Panel on Climate Change projects significant impacts to ecological systems and the economy, including food security, water resources, coastal zones, and human health.

Information on the potential impacts of climate change on agriculture and net greenhouse gas emissions from agriculture and forestry activities is currently available. The White House Climate Change Task Force can arrange a briefing on this at your earliest convenience.

In light of the potential environmental consequences of climate change, this Administration has called on developed countries to agree to realistic and achievable binding targets for greenhouse gas emissions in the current climate negotiations. We believe that each nation needs the flexibility to determine its own cost-effective means of reducing emissions. And finally, everyone -- all nations (including developing countries) and all economic sectors -- must contribute to the solution because climate change is a global problem. We must begin now to lead the way to a sustainable future.

Further commitments under the United Nations Framework Convention on Climate Change must ensure that the U.S. economy remains strong and internationally competitive. To help find the best solution, the Administration is engaged in an assessment of the economic impacts of various emissions targets [coordinated by Dr. Everett Ehrlich: Undersecretary for

Economic Policy at the Department of Commerce.] This assessment includes a variety of aggregate national economic impacts, as well as sectoral and international economic impacts. This analysis is currently underway. As it progresses, it will be subject to a peer review process. Once this process is completed, we fully expect to brief Congress.

As part of this assessment, the Department of Agriculture will analyze the impact of any new agreement on America's food sector and our farmers, ranchers and consumers. Evaluation of the agricultural sector impacts of emissions reductions scenarios is contingent in some cases on national macroeconomic results. As a result, an agricultural sector analysis will follow Dr. Ehrlich's modeling results.

I appreciate your concerns and look forward to working with you on this important environmental issue.

Sincerely,

Al Gore

Al Gore

AG/pgu

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Divider Title: **18**

United States Senate
COMMITTEE ON
ENERGY AND NATURAL RESOURCES
WASHINGTON, DC 20510-6150

October 3, 1997

Mr. Dirk Forrister
Chair
White House Climate Change Task Force
The White House
Washington, DC 20500

Dear Mr. Forrister:

Because the administration declined to provide a witness for our September 30 hearing on climate change, members of our Committee were unable to ask questions on a variety of issues relevant to the climate change negotiations.

In an effort to allow the Senate—and the public at large—to appreciate the diplomatic, economic and technical issues we face as a consequence of the climate change issue, I respectfully request that the enclosed written questions for the record be answered in a time frame prior to or concurrent with the upcoming negotiations in Bonn.

Should you, your staff, or officials in agencies generating responses to these questions require clarification of additional information, David Garman of the Senate Energy Committee staff may be reached at (202) 224-7933.

Thank you for your attention to this request. I will look forward to the administration's responses.

Sincerely,

Frank H. Murkowski

Frank H. Murkowski
Chairman

cc: The Honorable Federico Peña
The Honorable Janet Yellen
The Honorable Timothy Wirth
The Honorable Chuck Hagel
The Honorable Robert C. Byrd

Questions from Chairman Murkowski

TF

1. When will the Administration unveil its proposed "targets and timetables" for carbon emission reductions?

CEA

2. When will the Administration release to the public the economic analysis that it used in reaching these targets and timetables?

CEA

3. Will the economic analysis used to arrive at these targets and timetables be peer reviewed?

    a. If not, why not?

    b. If so, will the peer reviewers comments be made public?

State

4. The Administration has indicated that it seeks to have an international emissions trading scheme in the new treaty.

    a. Roughly how many of the 165 parties to the existing climate treaty have agreed to this approach?

State

5. The Administration has indicated that it wanted to have "joint implementation" with developing countries as a means to reduce the costs of treaty compliance.

    a. Roughly how many of the 129 developing country parties have agreed to this approach?

State

6. The Administration has indicated that it will "advance existing commitments" for developing countries and has even proposed a means under which developing nations would "graduate" into binding commitments.

    a. Roughly how many of the 129 developing country parties have agreed to the "graduation" approach?

    b. Roughly how many of the 36 industrialized country parties have agreed to the "graduation" approach?

State

7. Some of the key strategies for our negotiations—including developing country participation, joint implementation, and emissions trading—are not faring well in the negotiations.

    a. If we don't get all of these elements in a Kyoto Protocol, will we walk away from the deal?

8. Last week the DOE released a report (the so-called "five labs" study) indicating that we __might__ reduce carbon emissions to 1990 levels with a $50/ton carbon tax __and__ an aggressive energy R&D program. In response to this report, the Secretary of Energy was quoted in a press release as saying that the analysis "...showed that what was good for the environment would be good for the economy."

DOE

   a. Is it the Administration's position that a $50/ton carbon tax would be good for the economy?

   b. Does the DOE study analyze impacts on business and manufacturing?

   c. Is the DOE study an economic study or an attempt to make predictions?

9. The economic modelling effort that was abandoned by the Administration earlier this year assumed that the mere announcement of an agreement to reduce carbon dioxide would immediately result in a 25% increase in the rate of improvement in energy efficiency.

CEA

   a. Was this a valid and realistic assumption?

   b. Did the peer reviewers feel it was a realistic assumption?

10. The administration economic modelling effort also assumed a __decrease__ in long term interest rates to almost 2%.

CEA

   a. Was this a valid and realistic assumption?

   b. Don't new taxes and higher costs tend to increase inflation and interest rates?

11. The administration modelling effort did not consider the costs associated with the development, implementation and monitoring of a trading program.

CEA

   a. Was this a valid and realistic omission?

12. Did the administration modelling effort take into account the adverse effects on U.S. competitiveness and the potential shifting of producers in the United States?

CEA

13. It was reported earlier this month that the Administration is considering an executive order that would require federal agencies to reduce emissions by 20%. It was also reported that the Department of Defense will oppose any Administration proposal on climate change that threatens military readiness.

DOD

a. What studies have been done to assess the impact of such an executive order on the U.S. military?

b. Have any such analyses been conducted by the Department of Defense to your knowledge?

c. Is consideration being given to granting waivers to federal agencies that cannot comply with emission reduction mandates without compromising their legal obligations and vital functions?

d. Is the Administration considering granting a waiver to the Department of Defense? To any other departments or agencies?

14. The DOE "five labs" study concludes that a carbon emission reduction of 390 million metric tons per year is required to stabilize emissions at 1990 levels in 2010 and is based on implementation of the program by the year 2000. The study finds that by increasing energy efficiency through a variety of federal and state programs with industry participation as well as imposing a $50 per metric ton of carbon permit price that "2010 emissions could be cut by about 390 [million metric tons] per year."

DOE

a. Does this mean that we can reach 1990 levels by the year 2010 or that in the year 2010, using new technology in combination with regulatory and other measures, we will begin to reduce emissions at a rate high enough to stabilize emissions at 1990 levels at some point in the future?

b. In 2010, how many million metric tons will China or Brazil be emitting per year? More than 390?

15. The DOE study concludes that "in all [three] cases, carbon reductions require the nation to embark on an aggressive set of policies and programs."

DOE

a. Assuming everything works as has been hypothesized in the Efficiency Case (Case One), we will not achieve stabilization of carbon emissions at 1990 levels by 2010, correct?

16. According to the report, the Case 2 and 3 scenarios require "better technology, 'readier' markets, and a price of carbon that results in a significantly increased willingness to manufacture, purchase, and use low-carbon technologies. It represents a vigorous national commitment that goes far beyond current efforts."

DOE

a. If we were to agree to implement a program similar to Case Two, including "a vigorous national program of research, development demonstration, and diffusion, and a trading regime for carbon" at a price of $25/ton, we still will not stabilize emissions at 1990 levels by 2010, correct?

DOE

b. According to the DOE study, only if we were to do all of the above and impose a $50/ton carbon charge would we be able to achieve stabilization at 1990 levels by 2010, correct?

c. To your knowledge, has any nation involved in the international climate negotiations proposed the adoption of an international mandate for developed countries to stabilize emissions at 1990 levels by the year 2010?

d. If not, then this study fails to tell us what would be necessary to achieve the significantly higher emission reductions that would be necessary to comply with any of the climate proposals that are on the table, correct?

e. If that is the case, then this study also fails to demonstrate that the U.S. can comply with the kind of legally binding emission reduction mandates currently under consideration in the international negotiations through use of existing technology at no cost to the nation, correct?

f. If $50/ton charges are required to stabilize emissions at 1990 levels by 2010, how much would the per ton charge need to be to reduce emissions to 10% or 15% below 1990 levels? Would it double? Triple?

17. Recent studies conducted by DRI/McGraw-Hill conclude that a $180-190/ton carbon charge would be necessary to stabilize emissions at 1990 levels by 2010. (Pg. 4 of July 1997 study, "The Impacts of Carbon Mitigation Strategies . . .")

✓ DOE

a. Can you explain why there is such disparity between DRI's and DOE's estimates of the per ton charge necessary to reach 1990 levels by 2010?

b. Has any attempt been made to reconcile these significant differences?

c. Is it possible that the necessary carbon charge would be higher than $50/ton to simply stabilize emissions at 1990 levels by 2010?

✓ DOE

18. One of the primary conclusions stated in the DOE study is that each of the three scenarios under consideration "can produce energy savings that are roughly equal to or exceed costs" . . . "if feasible ways are found to implement the carbon reductions...." The report states, however, that the study did not analyze specific policies to achieve the reductions described in the cases or the political feasibility of policies.

a. If we don't know what the policies or means for reductions are, and have not determined whether or not they are feasible, how can we rely on this report's conclusion that the reductions can be achieved without a cost to the nation?

b. What are some of the means that might be used to achieve the reductions? Would it involve new taxes? Note: Possible programs mentioned include "energy efficiency codes and standards" and "incentives through the tax system directed at investments in energy- efficient technology in industry." (Page 1.13)

DOE

19. In numerous places in the report, information is provided on what costs were taken into account or were excluded from consideration in making the cost-benefit assessments. "... we count as benefits only the energy savings to the nation.... Costs include the increased technology cost plus an approximate estimate of the costs of program and policy implementation." (Exec. Summary, footnote 2)

a. If no effort has been made to analyze specific policies to achieve the described reductions, how did you determine costs of programs and policy implementation?

b. What is an example of a "program" that was included in your analysis. What is the cost of that program? What cost did you assign to the "policy implementation" associated with that program?

DOE

20. On page 1.12 of the report the following statement appears: We have presented the direct and most easily quantified of the costs and benefits, but have not attempted a full benefit-cost analysis. We do not account for indirect effects of policies (e.g., the reallocation of investment dollars to efficiency investments). We do not account for the increased cost of some R&D programs that are needed to achieve the scenario results nor do we count the benefit of reduced carbon and other pollutant emissions. Also, we have not analyzed any possible redistribution of wealth that could arise from a carbon trading system or other policy to increase the price of carbon-based fuel."

a. Aren't these pretty significant holes in DOE's analysis?

b. If a "full benefit-cost analysis" has not been conducted, then how can you legitimately conclude that emission reductions can be achieved through energy efficiency without cost?

21. On page 1.15, the report states that the $50/ton carbon charge is not a "direct cost."

DOE

a. Why isn't the carbon charge considered a "direct cost?"

b. Isn't it a direct cost to someone? Who has to pay it?

c. Is the cost of the carbon permit fees included in the analysis in any way?

22. The report characterizes the carbon charge as "a potentially large transfer payment" and makes the following statement: "The magnitude of the transfer payment, as well as the losers and winners from the transfers, depends on the nature of policy and its implementation as a cap and trade system or some alternative. The amount of money that could be in play is very large: $50/ton times 1.3 billion tons per year equals $65 billion per year." (Page 1.15)

✓ DOE

a. Is it correct then that the study concludes that emissions reductions could be made at low or no cost yet fails to take into account some $65 billion in "transfer payments?"

b. Who are these "losers" the DOE report refers to?

23. In describing the results of DOE's analysis, the statement is made that the DOE report "makes a strong case for the value of energy technology research, development, demonstration, and diffusion as a public response to global climate change." As the report points out on page 1.3, DOE's expenditure of $8 million on energy-efficiency research between 1978 and 1996 has resulted in net benefits of $28 billion through 1996 including significant environmental, health, productivity and economic competitiveness benefits. As you know, numerous economists agree that research and development and technology deployment is the most cost-efficient way to address climate concerns. Indeed, it is precisely because of the kinds of cost-effective opportunities DOE has identified that these economists have concluded in a number of independent studies that the wisest course of action, is to delay the adoption of any kind of mandates or legally binding targets and timetable for a modest period of years to permit research and development to occur and to generally avoid replacement of equipment and machinery prior to the end of its useful life cycle.The Administration has previously testified that if we "do it dumb," compliance with the proposed international target and timetable mandates could be very costly to the U.S.

✓ DOE

a. Doesn't the DOE report provide further support and justification for not rushing into legally binding emission reduction mandates in December in Kyoto but delaying - even for a few years - to reap the benefits of the kinds of R& D the DOE report is promoting?

b. Can you quantify the "cost" of delaying for 10 or 20 years?

c. Can you demonstrate that the cost of delay exceeds the cost of adopting international mandates three months from now?

24. According to the DOE report, 95 million of the 135 million tons of carbon reductions necessary in the utility sector to achieve stabilization at 1990 levels by 2010, "comes from retirement of coal power plants and carbon-ordered dispatching of the utility system . . . and from repowering coal plants with natural gas." (Page 1.6)

DOE

a. How much does it cost to "repower" an average coal plant with natural gas?

b. Who would bear these costs?

25. The DOE report says that the measures used to reduce emissions in the utility sector are "cost-effective with a $50/ton carbon charge." (Page 1.6)

a. When you say that retiring a coal plant is "cost-effective" with a $50/ton carbon charge, aren't you really saying is that if we impose a fee of $50 per ton of carbon, a given number of coal plants will be forced to shut down?

DOE

b. How many existing coal plants would be "retired?"

c. Where are these plants located?

d. Has any consideration been given in DOE's analysis to the costs associated with the shutdowns, layoffs, displacements that would occur as a result of "retiring" existing plants?

e. When you say that energy savings or reductions can be achieved at little or no cost "to the nation," does that include the citizens, communities and businesses in this country?

26. The DOE report also states that the remaining reductions in the utility sector would be achieved from renewables such as wind, biofuels, expansion of hydropower, and extension of nuclear power plant life. (Page 1.6)

DOE

a. Explain what is meant by "nuclear power plant life extensions."

b. Does this study contemplate new nuclear power plants or a greater dependence on nuclear power?

27. Turning to the transportation and industry sectors, the DOE report contemplates a reduction of 50 million tons of carbon per year through (a) advanced combustion turbine cogenerators in industry; (b) biomass and black liquor gasification and low-carbon industrial

processes; and (c) cellulosic ethanol/gasoline blends for automobiles. (Page 1.6)

DOE

a. What kinds of industrial processes utilize advance combustion turbine cogenerators?

b. What percentage of industrial plants currently use these turbine cogenerators?

c. How much would it cost a given plan to re-outfit with a turbine cogenerator?

d. Are cellulosic ethanol/gasoline blends currently available to American consumers? What automobiles can use this fuel? What kind of conversion would be necessary for other cars to use this fuel? What would it cost?

28. The Acid Rain trading program exists solely within the United States and operates primarily through the annual allocation of sulphur dioxide permits to a known group of electric power generators, correct?

EPA
DOE

a. Why are the permits generally allocated only to electric power generators?

b. What mechanism is used to determine whether these entities' emissions are within their permit allowances?

c. What happens if a company's emissions exceed its permits?

d. What legal process exists to allow the regulated community to appeal decisions with which it disagrees in connection with the trading and emission program?

e. What costs are associated with the operation and administration of the trading program? How are these costs minimized to maintain market incentives?

29. I understand that the establishment of a trading regime similar to the sulphur dioxide program for carbon emissions has been proposed.

EPA
DOE

a. Would the carbon trading program operate domestically or internationally?

b. What role is envisioned for the Chicago Board of Trade?

c. Could a U.S. company such as an automobile manufacturer in Detroit purchase carbon permits through the Board of Trade from another developed country such as Germany? From a developing country such as Guatemala or Botswana?

d. If carbon permits may be purchased from a developing country, how would it be determined how many permits each developing country would be allocated?

e. Would any UN agencies or bodies be involved in the implementation of the emission trading program? How would they be funded?

f. What kind of transaction costs would you expect to be associated with an international emissions trading program?

g. Would state or local governments be required to purchase carbon units for emissions? Federal agencies?

h. What kind of allocation process would be set up to establish the caps that would be required to provide incentives to trade?

i. In the Acid Rain program, compliance with permits is ensured through sophisticated continuous emissions monitoring equipment. How would compliance with permit limitations be ensured under this program?

j. Would developing countries have to reduce their own emissions by one ton of carbon for each carbon unit they sell? How would compliance be ensured for developing countries? Will developed countries only be able to sell a carbon unit if they can demonstrate they have already achieved the relevant reductions?

k. What penalties would apply if a developing country failed to reduce its emissions at an amount commensurate with the carbon units it had sold?

l. Who will monitor countries or companies for enforcement purposes?

30. What is the administration's calculation or estimate of the greenhouse gas emission reduction equivalent of the Clean Coal Technology Program, which was a 7 billion dollar program, at least half of which came from private industry?

DOE

31. What exactly is the Administration itself doing to develop new technologies to reduce greenhouse gas emissions? I'm not talking about what the government is doing with industry in a partnership, or what industry is doing alone—what is the federal government doing itself?

DOE

White House Climate Change Task Force

734 Jackson Place, N.W. • Washington, DC 20503

October 31, 1997

The Honorable Frank H. Murkowski
Chairman
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510-6150

Dear Senator Murkowski:

Thank you for your letter of October 3, 1997, relaying questions related to the climate change negotiations, which we received on October 16.

We are facilitating an interagency effort to respond to your questions and will incorporate recent developments at the negotiations completed today in Bonn. When Mr. David Garman of your staff returns from Bonn, I will contact him to determine a mutually convenient date for delivery of our responses.

I can be reached at (202) 343-1060 if you have any further questions.

Sincerely,

Dirk Forrister

Dirk Forrister
Chairman

cc: The Honorable Federico Peña
The Honorable Janet Yellin
The Honorable Timothy Wirth
The Honorable Chuck Hagel
The Honorable Robert C. Byrd

202 343-1060 • Fax 202 343-1162

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Divider Title: **19**

United States Senate

COMMITTEE ON FOREIGN RELATIONS
WASHINGTON, DC 20510–6225

February 13, 1998

The Honorable Stuart E. Eizenstat
Under Secretary for Economic, Business
and Agricultural Affairs
Department of State
Washington, D.C. 20520

Dear Secretary Eizenstat:

Attached are questions for the record for this week's hearing on the implications of the Kyoto Protocol. Because of the need for timely oversight of this issue, I am requesting that you supply the requested responses and documents within two weeks.

Thank you.

Sincerely,

Chuck Hagel
Chairman
Subcommittee on International Economic
Policy, Export and Trade Promotion

CTH/kp

QUESTIONS FOR THE RECORD
FOR UNDERSECRETARY OF STATE STUART EIZENSTAT
SUBMITTED BY SENATOR CHUCK HAGEL
UNITED STATES SENATE COMMITTEE ON FOREIGN RELATIONS
HEARING ON IMPLICATIONS OF THE KYOTO PROTOCOL
February 13, 1998

1. When the Congressional delegation met with Vice President Gore in Kyoto, I asked the Vice President exactly what he meant when he called on you and the rest of the U.S. delegation to show more flexibility. The Vice President said that he would defer that question to you, but you were not at that meeting. Can you tell us exactly what instruction you received from the Vice President and what he meant when he instructed you to be more flexible in the negotiations?

2. Please define for me: "meaningful participation from key developing countries?"
   - 2.1 What countries do you define as "key?" Do you consider China a "key" developing country? Do you consider India a "key" developing country?

3. The Administration's position on the issue of developing country participation has been much weaker than that unanimously urged by the Senate in Senate Resolution 98. The President has called for "key" developing countries to participate in a "meaningful" way, while the unanimous view of the Senate was that "the United States should not be a signatory to any protocol which would mandate new commitments to limit or reduce greenhouse gas emissions for the Annex I Parties, unless the protocol or other agreement also mandates new specific scheduled commitments to limit or reduce greenhouse gas emissions for the Developing Country Parties within the same compliance period." Why did the Administration use a different standard than that voted unanimously by the Senate?
   - 3.1 Does the Administration intend to adhere to the letter of S. Res. 98, that is to negotiate legally-binding, specific new scheduled commitments within the same compliance period for the Developing Country Parties currently left out of the Kyoto Protocol?
   - 3.2 At what point, specifically, will the Administration reconsider the viability of the Kyoto Protocol if emission reduction commitments cannot be secured from the Developing Country Parties?
   - 3.3 Does the President intend to honor the unanimous request of the Senate not to be a signatory — that is not to sign the Protocol — until we have met both objectives of the Byrd-Hagel resolution test: emission reduction commitments from the Developing Country Parties and a demonstration that the Protocol will not seriously harm the U.S. economy?

4. Does the FY99 budget contain any programs or budget requests that could have the effect of implementing portions of the Kyoto Protocol? Please provide the Committee with a

list of all climate change programs in the Executive Branch, with a description of each program and how they relate to the Kyoto Protocol.

5. Article 3 calls for the U.N. Subsidiary Body for Scientific and Technological Advice to report within a year on which additional activities should be regulated by the treaty. What specific additional domestic U.S. economic activities do you believe should be brought under the jurisdiction of the Kyoto Protocol?

6. Article 5 calls on countries to enhance their monitoring systems of greenhouse gas emissions. Will the Administration make any changes in our existing monitoring systems prior to Senate ratification of the treaty?

7. Article 6 delays the implementation of any international emissions trading system among industrial countries until some later U.N. conference establishes procedures for verification and reporting. Do you believe that a fully functioning trading system will, in fact, be adopted next November in Buenos Aries?

8. Article 11 requires the industrial countries to "provide new and additional financial resources" to developing countries. What exactly does this mean, in terms of the U.S. budget?

   8.1 Does the Administration plan to implement this requirement of the Kyoto Protocol before Senate ratification?

9. Article 12 creates a new U.N. foreign aid fund on the climate change issue. This is the "Clean Development Mechanism." This Article creates a new U.N. structure for the transfer funds from industrial to developing nations. It would permit industrial countries or companies to pay into a fund that would, in turn, pay for projects in developing nations to achieve "sustainable development" and to reduce greenhouse gas emissions beyond what they would otherwise be. Article 12 also contains language that would permit the U.N. Clean Development Mechanism to retain a portion of the funds it receives for its own administrative purposes. Early versions of this Brazilian proposal forthrightly referred to this as "user fee" authority, a form of U.N. taxation authority. Does the Administration have any concerns about granting this kind of fee retention authority to a U.N. body?

10. Last year, the Administration abandoned a year and a half-long effort to develop an economic model that would show that we could make major cuts in energy use in this country without harming our economy. The Chair of the Council of Economic Advisors went so far as to call economic modeling "futile." On February 4, 1998 the Chair of the Council on Environmental Quality, Kathleen McGinty said before the House Science Committee, "The Administration is working on a more detailed economic analysis of the impact of the targets reached in Kyoto. Council of Economic Advisers Chair Janet Yellen will be prepared to discuss the analysis at a hearing next week before the Senate Foreign Relations Committee." Can you tell me why the Administration did not produce either Janet Yellen as a witness or the promised detailed economic model or analysis?

11. Were you involved in developing the statement of the Administration's climate change policies announced by the President in his October 22, 1997 speech at the National Geographic Society, and, if you were, will you please describe for us the role you played?
   11.1 When were you told that you would be head of the U.S. delegation at the third session of the Conference of the Parties to the United Nations Framework Convention on Climate Change; and who told you?
   11.2 Will you please describe for us the role you played in developing the Administration's policy approach to, and strategies concerning, the international climate-change negotiations during the period between the President's October 22 speech and the first day you arrived at the Kyoto Conference?
   11.3 At the Kyoto Conference, you were the head of the U.S. delegation. Will you please describe the role you played in developing the Administration's policy approach to, and strategies concerning, the international climate-change negotiations in Kyoto; and, in doing so, will you please describe on a comparative basis the decision making authority within the delegation of you, Ms. Kathleen McGinty, and Mr. Todd Stern?

12. In his testimony last fall before the House Commerce Committee, former Under Secretary of State Wirth referred to the Administration's "economics team" in response to Committee questions about economics issues relevant to the international climate change negotiations. Prior to your appointment as head of the U.S. delegation for the Kyoto Conference, did you regard yourself as part of the Administration's "economics team" with respect to the international climate-change negotiations?
   12.1 From and after the time you were appointed head of the U.S. delegation, was there an "economics team" concerning the international climate-change negotiations, and, if there was, who were its members and who headed the "economics team?"

12. Is there currently in place any interagency body within the Executive Branch that has the responsibility to analyze the economic implications to the nation of the emissions-reduction requirements specified in the Kyoto Protocol for the United States and of alternative domestic policies to achieve those reduction requirements?
   12.1 If yes, What is the name of that interagency body? Who is the chair of that body? Are you a member of that body?

13. You were appointed head of the U.S. delegation at the Kyoto Conference after former Under Secretary of State Wirth announced his intention to resign as Under Secretary for Global Affairs. The President has not yet sent to the Senate his nomination of a successor to Mr. Wirth. Are you currently proceeding on the assumption that, unless and until you are informed by the Secretary of State or the White House to the contrary, you are the senior State Department official who has immediate responsibility for the Administration's policy approach to, and strategies concerning, international climate-change negotiations?
   13.1 What is your current assumption about whether you or Mr. Wirth's successor, if and when confirmed by the Senate, will head the U.S. delegation at the fourth session of the Conference of the Parties when it meets in Buenos Aires in November?

14. In his October 22, 1997 speech at the National Geographic Society, the President said: "First, the United States proposes at Kyoto that we commit to the binding and realistic target of returning to emissions of 1990 levels between 2008 and 2012. And we should not stop there. We should commit to reduce emissions below 1990 levels in the five-year period thereafter, and we must work toward further reductions in the years ahead." As of the time you arrived at the Kyoto Conference, or at any time during the Kyoto Conference, were you informed of:

- what the President's October proposal would require of the United States in terms of the tons of carbon-equivalent emissions reductions;
- what domestic laws and regulations likely would be required to enable the United States to abide by the President's October proposal; and
- what the economic consequences to the nation likely would be if the President's October proposal were the basis for a protocol?

14.1 For any affirmative response to any of the above questions,

- Who gave you that information, and when?
- Please tell us what portions of the information were in written form, by way of briefing papers or otherwise, including any notes you made of information that was given to you?
- To the extent the information to which I have referred was not given to you in written form or reflected in any notes you made of the information given to you, would you please tell the Committee:
  - what the President's October proposal would require of the United States in terms of the tons of carbon-equivalent emissions reduction;
  - what domestic laws and regulations likely would be required to enable the United States to abide by the President's October proposal; and
  - what the economic consequences to the nation likely would be if the President's October proposal were the basis for a protocol?

14.2 Prior to your leaving for the Kyoto Conference, was it your understanding that the President's October proposal for emissions "targets and timetables" presupposed that a protocol would provide for emissions trading among Annex I Parties and for "joint implementation" among and between Annex I and non-Annex I Parties?

14.3 Prior to your leaving for the Kyoto Conference, what was your belief as to how difficult it would be for the United States to achieve the emissions limitation that was proposed in the President's October speech, assuming a protocol provided for emissions trading among Annex I Parties and for "joint implementation" among and between Annex I and non-Annex I Parties?

15. As you know, the Kyoto Protocol, if it ever were to become binding on the United States, would require our nation to reduce its emissions of greenhouse gases by 7 percent below their 1990 levels during the period 2008 through 2012, all in accordance with the specific provisions of the Protocol concerning the list of greenhouse gases, sinks, baseline dates, and so forth. I refer you to a document entitled "Fact Sheet: The Kyoto Protocol on Climate Change," dated January 23, 1998. It states that it was prepared by the Department of State's Bureau of Oceans and International Environmental and Scientific

Affairs." Did you, personally, approve issuance of that "Fact Sheet," and, if you did not, who was the highest ranking official of the State Department who approved its issuance?

15.1 The State Department's "Fact Sheet" states: "The 7 percent target represents at most a 3 percent real reduction below the President's initial proposal of reducing greenhouse gases to 1990 levels by 2008-12. The remaining 4 percentage points result from certain changes in the way gases and sinks are calculated and do not reflect any increase in effort as compared to the President's original proposal." The document then goes on to attribute one percentage point of the 4 percentage points to changing the baseline from 1990 to 1995 for the three synthetic gases covered by the Kyoto Protocol (HFCs, PFCs, and SF_6). It further attributes "about 3" percentage points of the 4 percentage points to not including in the 1990 baseline U.S. sinks, but including certain changes in sinks during the period 2008 through 2012. Was an analysis, which showed that the Kyoto Protocol involves "at most a 3 percent real reduction" of U.S. greenhouse gas emissions below 1990 levels furnished to you while you were in Kyoto and before you agreed to the 7 percent reduction figure; and, if so:

- Who prepared the analysis?
- Who furnished you the analysis, and when?
- Were you given or shown any such analysis in writing?

15.2 Please tell us which other nations – at the time of the Kyoto Conference, but before actual adoption of the Kyoto Protocol -- were informed, either by you or by any other member of the U.S. delegation, that the Kyoto Protocol, as finally proposed to be adopted by the Kyoto Conference, would entail at most a 3 percent real reduction of U.S. greenhouse gas emissions below 1990 levels?

- Was Chairman Estrada of the Committee of the Whole informed of that; and, if so, when?
- Were any member nations of the European Union informed of that; and, if so, which ones and when?
- Were any developing nations, including, but not limited to, China, India, Argentina, Brazil, or any member nation of the Alliance of Small Island States informed of that; and, if so, which ones and when?

16. Article 3.1 of the Kyoto Protocol states that the emissions reduction requirements of the Annex I Parties set forth in Annex B to the Protocol, in accordance with the provisions of Article 3, are "with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012." My recollection is that Ambassador Estrada, who chaired the AGBM and the Committee of the Whole, stated that the reduction of the Annex I Parties would amount to about 5.2 percent below 1990 levels. If the "real" reductions or limitations of the Annex I Parties are calculated in the same manner as the proposed U.S. reduction is calculated in the State Department's "Fact Sheet" — in other words, taking into account the 1995 baseline for the three synthetic gases and the provisions regarding sinks – shouldn't we conclude that the "real" reductions of the Annex I Parties below 1990 emissions levels will be less than 5 percent?

16.1 Putting it another way, if the U.S. reduction is "at most a 3 percent real reduction" below 1990 levels, that would be less than one-half of the 7 percent proposed reduction for our nation set forth in Annex B to the Kyoto Protocol. I understand that the United States accounted for perhaps as much as one-third or more of the Annex I Parties' gross emissions in 1990; Russia (the next largest Annex I emitter of greenhouse gases), as well as New Zealand and Ukraine, refused to agree to any reductions below their respective 1990 emissions levels; and Australia would be allowed to increase its emissions by 8 percent over its 1990 level. In these circumstances, can you explain how the aggregate reductions of the Annex I Parties during the period 2012 through 2018 will achieve the 5 percent reduction level referred to in Article 3.1 of the Kyoto Protocol?

16.2 As far as the Administration is concerned, is the phrase "with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012," as set forth in Article 3.1 of the Kyoto Protocol, anything more than a purely political statement; or, could it in any manner be interpreted as placing on the United States a legal obligation over and above the 7 percent reduction set forth in Annex B, when interpreted in accordance with the balance of Article 3 without regard to that phrase?

17. The fact sheets and related documents that were distributed by the White House, along with the text of the President's October speech, stated with respect to the emissions target and timetable he had announced: "And it is meaningful. Achieving 1990 levels in the period 2008-12 would amount to almost a 30 percent reduction off a business-as-usual approach." Even assuming, for the sake of our discussion, that the 7 percent reduction referred to in Annex B of the Kyoto Protocol amounts to "at most a 3 percent real reduction" below 1990 levels, would you please:

- tell the Committee how many millions of tons of reduction will have to occur in 2012 (the last year of the first commitment period) compared to the baseline emissions projections for that year; and
- explain why the Administration agreed in Kyoto to a legally binding obligation to reduce our greenhouse gas emissions by such amount below 1990 levels during the period 2008 through 2012?

17.1 Given the provisions in the Kyoto Protocol concerning the baseline for the three synthetic gases and the provisions regarding sinks, if the U.S. delegation had insisted at the Kyoto Conference on percentage figures in Annex B to the Protocol that would have resulted, in reality, in a U.S. commitment only to return its greenhouse gas emissions to their 1990 level, rather than the 3 percent reduction claimed in the State Department's "Fact Sheet," please tell us, based on your discussions with other nations, which of them, if any, would have formally objected to adoption of such a protocol?

18. Article 3.2 of the Kyoto Protocol states: "Each Party included in Annex I shall, by 2005, have made demonstrable progress in achieving its commitments under this Protocol." Does this constitute a legally-binding obligation?

18.1 Will you please tell us what that provision means in terms of the relationship between U.S. greenhouse gas emissions in 2005 and --

- the baseline projection of U.S. emissions for 2005; and
- U.S. greenhouse gas emissions in 1990?

18.2 Does the Conference of the Parties to the Kyoto Protocol have the authority to determine whether the United States is in compliance with Article 3.2; and, if it does, would our nation be exposed to risk of enforcement provisions that might be established pursuant to Article 17 of the Protocol?

19. In his October speech, the President said there should be reductions below 1990 levels during the five-year period after 2012. Either before or during the Kyoto Conference, did you or any other member of the Executive Branch ever propose to, or discuss with, another nation what the percentage reduction should be during the five-year period after 2012? If yes —

- what percentage reduction was proposed or discussed for that second commitment period;
- who expressed the view of the United States on that issue;
- when such further reduction was proposed or discussed;
- who the other nations were; and
- what their reaction was?

19.1 As nearly as I can determine, there are two places in the Kyoto Protocol that define the first "commitment period." Article 3.1 uses the expression "the commitment period 2008 to 2012," and Article 3.7 uses the identical expression. I am concerned that the word "to" could be interpreted by some to mean "up to," rather than "through," so that the language in the Kyoto Protocol would be interpreted to refer to the years 2008, 2009, 2010, and 2011— that is, "up to" 2012. Such interpretation would mean that the first commitment period has a duration of only four years. Was it the intention and understanding of the U.S. delegation at the Kyoto Conference that the phrase "the commitment period 2008 to 2012," as used in the Kyoto Protocol, was meant to include the full year 2012?

20. Even if one assumes that the Kyoto Protocol provides for at most a real 3 percent reduction of U.S. greenhouse gas emissions below their 1990 levels during the period 2008 through 2012, would you agree that, all other things being equal, the level of effort required to enable U.S. compliance with that commitment would have to be greater or more far-reaching than would be the case if the Protocol only required, under its provisions, returning the nation's emissions to their 1990 level, and, also, that the economic consequences would be greater?

20.1 During the decision-making process as to whether the U.S. delegation should agree to the Kyoto Protocol, as it finally was to be proposed to the Kyoto Conference, did you participate in any discussions, or receive any information, concerning whether, or how, or the extent to which, domestic laws and regulations that would be required, and the economic consequences to the nation, would or could differ from those contemplated at the time of the President's October 1997 speech? If yes --

- Was any such information furnished to you in written form; and, if so, who prepared the information, and who furnished it to you?

- Would you please describe for the Committee what was said during any discussions you had on that issue?
- Would you please tell us whether the President or the Vice President, or both, were provided the information that you had?

21. As you know, Senate Resolution 98, the Byrd-Hagel Sense of the Senate Resolution, provided, in part, that "the United States should not be a signatory to any protocol to, or other agreement regarding, the United Nations Framework Convention on Climate Change of 1992, at negotiations in Kyoto in December 1997, or thereafter, which would -- (A) mandate new commitments to limit or reduce greenhouse gas emissions for the annex I Parties, unless the protocol or other agreement also mandates new specified scheduled commitments to limit or reduce greenhouse gas emissions for Developing country Parties within the same compliance period. . . ." Please tell the Committee what efforts were made by the United States, from and after the time you were told you would head the U.S. delegation at the Kyoto Conference, to obtain language in the Kyoto Protocol that met the specific requirements of Senate Resolution 98, namely, that "*mandates new specified scheduled commitments to limit or reduce greenhouse gas emissions for Developing country Parties within the same compliance period*" as would apply to our nation?

21.1 In the President's October speech, he stated: "The United States will not assume binding obligations unless key developing nations meaningfully participate in this effort." In his December 8 speech to the Kyoto Conference, one of the specific conditions stated by the Vice President to show "increased negotiating flexibility" also was "the meaningful participation of key developing countries." At any time, were you under the impression that such language met the requirements set forth in the Senate Resolution that was adopted by a vote of 95 to zero? If yes --

- What, if anything, made you think that Senate Resolution 98 was only concerned with "key" developing nations, as distinguished from all, or substantially all, of them?
- What, if anything, made you think that the expression "meaningful participation" was exactly the same thing as the requirement of Senate Resolution 98 that referred to "new specified scheduled commitments to limit or reduce greenhouse gas emissions for the Developing country Parties within the same compliance period?"

21.2 Do you agree that the Kyoto Protocol, as written, does not meet the requirements of the Senate, as set forth in Senate Resolution 98?

22. As of, or around, the time you were designated to head the U.S. delegation to the Kyoto Conference, what was your understanding of the intention and meaning of the following words, as used in the President's October speech:

- "key" — Please name all of the developing nations that were "key?"
- "participation" — did it include quantitative commitments, in the Protocol or in a simultaneously adopted, but separate, protocol, to limit the growth of developing nations' greenhouse gas emissions?
- "meaningful" — what did that mean?

22.1 My understanding is that the Annex I nations and the developing nations knew of the terms of Senate Resolution 98 at least by the summer of 1997, when the Ad Hoc Group on the Berlin Mandate met in Bonn. Is that your understanding also?

23. At any time during the Kyoto Conference, did the Administration's intent and understanding of the phrase "meaningful participation of key developing nations" change from the intent and understanding that existed as of the President's October speech? If so, would you please tell us what the changes were?

24. Does the Kyoto Protocol, as written, provide for "meaningful participation of key developing countries" within the meaning of the President's October 1997 speech?

24.1 The following is from a document, dated December 11, 1997, which is entitled "Transcript: Eizenstat Briefing on Results of Climate Talks" and which bears a legend at the top stating "The United States Mission to Italy." The document purports to be a transcript of your news conference on December 11 in Kyoto. The following statement is attributed to you:

> "Second is the question of eventual ratification by the U.S. Senate. The President has indicated that the United States would not take on legally binding targets until there was meaningful participation by developing countries. Clearly, despite the very important step taken through the Brazilian process of creating a Clean Development Mechanism for Credit, that meaningful participation has not yet been taken as a result of the steps that were done here. We hope, over time, they will."

Did that transcript accurately set forth what you said at your news conference?

24.2 If anybody in the Administration, or anybody else, ever tries to tell or suggest to this Committee that the Kyoto Protocol, as written, provides for "meaningful participation by key developing countries," can we count on you to deny that?

25. The State Department's "Fact Sheet: The Kyoto Protocol on Climate Change," dated January 23, 1998 states (beginning at the bottom of page 4): "While the conference rejected a proposal to create a new category of nations that would voluntarily assume

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25. The State Department's "Fact Sheet: The Kyoto Protocol on Climate Change," dated January 23, 1998 states (beginning at the bottom of page 4): "While the conference rejected a proposal to create a new category of nations that would voluntarily assume binding emissions targets, developing countries may as a prerequisite for engaging in emission trading still do so through amendment to the annex of the protocol that lists countries with targets." Does that statement mean that there is a mechanism for developing nations to opt into the Kyoto Protocol by means of amendment to Annex B?

25.1 Was the United States, before and during the Kyoto Conference, a proponent of what had been called Article 10, which was called Article 9 in a subsequent draft because of renumbering of the Articles, and that Article 10 was intended to set forth the rules by which a non-Annex I Party (that is, a developing nation) could "opt in" to a quantitative commitment to limit or reduce its greenhouse gas emissions?

25.2 Is it true that the developing nations, as a group, refused to go along with this "Article 10," and that, in your press conference immediately after adoption of the

Protocol, you stated that the defeat of the opt-in provisions of Article 10 "was I think our single greatest disappointment?"

25.3 Who came up with the idea that Annex B could be amended so as to add a developing nation and a related emissions-limitation commitment, or when such idea first entered into a draft of the Protocol?

25.4 Do you believe that a majority of the developing nations wanted to include Article 10 in the Kyoto Protocol?

25.5 If a "developing" nation wanted to undertake an emissions-limitation commitment for itself and that it proposed to amend Annex B of the Kyoto Protocol by stating what its commitment was, do you agree that, by reason of Articles 20.7 and 19.3 of the Protocol, such amendment would first have to be approved by at least a three-fourths majority vote of the Parties to the Protocol?

25.6 Do you believe that the Government of the United States, under our Constitution, could not deposit an instrument of acceptance to any amendment of Annex B pursuant to Article 19.4 of the Kyoto Protocol without the advice and consent of the U.S. Senate?

25.7 If a developing nation were added to Annex B, would it automatically become an Annex I Party to the Convention?

25.8 Would a developing nation that is added to Annex B also undertake the commitments of Annex I Parties set forth in Article 2 (concerning policies and measures), Article 5 (concerning a national system for estimation of its emissions and sinks), Article 7 (concerning its national emissions inventory and national communications), and Article 8 (concerning expert review of its reports filed pursuant to Article 7)? If yes –

- Will you please look at those Articles in the Kyoto Protocol and tell me what language in them would make them applicable to a developing nation that became listed in Annex B?

26. In her written testimony before the House Science Committee on February 4, Ms. Kathleen McGinty said: "The President has made it clear that he does not intend to send the Kyoto Protocol to the Senate for ratification until we have achieved meaningful participation by key developing countries." Is that also your understanding of the President's position; and, if it is, who told you that?

27. I am told that various Administration officials have referred to efforts to obtain, on a bilateral or multilateral basis, the agreement of certain developing nations to quantitative limita- tions on the growth of their greenhouse gas emissions. For example, I understand that Ms. McGinty indicated that in her oral testimony before the House Science Committee. Is it the Administration's position that any such bilateral or multilateral agreements would constitute "meaningful participation by developing nations?"

27.1 How could the Administration contend that bilateral or multilateral agreements with developing nations would justify the Senate's ratification of the Kyoto Protocol, in the absence of amendments to the Kyoto Protocol that made it certain the developing nations added to Annex B also were subject to Articles 2, 3, 5, 7, and 8, and that all such commitments, including those undertaken by means of joining Annex B, were subject to such enforcement provisions as might be adopted to elaborate Article 17?

27.2 Is the Administration contemplating proposals to amend the Kyoto Protocol to make certain that, if developing nations were added to Annex B, they also will be subject to Articles 2, 3, 5, 7, and 8?

28. What do you believe the chances are that the Kyoto Protocol will enter into force by the fourth session of the Conference of the Parties in November if the Senate has not ratified it more than 90 days before that session?

29. If the Kyoto Protocol does not enter into force by the November session of the Conference of the Parties, do you believe that the Protocol's provisions concerning amendment of the Protocol are irrelevant and that, in the absence of adoption of the Rules of Procedure of the Conference of the Parties that provide for amendment of the Kyoto Protocol by something other than "consensus," any amendments to that Protocol would require "consensus?"

30. Would you please describe for us all of the ways, including procedure, that the State Department is considering to accommodate the requirements of Senate Resolution 98?

31. Did the President, personally, authorize the U.S. delegation at the Kyoto Conference to vote for adoption of the Kyoto Protocol?

31.1 Will you please explain to the Committee why the President authorized the U.S. delegation to vote for adoption of the Kyoto Protocol at the Kyoto Conference, but no decision has been made as to when it will be signed in behalf of the United States?

32. Will you please identify and describe any oral or written understandings with, or commitments to, other nations -- of any kind other than those specifically set forth in the Protocol -- which were made by the President, by the Vice President, or by any member of the U.S. delegation to the Kyoto Conference, including, but not limited to, any understandings or commitments regarding:

- implementation or the interpretation of the Protocol;
- the substance of future decisions by the Conference of the Parties, which the United States would support, regarding rules or guidelines elaborating the Protocol; or concerning the timing of any Party's signature or ratification of the Protocol.

33. Article 16 bis. Will you please tell us what "modalities" would be, as distinguished from the "principles," "rules," and "guidelines" referred to in that Article?

33.1 Do you believe that, until the Conference of the Parties makes all of the decisions that it is empowered to make under those Articles of the Kyoto Protocol, it will be impossible for either the Administration or the Congress to know the extent to which those Articles – in reality – would or could reduce the nation's cost of complying with the emissions- reduction requirement set forth in the Protocol?

34. Do you believe that under Article 16 bis, Annex B Parties can begin engaging in emissions trading now?

34.1 Do you have any reason to believe that other Parties to the Convention, specifically including the European Union, agree that, under Article 16 bis, Annex B Parties can begin engaging in emissions trading before the Conference of the Parties defines what it regards as the "relevant principles, modalities, rules and guidelines" for emissions trading, as provided for in the first sentence of Article 16 bis?

34.1 Will you please explain to the Committee, in summary form at this time, all of the issues that will have to be decided by the Conference of the Parties in order to enable emissions trading under Article 16 bis be a viable and effective mechanism for reducing the costs of complying with the emissions-reduction commitment of the United States under the Kyoto Protocol?

35. Regarding the Clean Development Mechanism, particularly Article 12.8, which states: "The Conference of the Parties serving as the meeting of the Parties to this Protocol shall ensure that a share of the proceeds from certified project activities is used to cover administrative expenses as well as to assist developing country Parties that are particularly vulnerable to the adverse effects of climate change to meet the costs of adaptation." Who are those countries that will be entitled to receive funding to meet the costs of adaptation?

- Are they limited to the groups of countries referred to in Article 4.8 of the Convention?
- Will the share of proceeds to be used to meet the costs of adaptation be allocated among deserving nations in accordance with some currently unknown, decision making process to be established by the Conference of the Parties?
- Please identify all countries that would be excluded from receiving any portion of such funding.

35.1 Does the United States have an understanding with Brazil, or with any other nations, as to a limit, or potential limit, on the amount of money derived from projects under the Clean Development Mechanism that will be diverted to developing nations for adaptation purposes?

36. My understanding is that the fourth session of the Conference of the Parties in November will review the adequacy of Articles 4.2(a) and (b) of the Convention. Given that the Conference of the Parties adopted the Kyoto Protocol and that Articles 4.2(a) and (b) of the Convention have nothing to do with commitments of developing nations, will you assure this Committee that the position of the United States at the November session will be that Articles 4.2(a) and (b) of the Convention <u>are</u> "adequate?"

37. The Kyoto Protocol contains no provisions that describe what the procedures and consequences will be if a Party is not in compliance with its commitments under the Protocol. Article 17 of the Protocol does not itself provide deterrence to non-compliance; yet we know that, for any number of reasons, the United States would comply with its commitments <u>if</u> the Protocol ever received the advice and consent of the Senate. What

specific proposals did the U.S. delegation make during the negotiations that concluded with the Kyoto Protocol that detailed the procedures to determine whether a Party was in non-compliance, and, in case of non-compliance, what specific consequences would ensue in different situations?

37.1 Does the Administration favor use of trade sanctions, such as embargoes, in case of certain types of non-compliance; and, if so, please tell us what the Administration is considering in that regard?

38. Is the Administration contemplating submitting to Congress any other legislative proposals, or is it contemplating proposing any new or amended regulations, any of which are intended to reduce U.S. greenhouse gas emissions, prior to the President's signing the Kyoto Protocol and submitting it to the Senate for its advice and consent? If so, will you please describe the substance of any such legislative or regulatory proposals that are being contem- plated?

39. Has any Department or agency of the Executive Branch, or any interagency body, been given the responsibility to develop potential proposals for legislation or regulations that would be intended to facilitate compliance by the United States with the Kyoto Protocol if the Protocol ever were to become binding on this nation? If so, will you please identify the Departments, agencies, or interagency body; and, if it is an interagency body, who is the head of it?

QUESTIONS FOR THE RECORD
SENATOR JESSE HELMS
IMPLICATIONS OF THE KYOTO PROTOCOL HEARING
February 13, 1998

- Please provide the following information either in electronic or hard-copy form:

  -- the official U.S. global greenhouse gas inventory used by negotiators in Kyoto, on a country-by-country specific basis, for the six greenhouse gases listed in Annex A of the Kyoto Protocol;

  -- the 1990 baseline and projections at least through 2030 for carbon dioxide, methane, and nitrous oxide; and

  -- the 1995 baseline and projections at least through 2030 for hydroflurocarbons, perfluorocarbons, and sulphur hexafluoride.

- Please provide the assumptions, data and calculation methodology that support the Administration's assertion that the impact of carbon sinks on the U.S. greenhouse gas reduction commitment will reduce the actual reduction to 2 or 3 percent below 1990 levels, rather than 7 percent.

- The Kyoto Protocol establishes a Clean Development Mechanism. Please provide the following information regarding the "Mechanism."

  -- What staffing and administrative costs do you anticipate will be required to establish and run this "Mechanism"?

  -- What fee do you anticipate the U.N. will charge companies for investing in developing countries through this "Mechanism"?

  -- What criteria do you anticipate this "Mechanism" will use to approve or reject investments?

- The Energy Information Administration (EIA) has projected that carbon emissions in the United States will increase from 1990 emissions levels by 34 percent by the year 2010. The Kyoto Protocol would require the United States to <u>reduce</u> these emissions to 7 percent <u>below</u> 1990 levels by 2010.

  -- In addition to your assertions of increased energy efficiency, and international emissions trading, please detail how the Administration intends to reach these enormous commitments <u>without</u> constraining U.S. economic growth?

- Please answer the following questions regarding the creation and implementation of a domestic emissions trading program.

  -- Is the Administration considering the creation and implementation of a domestic emissions trading program?

  -- Does the Administration believe that a domestic emissions trading program could be implemented absent legislation? Would legislation be required for any aspect of a domestic emission trading program under consideration? If you do not believe that legislation is required, under what statutory authority, specifically, would the Administration intend to proceed? What would be the basis for such an interpretation?

  -- Would a domestic emissions trading program be implemented without ratification of the Kyoto Protocol? If so, on what basis? How would such a program relate to the proposed, yet thus far undefined, international emissions trading regime?

  -- Would a domestic emissions trading program be voluntary? If so, what incentives would be offered to induce companies and other entities to participate? Who would run such a program? Under what authority?

  -- By its very nature, an emissions trading program would require an emissions "cap" that would make an emissions unit tradable commodity. Would adherence to the cap be voluntary or mandatory? How would a cap be established? Has any Administration official or entity examined in any way whether a mandatory cap could be placed on carbon emissions? If so, would it be the Administration's's view that legislation would be required to proceed? If not, under what authority would the Administration act?

  -- Could international emissions trading proceed today on the basis of the Kyoto Protocol? If so, how? If not what would the Administration deem necessary for an international emissions trading program to proceed?

- Please answer the following questions regarding amendments to the Kyoto Protocol:

  -- While the Administration is calling the Kyoto Protocol a "work in progress," isn't it true that the Kyoto Protocol is a final document that must be considered by all nations as is? Can the Protocol be amended or changed in any way before it enters into force? If so, how would this be done?

  -- Procedurally, how does the Administration intend to act on any proposals in Buenos Aires? For example, how would an emissions trading regime be considered and adopted? What about enforcement and compliance rules? What about new scheduled emissions reduction commitments by developing countries in the same compliance period as developed countries?

-- If the United States, or any other nation, sought to amend the Kyoto Protocol, wouldn't it need to follow the amendment process to the Protocol? To participate in that process, wouldn't the United States, or any other nation, have to be a party to the Protocol? If this is the case, how does the Administration intend to change anything that is now included in the Protocol or add anything to the Protocol -- which is deemed a work in progress -- until after U.S. ratification? If it is your belief that the United States does not have to be a party to the Protocol to amend the agreement, how could this be done?

-- Would the Administration consider submitting the Kyoto Protocol to the Senate for its advice and consent before formal adoption of amendments to the Protocol? If not, is it the Administration's intention to forgo submitting a global climate treaty to the Senate? If so, how specifically would the Administration go about making the Protocol acceptable to the American people?

-- Is it the intention of the Administration's to seek to negotiate a new Protocol and send both Protocols together to the Senate for advice and consent? If so, what would a new Protocol look like specifically? Have any other countries expressed an interest in such an approach? If so, which countries?

Clinton Presidential Records
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This marker identifies the place of a tabbed divider. Given our digitization capabilities, we are sometimes unable to adequately scan such dividers. The title from the original document is indicated below.

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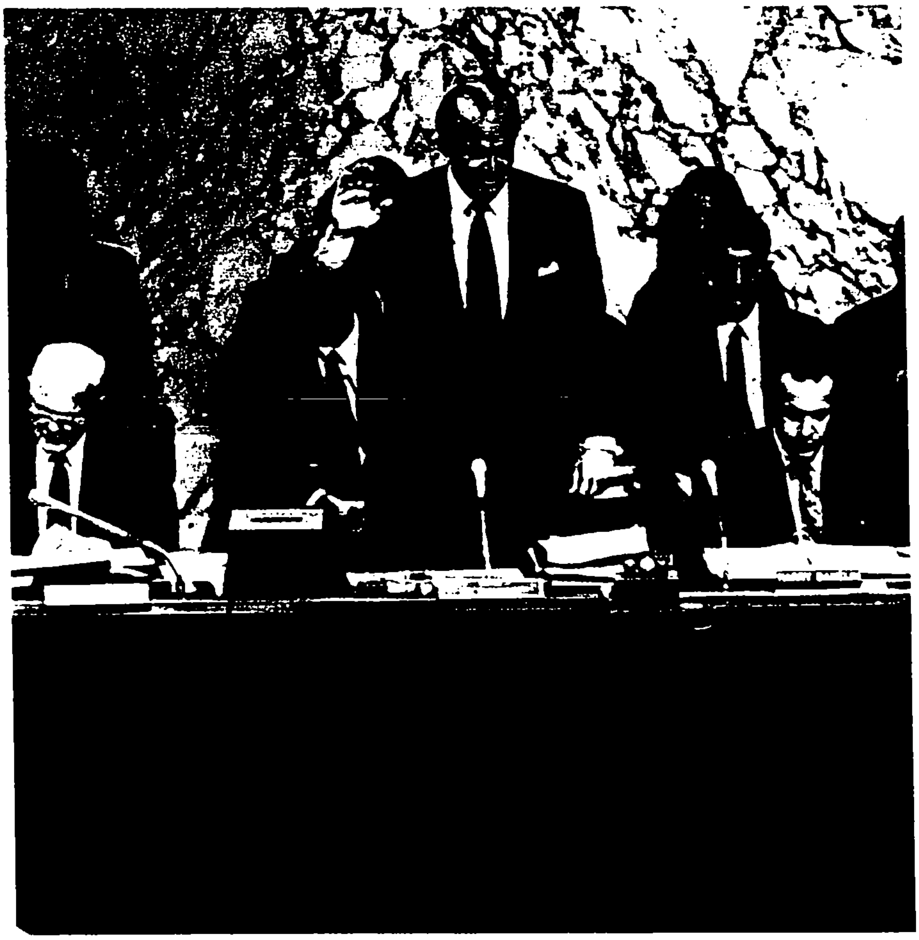
Divider Title: ______________________________

Infinite Jeopardy

AP/JOE MARQUETTE



TODAY, EVEN THE MOST HONEST POLITICIAN RUNS THE RISK OF RUINOUS CORRUPTION INVESTIGATIONS. TO UNDERSTAND THE BREAKDOWN OF THE ETHICS PROCESS, ASSUME THE CHARGES AGAINST BRUCE BABBITT ARE TRUE—AND THEN DECIDE WHETHER HE COMMITTED A CRIME.

On Feb. 11, Attorney General Janet Reno called for an independent prosecutor to find out whether Interior Secretary Bruce Babbitt lied to Congress last year when he testified about a controversial Indian casino deal. For Babbitt and some other Administration insiders, the most important aspect of the case is presumably its outcome. For the rest of us, however, its broader implications matter a good deal more.

BY JONATHAN RAUCH

Assume, for the next few minutes, that the charges against Babbitt are true. If he is, therefore, guilty of corruption, then 535 Members of Congress, give or take one or two, and most of the executive branch's political appointees—and, of course, their staffs—would be well advised to get lawyers.

Since the 1970s, criminal law has been reaching ever deeper into politics. The post-Watergate reforms brought a fine screen of campaign finance rules and, in 1978, the independent counsel law. The 1980s brought the "zero tolerance" prosecutorial mind-set, putting wetlands-fillers in jail with muggers and expelling students for bringing Advil or keychain pocketknives to school. The result is shown in the chart on page 567: a spectacular increase in prosecutions of public officials, stabilizing in the late 1980s at an unprecedented level (though dropping off a bit in 1995). Through it all, the public became convinced that all politicians are crooked, if you only dig a little.

RICHARD A. BLOOM

BRUCE BABBITT: His testimony before Thompson's committee was enough to trigger Reno's request for an independent prosecutor.

Politics is not like arson or battery, however. Politics is a messy affair, in which no two people will draw quite the same line between lobbying and peddling influence, or between rewarding supporters and paying them off. As zero-tolerance advanced, it was inevitable that at some point the ethics process would lose the ability to distinguish in any predictable way between politics and crime. With the Babbitt case, that point has now arrived.

To say this is to make no judgment about what, if anything, Babbitt's independent prosecutor will come up with. It is to say that, no matter how hard even the most honest politician tries to obey the law, he can no longer go about his business without fear of one or more ruinous corruption investigations. The law's first duty is not to catch the guilty, but to provide a zone of comfort for the innocent. On that score, the ethics process has reached the point of collapse. Ethics investigations can bring down the honest and dishonest alike.

To see that this is true, you need not believe any of Babbitt's denials. Just the reverse: The best way to understand what has happened is by adopting the Alice-in-Wonderland theory of justice—verdict first, charges after. For the purposes of this article, the verdict is Guilty. That is, in all important disputes of fact, this article will assume that Babbitt's accusers are right about what actually happened. Wonderland jurisprudence is not fair to Babbitt, who has strenuously denied the charges; the box on page 566 tells his side of the story. For now, however, never mind which side you believe, and consider what it is that Babbitt is charged with, and what it means if those charges can ignite four separate corruption investigations.

Raising the Stakes

From the day it opened in 1991, the St. Croix Meadows Greyhound Park, in the town of Hudson, Wis., lost money. The dog track's owner, a Miami company called HAH Associates Inc., was losing something like $7 million a year. HAH attributed its ill fortunes to competition from casino gambling on Indian reservations nearby, and it decided to fight back by turning St. Croix Meadows into a gaming operation. Unfortunately, though, the dog track was not on an Indian reservation. So HAH made a deal with three poor Chippewa tribes, whose reservations were anywhere from 85 miles-188 miles from Hudson. The Indians would ask the Interior Department to take the dog track "in trust" for them, effectively making it Indian land. Then the place could be converted to a casino, and both HAH and the Chippewas would make money.

In due course, a regional office of the department's Bureau of Indian Affairs blessed the plan and, in November of 1994, sent it to the central office in Washington, which had the final say. A lot of money was at stake, not only for HAH and the Chippewas but, on the other side, for several Indian tribes that operated casinos near Hudson and did not relish the new competition. That winter and spring, a fierce lobbying battle took place. The casino's opponents—call them, for clarity in this article, the Winners—hired a small phalanx of Washington insiders, including Patrick J. O'Connor, a former Democratic Party treasurer who lobbied, among others, the chairman of the Democratic National Committee, the White House and, at a reception, President Clinton. In a letter, O'Connor pointedly reminded Harold M. Ickes, who was then the White House deputy chief of staff, of the Winners' "previous financial support" for Democrats and Clinton. For their part, the Losers hired one of Babbitt's oldest and best friends, a lawyer in Phoenix named Paul Eckstein, who lobbied the Interior Department, including Babbitt himself.

The department usually follows the recommendations of its regional offices. On the other hand, an application for an off-reservation casino was itself unusual. Such casinos are controversial with local communities, which fear that the Interior Department might use federal muscle to force casinos into unwilling towns or neighborhoods. Only one off-reservation casino had been approved—and that one with the community's support. The people in and near Hudson, by contrast, were bitterly divided on the dog track proposal, and the area's two city councils opposed it. On July 14, 1995, the Interior Department, citing local opposition, announced that the casino application would be denied.

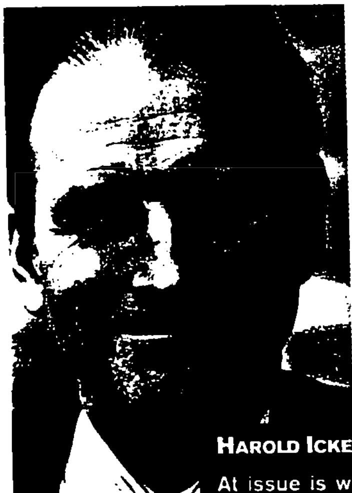
Subsequently, between March and November of 1996, the Winners, renewing their "previous financial support," donated $230,000 or more (various figures are cited) to the Democrats. The Losers, meanwhile, sued. Suit soon blossomed into scandal.

Those are the raw facts. To them, add one sharply contestpiece of information, the only direct evidence of a link between the money and the decision. In July of 1995, on hearing that his clients' casino application was about to be denied, Eckstein rushed to Washington. On July 14, as the denial was about to be issued, he met with his old friend and pleaded for time. Babbitt refused. In his testimony before the Senate Governmental Affairs Committee last Oct. 30—which, in this article, we will assume to be definitive—Eckstein said: "And his response was that Harold Ickes [in the White House] had directed him to issue the decision that day."

Eckstein recalled something else, too. "At some point, the Secretary said to me, Do you have any idea how much these Indians, Indians with gaming contracts . . . have given to Democrats? I said I didn't have the slightest idea, and he said, half a million dollars."

Now the charge. It was spelled out clearly and accurately (with one factual slip, which, to avoid confusion, I have elided) in the Senate hearings by Sen. Pete V. Domenici, R-N.M.:

"The issue is whether or not this permit was denied to these three rather poor Indian tribes because of political pressure put on by the opposition, namely, other tribes who had permits; and whether or not that opposition ripened into campaign contributions and whether . . . high officials in this Administration, including possibly the Secretary of the Interior, acted adversely to the Indians based on that."



RICHARD A. BLOOM

HAROLD ICKES: At issue is whether he "directed" Babbitt to make a decision on the casino case.

A Crucial Distinction

The first thing to notice here is what is not being alleged: bribery. The omission may seem strange, given the charge that money was tacitly exchanged for favors. But in fact the law, according to a number of experts I interviewed, is quite clear. On the facts alleged, bribery did not occur.

The Hudson case involves campaign contributions rather than gifts, a distinction that turns out to matter. Whereas politicians draw salaries so that they need not take personal gifts, campaign donations are an intrinsic part of American politics, for better and, of course, for worse. For exactly that reason, in a 1991 case called *U.S. v. McCormick*, the Supreme Court laid down a refreshingly bright line. A state legislator who had supported a bill favored by a certain group complained to the group's lobbyist that campaigns were expensive and that he had not heard anything from them. The group then coughed up a $900 donation. The official was convicted, but the Supreme Court overturned the verdict.

Campaign contributions—as opposed to personal gifts—do not violate the law, the Court held, unless "the payments are made in return for an *explicit* promise" of some official favor (emphasis added). Why "explicit," instead of tacit, which would be the usual way to make such a promise? "To hold otherwise," the Court said, "would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the nation."

The lawyers and scholars I talked to all agreed that the Eckstein version of events, in which Babbitt mentioned both White House pressure and campaign contributions but said nothing about a deal, does not even approach the Court's bright line. "'Abortion-rights groups are big supporters of mine,' or whatever—that's just politics," says Michael I. Krauss, a law professor at George Mason University. On the facts alleged, neither Babbitt nor Ickes could be convicted of bribery without reshaping the law itself.

Of course, even if criminal bribery didn't occur, the process might still have been politically tainted. And that, not bribery, is what is actually charged in this case.

Look back at Domenici's summary: "The issue is whether . . . this permit was denied . . . because of . . . political pressure

■ Babbitt's Side of the Story

The main article assumes that the core allegations in the Hudson casino case are well-founded, but there is another side to the story. According to Bruce Babbitt and the Interior Department:

■ Babbitt never discussed the Hudson matter with Harold M. Ickes or anyone else at the White House, and was unaware of the casino opponents' allegedly improper White House lobbying until long after the fact.

■ He did tell Paul Eckstein, the lobbyist for the casino advocates, that Ickes wanted a decision that day, but this was merely an excuse he made up to close the conversation with the persistent Eckstein.

■ Staff members in Ickes's office called staff members of the Interior Department to inquire about the case, but those were routine status checks.

■ To the best of his recollection, Babbitt said nothing in the conversation with Eckstein about Indians' campaign contributions.

■ Babbitt also never intervened in the Hudson case within the Department, which properly followed both the law and its own rules. The key recommendation to deny the Hudson application was made by a career civil servant named George Tallchief Skibine, the director of the Indian Gaming Management Staff. Skibine has testified that he made his recommendation strictly on the merits, and that he never met or spoke to Babbitt until this year.

. . and campaign contributions." In effect, the charge is improper political influence—not a criminal-justice concept at all, but still relevant, since it is improper for a federal agency to decide government business on the basis of partisan politics or campaign contributions. Assume, then, in keeping with Wonderland justice, that politics skewed the Interior Department's deliberations against the Losers, as they believe.

Charges of this sort are actually quite common. Aggrieved claimants often say that government agencies handled their cases unfairly or improperly, whether because of politics, animus or stupidity. And there is something they can do about it: sue. The Interior Department faces about 2,000 such lawsuits at any given time, according to John D. Leshy, its general counsel, of which a handful charge unfair politicking. In the Hudson lawsuit, the Losers are alleging that because of politicking they were left out of an important meeting, not given enough time to rebut the Winners' claims and otherwise not given a fair shake. If the federal court in Wisconsin decides that the Interior Department broke its rules or behaved unfairly, it will vacate the Hudson decision and send the department back to the drawing board to make the decision properly.


AP/JOE MARQUETTE

PAUL ECKSTEIN: His recollection differs from Babbitt's on what Babbitt told him about Ickes.

That civil procedure is an adjudicatory process about fairness, not a criminal or ethical procedure about corruption. No one goes to jail, faces a grand jury or is declared a crook. For just that reason, civil charges of improper political influence and the like can be handled routinely, without wrecking careers and reputations. Launching formal corruption investigations on charges of improper politicking, however, is a different sort of thing, and a departure with sweeping implications.

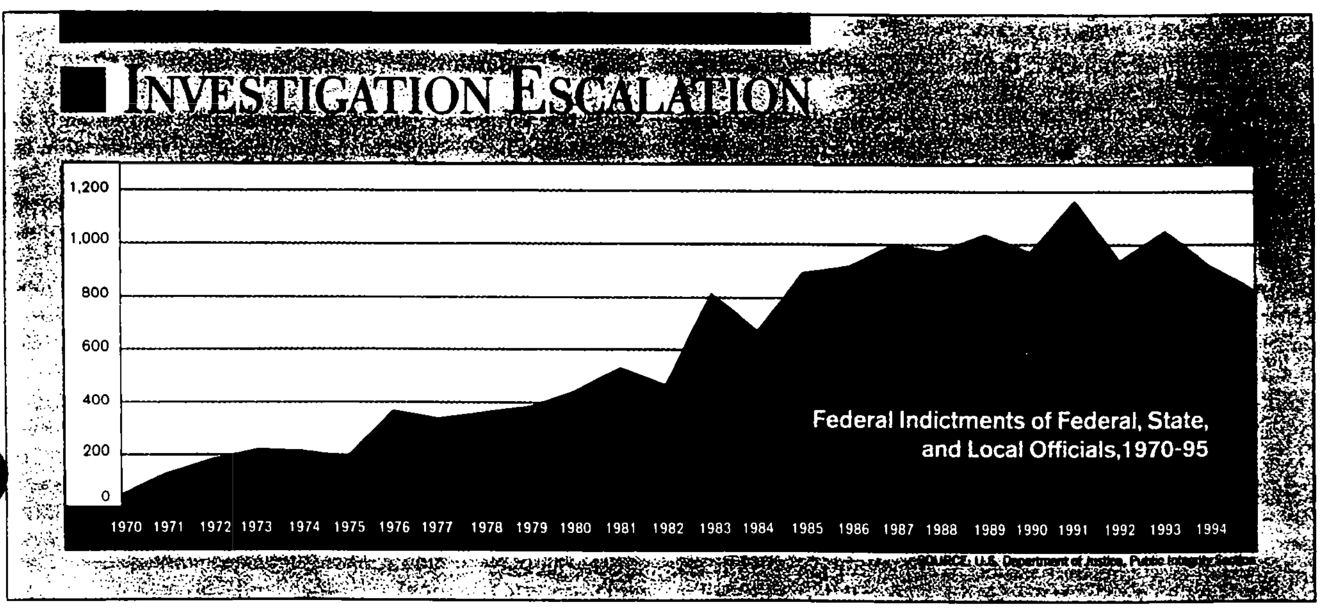
THE RISK OF TALKING POLITICS

On our Wonderland theory of justice, continue to assume Babbitt did in fact tell Eckstein, "Do you have any idea how much these Indians . . . have given to Democrats?" The comment might, of course, be evidence that the fix was in. Absent any pattern of venality, however, it might also be frank political talk between adults. If Babbitt's (alleged) remark is presumed corrupt, then it is also presumably corrupt for a Republican Congressman talking about his opposition to gun control to say, "Fred, do you have any idea how much the NRA [National Rifle Association] has given this party over the years?"—or for a Democrat opposing school vouchers to say, "The teachers' unions have been some of our best backers, so you bet we listen to them." If the ethics process is going to assume the worst about such talk, then honest discussion of politics is at an end.

Back in Wonderland, assume also that Babbitt did indeed say "that Harold Ickes had directed him to issue the decision that day." Here an important detail swims to the surface: Ickes is not directing a *particular* decision, only a *prompt* decision. Eckstein himself told the Senate that the alleged direction was "simply as to timing" and that he had "no basis to believe" that Ickes had directed the substance of the decision.

Sometimes, of course, the timing of a decision can affect the outcome. Presumably the Losers thought so, or they would not have sent Eckstein to wheedle more time from his old friend. On the other hand, one reason we elect politicians is to prod bureaucrats to get things done. For a White House aide to tell a Cabinet officer to hurry up with a controversial and heavily lobbied decision involving a big contributor is a very long way from any traditional notion of corruption. Congressmen do it all the time. In fact, they are sometimes known even to drop strong hints about the outcome of a case.

"I know at times we made calls to EPA [Environmental Protection Agency]," says former Rep. Timothy J. Penny, D-Minn. His office contacted the Environmental Protection Agency on behalf of businesspeople fighting wetlands battles, and it contacted the Agriculture Department on behalf



DEFINING THE ISSUE: Domenici (right), with Joseph Lieberman, said the charge focused on political money and pressure.

of farmers trying to get their loans restructured. "The list goes on and on of activities like this," Penny says, "and you have to make a judgment call on what's meritorious."

Politicians may misjudge the merits when assessing the grievances of their big donors. They may even think, "I wouldn't waste my time on this trivia if the guy hadn't given me so much money." That may not be pretty, but it's politics, inherently and unalterably. The Supreme Court made precisely that point in *McCormick*, which specifically renounces an "appearance" standard where campaign contributions are concerned: "Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion [McCormick was tried for extortion rather than bribery] when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant."

On Capitol Hill, however, the ethics process now effectively stands *McCormick* on its head: If favors even appear to have been traded for contributions, let fly the congressional subpoenas, and the more, the merrier. Charles Tiefer, a University of Baltimore law professor and a former deputy general counsel of the House, says that as recently as the early 1990s, "a congressional investigation was quite serious if it used even a couple of dozen subpoenas." In its current campaign fund-raising investigation, by contrast, the House Government Reform and Oversight Committee (whose chairman, Rep. Dan Burton, R-Ind., has himself been accused by Democrats of fund-raising improprieties) has issued 479 subpoenas, many of which land the recipient with legal bills in the four, five or even six figures.

Oddly, all but nine of those 479 subpoenas were issued to Democrats, according to the committee's Democratic staff. Still more oddly, none at all were issued to Members of Congress or their staffs. If congressional investigators are serious about the new corruption standards, they will have to do a more thorough job.

They might start with subpoenas for the 61 Senators who voted in 1996 to preserve the federal sugar subsidy, and who (according to the Center for Responsive Politics, a watchdog group) received an average of $13,500 in sugar-industry money from 1991-96, as against the $1,500 received by Senators who voted the other way. Then the investigators might summon the 213 House Members who voted for Northrop Grumman Corp.'s B-2 bombers, and who received an average of $2,100 each from defense contractors in the 1996 election cycle, versus less than $100 for the Members who voted the other way. Then they might pitch a tent outside the door of, for example, Sen. Alfonse M. D'Amato, R-N.Y., who (writes the center's Jennifer Shecter) received $42,800 in campaign contributions from executives of Alliance Capital Management three days after he introduced a bill exempting partnerships such as Alliance from certain taxes.

Asked about the Babbitt allegations, Penny replied, "What he [allegedly] did is replicated day in and day out in virtually every office on the Hill." When Mark Twain called Congress the only "distinctly native American criminal class," he presumably did not foresee that his assessment might come to be taken literally.

ONE INVESTIGATION TRIGGERS ANOTHER

In the wake of Congress's investigation of Babbitt, another charge arose: perjury. And that charge, not the original allegation itself, is what triggered the request last month for an independent prosecutor.

In a crucial respect, the perjury issue is different from the improper-influence issue: If the charge is true, than Babbitt clearly did commit a crime. In another crucial respect, though, the issues are similar. In both cases, a wide-ranging and potentially devastating corruption inquiry can just as easily be triggered by innocuous political behavior as by evidence of criminality.

Reasonable people can argue about whether Kenneth W. Starr, the Whitewater independent counsel, had enough to go on when he embarked on a major perjury investigation of President Clinton. Starr, however, had tape-recorded evidence that the President's alleged perjury was an integral part of a larger cover-up scheme. The Hudson case is something else again.

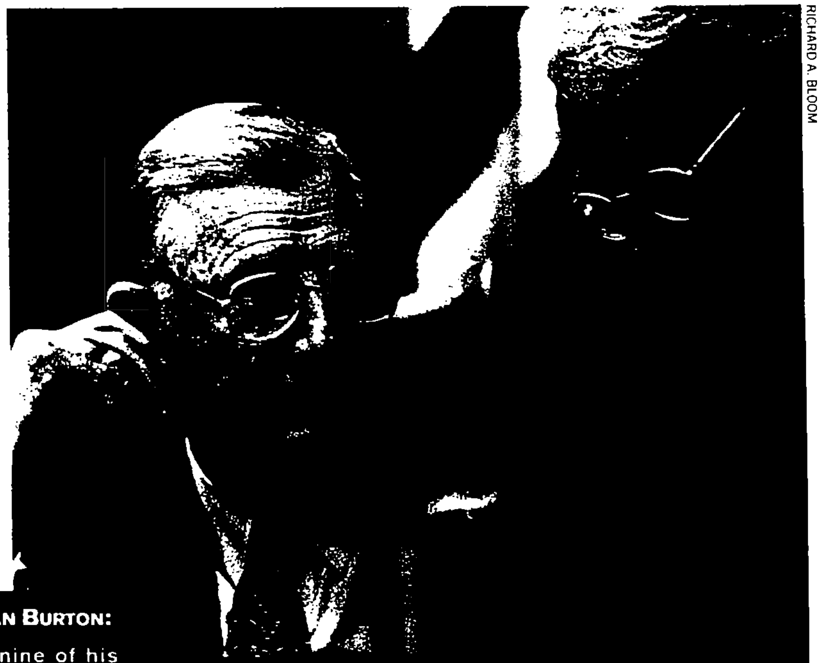
Very rarely would a busy public prosecutor pursue a perjury allegation without first having some fairly strong indications of a larger crime or cover-up (though he might poke around a bit). Even more rarely would he embark on a broad corruption investigation merely to back up a perjury charge. But, in the Hudson case, both are happening. Like Escher's two hands sketching each other, the perjury investigation and the corruption investigation justify each other. Never mind that the conduct of which Babbitt was originally accused is almost certainly not criminal: In effect, the investigative process triggers itself.

This needs a bit of explaining. Tracing the logic takes some effort, but is worth the trouble.

Most people assume that Babbitt's perjury problem is that he changed his story about his conversation with Eckstein, or seemed to change it. Actually, though, that is not the issue. Instead, as Reno explains in her request for an independent prosecutor, the problem is that Babbitt's revised story conflicts with Eckstein's story on one point.

Recall that Eckstein told the Senate committee last Oct. 30, "And his response was that Harold Ickes had directed him to issue the decision that day." But that is not what Babbitt, who also testified on Oct. 30, recalled saying. Babbitt's version was: "What I believe I've said is that Mr. Ickes expects me, or Mr. Ickes wants me, to make a decision."

Reno notes that there is a crack of daylight between those two accounts. "Expecting" probably wouldn't suggest arm-twisting by Ickes, but "directing" might, so the word choice is relevant. Moreover, says Reno, "if Eckstein's testimony is true, Secretary Babbitt's testimony on those points would be false." So that would be false testimony on a matter of concern to a Senate investigation—potential perjury, if Babbitt had criminal intent.


RICHARD A. BLOOM

REP. DAN BURTON: All but nine of his committee's 479 subpoenas have been issued to Democrats.

The difference between "directed" and "expected" might not imply criminal intent, of course. Both Babbitt and Eckstein enjoy reputations for honesty, and by the time of their Senate testimony, the conversation in question was more than two years old. When I asked two memory experts whether the difference between "expected" and "directed" in a years-old conversation can be assumed to be suspicious, they said, in effect, of course not.

"The verbatim words of a conversation fade away very quickly," says Elizabeth Loftus, a University of Washington psychologist who is the president-elect of the American Psychological Society, "and what you're left with is the gist of the conversation"—or rather the interpreted gist, because even the most honest and sincere people remember themselves in "prestige-enhancing" ways. (They often recall voting in elections when they didn't, for example, or giving more to charity than was the case.) I asked Robert A. Bjork, a psychologist at the University of California (Los Angeles), about "directed" versus "expected." "That is such a subtlety—you could have both sides be entirely confident and sincere, and nobody was lying," he said.

Reno, however, is required to assume the worst about Babbitt's motives if she is in doubt. To set the case aside, she notes, she would need "clear and convincing evidence" that Babbitt *lacked* criminal intent—and she is "unable to conclude" that the evidence is clear and convincing, because (she implies) Eckstein's testimony is plausible. So, under the terms of the independent-counsel law, she must appoint a prosecutor to settle the matter.

And now a final step—one that, by jujitsu, turns a narrow perjury question into an expansive criminal inquiry. To find out if Babbitt's "expected" was a deliberate lie, the prosecutor will need to know if Babbitt had anything to lie about. To do that, he will need to investigate "any potential criminal violations in connection with the underlying casino decision." Though the prosecutor's mandate is narrow, his authority is very broad.

Here, in microcosm, is the closed-loop logic that has given recent corruption investigations their peculiar quality of self-propulsion. The Hudson case has already been formally investigated by the FBI, the Senate and the House. Some of the people involved in the Hudson matter, including mid-level civil servants and political appointees who aren't accused of anything and never will be, have already been deposed three times. (In the Hudson case, one career staff member of the Interior Department has so far been questioned under oath for a total of 16 hours.) None of the investigations found a crime, and indeed it is doubtful that any crime was alleged to begin with. Nevertheless, the mere suspicion of perjury in the second investigation triggered yet a fourth investigation.

Far from being odd, this hall-of-mirrors pattern is becoming the standard. "The same ground gets churned again and again and again by multiple and redundant inquiries," says Tiefer, the Baltimore law professor. "And the subsequent investigations go over the responses to the previous investigations, producing what looks to the people caught in it like a never-ending cycle of being investigated for what was said in the last investigation." The "Travelgate" scandal, he says, produced five successive investigations. The Hudson matter is at four, and counting.

Babbitt is a wealthy man who aimed for national prominence in a game that he knew to be hardball; but the same is not necessarily true of the bureaucrats and political functionaries at Interior who are swept along behind him. An hour before a grand jury typically costs $1,000 or more in legal fees, according to a recent report in *The Kansas City* (Mo.) *Star*. As the subpoenas dropped on their doorsteps, more than a few Clinton Administration officials have been landed with legal bills ranging well into the six figures. Mere innocence is no protection.

"The legal bills are shocking to relatively junior people, who find themselves paying for lawyers both for grand jury

APA / ARCHIVE PHOTOS

JOSEPH McCARTHY: Flanked by David Schine and Roy Cohn, McCarthy waves a transcript during his 1954 hearings.

appearances and congressional depositions, even though they themselves have done absolutely nothing wrong and are mere bit players," says Tiefer. "We're not talking about rich people. These are people for whom the legal fees represent a sizable amount of all they have in the world." Or had, as the case may be.

CIRCLES OF FEAR

At the end of the day, Babbitt or somebody else may be found guilty of a crime. But undiscriminating investigations are not excused by the fact that they unearth wrongdoing, any more than McCarthyism was excused by the fact that some of its targets were Communist agents. Nor are such investigations excused by ultimately clearing their targets, if, along away, they have tormented or bankrupted scores of people who are guilty only of politics.

Bruce Babbitt is not Alger Hiss, and mindless legal process is not opportunism or paranoia. But imagine, for a moment, that you set personalities and circumstances aside, and just put 1950s McCarthyism and 1990s ethics investigating side by side in black boxes, so that all you could see is how both systems behave. Then certain similarities emerge. Formal investigations can be triggered by ordinary political conduct, with no showing that a crime has been committed; once the investigation begins, it justifies its expansive scope on the grounds that, after all, some people are guilty; the investigation exacts from even the innocent a toll in money and time and anguish that is itself often hard to distinguish from a form of punishment; above all, a cascade of investigations-of-investigations creates a maze of infinite jeopardy. At no stage is there protection from bankruptcy or exhaustion, or shelter from the radiating circles of fear as the subpoenas pour forth.

What to do? The independent-counsel law will almost certainly be revised and narrowed next year, when it is due to expire; it could be repealed altogether, or its hair trigger could be changed so that, for instance, no investigation would be allowed on less strong suspicion, or on less serious charges, than a busy public prosecutor would ordinarily pursue. In other words, it could presume innocence rather than guilt.

As for formal congressional investigations, which are hardly less onerous, they could be required to provide standard due-process protections, so that subpoenas could not be issued willy-nilly by curious congressional staffers, witnesses could not be badgered under oath, and formal investigations could not begin in the first place without strong indications of criminal intent and activity. (Congress would still be free to conduct informal investigations, such as ordinary hearings, and to criticize anybody for anything.)

More broadly, multiple jeopardy might be restrained, so that echo-chamber investigations could not repeat each other ad infinitum. Restraints might also be placed on the investigation of "naked perjury," so that free-standing perjury allegations could not be telescoped into open-ended searches for possible cover-ups. Arrangements could be made to help pay legal bills for people who are investigated but never charged. And so on.

None of that, however, would be enough without a further change: a recognition on the part of the broad public that politics will never be a virginal enterprise and that, while voters can and perhaps should be cynical about politicians, formal investigative processes must never be. When politicians' natural behavior becomes probable cause for inquisition, ethics investigations become random eruptions, avoidable only by avoiding public life altogether. Whether the ethics process has quite yet become legal McCarthyism is debatable, but the Babbitt case clearly hovers over the abyss. ■

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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

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>.

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

o <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>.

o <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.

- o 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.)

- o 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).

- o 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>.

- o 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.

- o 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>.

- o 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.

- o <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
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.

Administrator Browner's disrespect for the law. 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.

Clinton Presidential Records
Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a tabbed divider. Given our digitization capabilities, we are sometimes unable to adequately scan such dividers. The title from the original document is indicated below.

21

Divider Title: ______________________________

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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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.

DAVID E. SKAGGS

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.

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 "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 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 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 Honorable J. Danforth Quayle
June 8, 1992
Page 8

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

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DAVID E. SKAGGS
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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.

<u>Particular Questions about Particular Allegations</u>

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.

<u>Staffing Level of the Council</u>

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,

JL Howard

John L. Howard
Counsel to the Vice President

Enclosures

pleased that its result was unanimous, overwhelmingly approved tonight. I 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 soundbite 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 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.

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 in 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 part 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

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. 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.

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

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

4. The Council has refused to be accountable for its actions before Congress.

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)).

Clinton Presidential Records
Digital Records Marker

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This marker identifies the place of a tabbed divider. Given our digitization capabilities, we are sometimes unable to adequately scan such dividers. The title from the original document is indicated below.

Divider Title: **22**

Document	Schaefer to CEA	McIntosh(I) to OMB and CEQ	McIntosh(II) to OMB and CEQ	McIntosh(III) to NEC and Treasury	McIntosh(IV) to CEA	Talent to CEQ	Sensenbrenner (I) to CEQ	Sensenbrenner (II) to OSTP
Economic analysis that supports Yellen testimony	X	X				X	X	
Other economic analysis that produced different results	X							
Agency comments on drafts of Yellen testimony		X		X	X			
Economic analysis prepared for Administration and the US delegation in developing positions for Kyoto		X						
Economic analysis showing that FY 99 GCC budget proposal is necessary to prevent more drastic reductions later and all Ag comments		X						
Records indicating alternative policy options		X		X	X			
Comments by other federal agencies on alternative policy options		X		X	X			
Analysis of costs and benefits of binding targets and timetables		X			X			
Agency comments on cost/ benefit analysis		X						
Analysis of cost effectiveness of Administration proposal		X						
Document the opportunity costs of Administration proposal		X						

Provide all records of deliberations and all economic analysis and comments on whether emissions reductions would result in lower growth		X						
Provide analyses upon which Administration relied in deciding that emissions reductions below the 1990 baseline are acceptable		X						
Provide federal agency comments on any private sector analyses that Administration reviewed prior to Kyoto		X						
Document steps that the Administration has taken to comply with Byrd-Hagel Resolution		X						
Analyze whether the benefits of implementing the Protocol are justified by the costs		X			X			
Evaluate the effectiveness of the agreement by comparing marginal abatement costs of alternative scenarios (to be evaluated under specific conditions listed)		X			X			
Evaluate the opportunity costs of pursuing the Administration's strategy for the abatement of greenhouse gas emissions (to be evaluated under specific conditions listed)		X			X			

Evaluate how benefits and burdens of complying with Kyoto would be distributed on the national and household levels, describing the disparate regional and industrial sector impacts and the effects on different income levels (to be evaluated under specific conditions listed)		X			X			
Explain potential effects of Kyoto on GDP, per capita GDP, unemployment, income and real wages, trade competitiveness and energy prices		X			X			
All activities and/or plans for federal agency implementation of the Kyoto Protocol					X	X		
Document estimates of the percentage of US emissions reductions that might have to be purchased from other countries		X			X			
Legal and policy analysis re: applicability and availability of existing legislation to implement Kyoto				X	X			
Drafts of and comments on documents re: international emissions trading, joint implementation, Clean Development Mechanism				X				
Economic and legal analysis that US obligations under Kyoto can be met without constraining US economic growth and without imposing onerous and costly regulation		X						

Provide all drafts and analyses from any interagency effort on climate change since 1993 re: current or new legislation or rules, production or review of any environmental data and/or analyses, production or review of any cost-benefit data or analyses, production or review of any economic data and/or economic analyses, and any comments from your agency on any drafts				X	X			
Provide a copy of all data or analyses prepared or any comments by your agency on any environmental cost-benefit and/or economic data and analyses relating to the White House Initiative on Global Climate Change				X	X			
Identify and describe all initiatives to revise any existing rules or propose any new rules relating to climate change, including any cost-benefit analysis, and a timetable for their development and promulgation					X			
Provide any and all analyses that were prepared or considered of the cumulative effects on the US 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				X	X			

Provide all analyses that support the Administration's conclusion that impacts on the US economy of complying with the terms of the Kyoto Protocol "are likely to be modest." and all records of comments from federal agencies					X			
Analyses that support the statement that US electricity restructuring "will offer approximately $20 billion in cost savings." and all records of comments from other agencies.					X			
Analyses that support the statement that emissions trading among Annex I countries "can reduce the cost to the United States of achieving its targets for 2008-2012 emissions by about half" and all records of comments from other agencies					X			
Analyses that support the statement that emissions trading among a subset of Annex I countries "can reduce costs by an estimated 60-70 percent" and all records of comments from other agencies					X			

Explain and fully document how more limited trading among the 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. And provide all records of comments from other agencies					X			
Analyses that supports the statement that the Clean Development Mechanism "might shave costs by roughly another 20 to 25 percent" and all records of comments from other agencies					X			
Analyses that supports the statement that overall costs " would reach roughly one tenth of one percent of projected GDP in 2010" and all records of comments from other agencies					X			
Analyses that supports the assumption that the rate of improvement in energy efficiency will be 1.0 percent per year and all records of comments from other agencies					X			
Analyses that supports the statement that the estimated effect on energy prices will range from $14 to $23 per ton of carbon equivalent" and all records of comments from other agencies					X			

Analyses that supports the statement that "in energy-intensive sectors some employment reductions 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", and all records of comments from other agencies					X			
Analyses that support the Administration's estimate that the benefits relating to traffic congestion, highway accidents and air pollution unrelated to climate change "could offset approximately a quarter of the resources cost of climate change policy", and all records of comments from other agencies.					X			
Specify all of the models and analytical tools that the Administration has used and describe in detail their strengths and weaknesses					X			

Specify all the Administration's estimates that were derived by the SGM model, indicate why many of the Administration's key estimates were derived from this model, and identify the corresponding estimates derived from each model that the Administration has used in assessing the impacts of the Kyoto Protocol					X			
Provide the 1990 baseline, the FY97-98 data, and the annual out-year estimates until 2012 for the following outcome performance measures: 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.					X			
For any analysis provided, 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. And 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.					X			

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 social security, or more funding for education, health care etc.					X			
Evaluate the potential offsetting negative effects of exempting developing countries		X			X			
Evaluate the impact that exempting developing countries will have on the ability of emerging countries with export markets to transition to more energy efficient technologies		X			X			
The rate that the Administration expects the economy to grow during the next 10 to 20 years with or without the Kyoto treaty					X			
Provide peer-reviewer comments on all drafts of cost-benefit analyses performed by the Administration					X			
Identify all private parties that are currently performing economic analysis of the Kyoto treaty, describe their work and provide all products of their work in draft of final form					X			

Copies of side agreements, memos, or other documents re: the Kyoto Protocol entered into or contemplated by executive branch and other nations or parties						X		
Scientific evidence documenting existence of global warming						X		
Copies of draft testimony since the State of the Union				X	X			
Agency comments on all draft testimony since the State of the Union				X	X			
Document the Administration's annual performance measures for its 5-year Climate Change Technology Initiative (CCTI)		X						
Provide analyses that supports claim that CCTI is a "no regrets" policy		X						
Data on actual emissions and projected emissions reductions for FY97-FY2003		X						
Copies of the US Climate Action Report		X						
EIS in connection with Administration request for tax incentives and research funding		X						
Materials re: IAT group		X						

Table with FY89-FY99 historical budget authority, on agency-by-agency basis, for President's "Climate Change Technology Initiative" (with requests to explain specific budget provisions)			X	X	X			
Table with FY89-FY99 historical budget authority, on an agency-by- agency basis, for "US Global Change Research Program." (With requests to explain specific budget provisions)			X	X	X			
Table with FY89-FY99 historical budget authority, on an agency-by-agency basis, for any other components of the Administration's climate change program. (With requests to explain specific budget provisions)			X	X	X			
Identify all government-wide and agency-specific performance measures for the Administration's Climate Change proposal, including data for at least FY97, FY98 and FY 99			X		X			
Table showing what part of FY99 request is funding to continue initiatives funded in FY98 or prior years.				X	X			
Table for FY93-FY97 identifying contract awards to non-profit and for-profit organizations for work on GCC				X	X			
NOAA Report							X	X

Goddard Institute for Space Studies/NASA confirmation							X	X
East Anglia Univ. confirmation							X	X
Lancet Article							X	
Studies showing costs reduced with flexible implementation							X	
Study estimating that climate change could double the number of weather-related deaths								X