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MEMORANDUM

THE WHITE HOUSE

WASHINGTON

February 25, 1983

FROM: CHUCK COOPER (DOJ)
SUE JEWETT (TREAS.)
DAN OLIVER (DOEd.)
MIKE McCONNELL (OMB)
PETER RUSTHOVEN (WH)

FROM: BILL BARR

SUBJECT: "Bob Jones" Bill #II

Attached is my first stab at a bill that the Administration could submit in the event the Supreme Court rules against IRS in the Bob Jones case.

I would like to have a meeting to discuss this draft and any other ideas you have in my office (Room 235 OEOB) at 2:00 on Tuesday, March 1.

BOB JONES BILL II (Draft 1)

SECTION 1. Section 501 of the Internal Revenue Code of 1954 (relating to exemption from tax) is amended by redesignating subsection (j) as subsection (k) and inserting a new subsection (j) reading as follows:

"(j) Schools With Racially Discriminatory Policies. --

(1) In General. -- An educational institution shall not be deemed to be described in subsection (c)(3), and shall not be exempt from tax under subsection (a), if such educational institution

(A) is determined to have a racially discriminatory policy; or

(B) fails to include in any published by-laws, advertisements, admission application forms and other such published materials, a statement (in such form and manner as the Secretary may by regulation prescribe) that it does not discriminate against student applicants or students on the basis of race.

(2) Racially Discriminatory Policy. -- For purposes of this subsection --

(A) In general. -- An educational institution has a racially discriminatory policy if such institution refuses, on the basis of race, to --

(i) admit applicants as students;

(ii) admit students to the rights, privileges, programs, and activities generally made available to students by the educational institution; or

(iii) allow students to participate in its scholarship, athletic, or other programs.

(B) Quotas, etc. -- The term 'racially discriminatory policy' shall not include failure of an educational institution to pursue or achieve any racial quota, proportion or representation in the student body. No educational institution shall be required to use any racial quota or other device that takes account of race of any individual or of the proportional racial composition of any group as a prerequisite or condition to eligibility for tax exempt status under subsection (a).

(C) Race. -- The term 'race' shall include color or national origin.

(3) Educational Institution. -- For purposes of this subsection, the term 'educational institution' means a school that normally maintains a regular faculty and curriculum (other than an exclusively religious curriculum) and normally has a regularly enrolled body of students in attendance at the place where its educational activities are regularly carried on.

(4) Procedures. -- A determination under paragraph (1) that an educational institution has a racially discriminatory policy shall be made either by administrative order issued in accordance with section 7408(a) or by district court judgment in accordance with section 7408(d) and shall be made in accordance with the procedures set forth in section 7408.

SEC. 2. DENIAL OF DEDUCTIONS FOR CONTRIBUTIONS TO ORGANIZATIONS
MAINTAINING SCHOOLS WITH RACIALLY DISCRIMINATORY
POLICIES.

(a) Section 170 of the Internal Revenue Code of 1954 (relating to allowance of deductions for certain charitable, etc., contributions and gifts) is amended by adding at the end of subsection (f) a new paragraph (7) reading as follows:

"(7) DENIAL OF DEDUCTIONS FOR CONTRIBUTIONS TO ORGANIZATIONS MAINTAINING SCHOOLS WITH RACIALLY DISCRIMINATORY POLICIES. -- No deduction shall be allowed under this section for any contribution to or for the use of an organization described in section 501(j)(1) that has a racially discriminatory policy as defined in section 501(j)(2)."

(b) Section 642 of such Code (relating to special rules for credits and deductions) is amended by adding at the end of subsection (c) a new paragraph (7) reading as follows:

"(7) DENIAL OF DEDUCTIONS FOR CONTRIBUTIONS TO ORGANIZATIONS MAINTAINING SCHOOLS WITH RACIALLY DISCRIMINATORY POLICIES. -- No deduction shall be allowed under this section for any contribution to or for the use of an organization described in section 501(j)(1) that has a

racially discriminatory policy as defined in section 501(j)(2)."

(c) Section 2055 of such Code (relating to the allowance of estate tax deductions for transfers for public, charitable, and religious uses) is amended by adding at the end of subsection (e) a new paragraph (4) reading as follows:

"(4) No deduction shall be allowed under this section for any transfer to or for the use of an organization described in section 501(j)(1) that has a racially discriminatory policy as defined in section 501(j)(2)."

(d) Section 2522 of such Code (relating to charitable and similar gifts) is amended by adding at the end of subsection (c) a new paragraph (3) reading as follows:

"(3) No deduction shall be allowed under this section for any gift to or for the use or an organization described in section 501(j)(1) that has a racially discriminatory policy as defined in section 501(j)(2)."

SECTION 3. Subchapter A of chapter 76 of the Internal Revenue Code of 1954 (relating to judicial proceedings) is amended by redesignating section 7408 as section 7409 and by inserting after section 7407 the following new section:

"SEC. 7408 DETERMINATIONS AS TO RACIALLY DISCRIMINATORY POLICIES OF SCHOOLS.

(a) Administrative Proceedings To Determine Whether School Has Racially Discriminatory Schools. --

(1) In general. -- To deny an educational institution tax exempt status on the grounds that it has a racially discriminatory policy, pursuant to section 501(j), the Secretary shall, upon finding probable cause to believe that the educational institution has a racially discriminatory policy, initiate an administrative proceeding against the institution in accordance with subsection (c).

(2) Required Showing. -- Upon completion of the proceeding under paragraph (1), an order may be entered, declaring that the educational institution has a racially discriminatory policy only if the Secretary has established that --

(A) the educational institution has, pursuant to a racially discriminatory policy, committed a racially discriminatory act against a student applicant or student within the two years preceding commencement of the proceeding under subsection (a);

(B) the institution has, within the two years preceding commencement of the proceeding under

subsection (a), made a communication expressing that it has a racially discriminatory policy against student applicants or students; or

(C) the institution has engaged in a pattern of conduct intended to implement a racially discriminatory policy, and some act in furtherance of this pattern of conduct was committed within two years preceding commencement of the proceeding under subsection (a).

(b) Administrative Proceedings to Determine Whether School Has Stopped Racially Discriminatory Policy. --

(1) In general. -- At any time after the date which is 1 year after the date on which an order is entered under subsection (a), an educational institution may file with the Secretary a notice that such institution has ceased its racially discriminatory policy.

(2) Affidavit. -- Any notice filed under paragraph (1) shall be accompanied by affidavits --

(A) describing with specificity the ways in which the educational institution has abandoned its previous racially discriminatory policy;

(B) describing with specificity the ways in which such institution has taken reasonable steps to communicate its policy of nondiscrimination to students, to faculty, to school administrators, and to the public in the area it serves;

(C) averring that such institution has not, during the preceding year --

(i) committed a racially discriminatory act against a student applicant or student pursuant to a racially discriminatory policy;

(ii) made a communication expressing that it follows a racially discriminatory policy against student applicants or students; or

(iii) engaged in a pattern of conduct intended to implement a racially discriminatory policy, and committed some act in furtherance of this pattern of conduct; and

(D) averring that such institution has complied with the requirements of section 501(j)(1)(B).

(3) Order. -- If a notice is filed as provided under paragraph (1), the Secretary shall, within 120 days of such filing, issue an order declaring that such institution no longer has a racially discriminatory policy and is no longer ineligible by virtue of section 501(j) to receive tax exempt status, unless the Secretary --

(A) within such 120 days initiates an administrative proceeding against the institution in accordance with subsection (c); and

(B) establishes in such proceeding that --

(i) any affidavit provided by the institution under paragraph (2) is false;

(ii) the institution has, during the preceding year, committed any act, made any communication, or engaged in any pattern of conduct described in paragraph (2) of subsection (a); or

(iii) the institution has not, in fact, complied with the requirements of section 501(j)(1)(B).

(4) If the Secretary establishes any of the elements set forth in clause (B), an order shall be issued declaring that the educational institution has a racially discriminatory policy. Such order shall have the same effect as an original order issued under subsection (a).

(c) Notice and Hearing. -- Proceedings under subsections (a) and (b) shall include notice to the educational institution of all charges it makes and a hearing on the record in accordance with the provisions of 5 U.S.C. 554. The hearing shall be held in the regional office of the Internal Revenue Service for the region in which the educational institution is located.

(d) Judicial Review. --

(1) In general. -- An educational institution or the Secretary may obtain judicial review of the final administrative order entered in proceedings under subsections (a) or (b) by filing, within 60 days of such order, an action for declaratory judgment in the district court of the United States for the district in which an educational institution is located. Upon the filing of an appropriate pleading, the district court may make a declaration with respect to whether such institution has a racially discriminatory policy. Any such declaration shall have the force and effect of a final judgment of the district court and shall be reviewable as such.

(2) Judgment. -- The district court shall review de novo all issues of law and fact and shall declare whether the educational institution has a racially discriminatory policy. When reviewing an order under subsection (a), the district court shall, in determining whether an educational institution has a racially discriminatory policy, apply the standards set forth in paragraph (2) of subsection (a). When reviewing an order under subsection (b), the district court shall, in determining whether an educational institution is continuing a racially discriminatory policy, apply the standards set forth in paragraph (3) of subsection (b).

(3) Special Rules. --

(A) Retention of Jurisdiction. -- If, upon reviewing an order under subsection (a), the district court declares that the educational institution has a racially discriminatory policy, the court shall retain jurisdiction of such case and shall consider any subsequent action to review an order under subsection (b).

(B) Consolidation. -- If an action for review of an order under subsection (b) is filed before judgment has been rendered on an action for review of an order under subsection (a) involving the same educational institution, the court may make such orders concerning proceedings as may promote justice and tend to avoid unnecessary costs or delays.

(C) Validation of Certain Contributions. --

If --

- (i) an order is entered against an educational institution under subsection (a); and
- (ii) in a subsequent action under subsection (d) to review such order, a judgment is entered declaring that such institution has a racially discriminatory policy,

then, notwithstanding such judgment, for the period during which such action was pending in the district court in such additional period as the court may order, contributions shall be treated as under section 7428(c).

(e) Definitions. -- For purposes of this section, the terms 'racially discriminatory policy' and 'educational institution' have the same meaning given to such terms by section 501(j).

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

February 25, 1983

FOR: EDWIN L. HARPER
FROM: MICHAEL M. UHLMANN
SUBJECT: Antitrust Portion of President's Speech

The following is a modified version of what I sent you earlier as the antitrust portion of the President's speech. It has been approved by Justice.

Insert on page 9 at the end of the third full paragraph:

We intend, in addition, to propose certain changes to the Antitrust Laws & Patent Laws which will make it easier for American businesses to engage in valuable joint research ventures without the threat of punitive antitrust damages, and which would provide firmer protection of the patent rights of American inventors against illicit use abroad.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

February 25, 1983

FOR: EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN
WILLIAM P. BARR WPB
STEPHEN H. GALEBACH SG

SUBJECT: Anti-Abortion Strategy

I. Current Situation in Congress

There are three major bills in Congress that seek to solve the abortion problem by overturning Roe v. Wade:

- o Hatch Amendment -- Constitutional Amendment giving States and Congress power to prohibit abortions.
- o Helms Human Life Bill -- Seeks to overturn Roe by recognizing humanity of the unborn and declaring them persons under the Constitution.
- o Hyde-Jepsen Respect Life Bill -- Primarily a ban on federal funding, but also encourages Supreme Court to overrule Roe, and addresses issue of infanticide.

If a vote were taken now, pro-life leaders agree, neither Hatch nor Helms could win. Hyde-Jepsen could win a majority in both houses, but cloture in Senate and discharge petition in House would be very difficult. Vote-counts on any or all measures would improve if we could get some pro-life victory that would give us momentum. Pro-life leaders believe that, ideally, momentum could be built by holding hearings on one or two small-scale pro-life initiatives that would spur grassroots activity and set the stage for a vote on a major anti-abortion measure.

The strategy of pro-abortion forces, on the other hand, is to force a major vote at the earliest possible time, on a measure they can defeat decisively, before pro-life forces have a chance to build momentum in the new Congress. Senator Baker's announced strategy plays into their hands. He says he will hold an early vote on Hatch and no other abortion votes this Congress. Senator Packwood says he can defeat Hatch and will not filibuster it.

The consensus among the major pro-life players is that unless the President quietly helps to deflect Baker from his insistence on one, early, all-or-nothing vote on the Hatch Amendment, there will be no alternative but to go ahead with the vote.

Senator Hatch wants the major anti-abortion vote in the 98th Congress to be on his Amendment. If that vote must be taken before more groundwork and momentum is built, in his view, so be it.

On the other hand, it is not in the interest of the President or the pro-life movement to acquiesce in Senator Baker's strategy of an early all-or-nothing vote. We recommend that the President exert behind-the-scenes leadership to have Senator Baker adopt a more flexible posture and to encourage key pro-life Senators to move ahead with selected small-scale initiatives that could produce favorable hearings and winning votes.

II. Options

1. Acquiesce in Senator Baker's strategy to bring the Hatch Amendment to an early vote, and do not insist on other Senate floor votes on abortion.

ADVANTAGES:

- o Would place our opponents on record as favoring current system of abortion-on-demand when they vote against Hatch.

DISADVANTAGES:

- o A guaranteed failure -- no one in the movement or in the Senate believes a two-thirds vote to be possible.
- o Defeat would demoralize pro-life supporters and cause them to look for scapegoats. Some will blame the President, however unfairly.

2. Press for vote on Hyde-Jepsen Respect Life Bill instead of or in addition to Hatch Amendment.

ADVANTAGES:

- o Would have chance of passage with simple majority.

- o Pro-life caucus in House will push hard on discharge petition.

DISADVANTAGES:

- o Would probably not get 60 votes for cloture, unless pro-life movement builds greater momentum.
3. Encourage key pro-life Senators to arrange hearings and votes on small-scale winnable pro-life initiatives as a way to build up momentum for eventual vote on Hatch or Hyde-Jepsen.

(It would be made clear that these lesser items are not a replacement for a vote on the major initiatives, but rather a prelude to them, and that the President will continue to support Hatch as well as Hyde-Jepsen.)

ADVANTAGES:

- o Issues such as fetal pain, infanticide, federal abortion funding, and fetal experimentation would place pro-abortion side on the defensive and build momentum.
- o The President on January 21 expressed interest in simple, winnable initiatives, such as fetal pain.
- o Senate Subcommittees on Constitution and Family are favorable forums for hearings.

DISADVANTAGES:

- o This strategy is not possible under Senator Baker's current posture of vote on Hatch only.

III. Analysis

Option 1 is a prescription for disaster.

- o A vote on Hatch only will, by failing, cause division and recrimination among a potentially strong group of presidential supporters in 1984.
- o Option 1 would play into the hands of liberal Democrats. They would like nothing better than to have an early vote against Hatch, with no other votes on abortion in this Congress. They want to focus the Catholic community on the economy and peace issues, not abortion, to avoid a repeat of the massive pro-Reagan shift in 1980.

Option 2 presents a greater chance of success than Option 1, but still is not very promising. Even proponents of Hyde-Jepsen do not hold out much hope for enacting it in its present form -- the best hope is to enact parts of the bill, such as the anti-federal funding provision and the anti-infanticide provision. Pushing the parts of Hyde-Jepsen that appear winnable would fit well into Option 3.

Option 3 appears the best chance for winning a victory, for enacting at least some increased protection for unborn children and for building the momentum that will generate more votes for Hatch and momentum for pro-life electoral victories in 1984.

The disadvantages and obstacles to Option 3 can be overcome by quiet, behind-the-scenes Presidential leadership:

- o The President can make clear to Senator Baker the importance he places on allowing pro-life votes in addition to Hatch.
- o The President can assure Senator Hatch that he wants to support his Amendment vigorously, but with several months delay in the vote to see if greater pro-life momentum can be built.
- o Appropriate Senators or Representatives can be encouraged to introduce and hold hearings on smaller-scale measures and to push for votes on selected measures.

Some concrete possibilities are already apparent:

- o Senator Denton and Congressman Erlenborn are already planning to focus on infanticide as part of the hearings in April on reauthorization of the Child Abuse Act. Bringing national attention to bear on occurrences of withholding food from handicapped infants can help tremendously to boost public concern for protecting the sanctity of human life.
- o The President's reference in his Religious Broadcasters speech to pain suffered by unborn children during abortions sparked numerous media inquiries, but no media criticism, because the point is clear beyond dispute. Hearings would help bring the public to share the President's concern over this issue. A bill to prohibit the most cruel, prolonged, and painful form of abortions -- saline abortions -- might be the best way to make the issue concrete and immediate. Senator Hatch has promised hearings on fetal experimentation, and the issue of fetal pain is closely related.

- o We could push for House and Senate votes on the Dannemeyer Amendment, which passed the House last year by a vote of 260 to 140. This measure would prohibit federal funding for experimentation on live aborted babies.

A victory on just one or two of these issues would help enormously. There is very little down-side risk in having hearings on any or all of them. As hearings and committee votes take place, we could judge which issue(s) are best to bring to a floor vote.

A pre-condition for taking any of these initiatives, however, is to tell Senator Baker to allow abortion votes in addition to the Hatch Amendment.

Recommendation

Option 3:

- o Work closely and speedily with pro-life supporters, especially in the Senate, to develop and have introduced several small-scale initiatives, as outlined above.
- o Provide witnesses from Administration (e.g., NIH doctor to testify on pain experienced by unborn children).
- o Hold two Presidential meetings:
 - With Senator Baker, to tell him to be flexible in scheduling anti-abortion votes.
 - With Senator Hatch, to ask him to be flexible in timing of vote on his Amendment, while assuring him we do want it brought to a vote and will support him.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

March 7, 1983

FOR: EDWIN MEESE, III
EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN

SUBJECT: School Prayer Package

Our earlier circulation of this package brought comments from Fielding, Bakshian, and Duberstein. I have now revised the transmittal message to reflect that this is a resubmission of our amendment, and have also deleted the citations as overly legal for such a context. I have dropped both the Qs & As that Fred critiqued.

Ken Duberstein commented that we need to line up co-sponsors before we transmit a formal package to the Hill. We should do this as quickly as possible. I suggest we find at least one member in each House who is willing to push this package very hard.

The 34-page legal paper prepared by Justice Department was not transmitted to the Hill the first time, but was kept available at the press office to distribute. I suggest we follow the same course this time. The only change needed in the paper is the date on the cover.

School Prayer

On February 11, we presented an issues paper on the Alabama school prayer case and the possibility of the Justice Department filing a brief in the 11th Circuit Court of Appeals. The Attorney General has now decided not to file such a brief.

In the Alabama case, District Judge Brevard Hand ruled that the Establishment Clause does not prevent various forms of prayer in the public schools, and that the Supreme Court has strayed from the clearly intended meaning of the First Amendment.

The Attorney General decided that we could not file a brief urging affirmance of Judge Hand's decision because:

- o We should not urge a lower court to render a decision contrary to Supreme Court precedents, even if those precedents are wrong.
- o Our proper course is to wait and file a brief in support of the State of Alabama if and when it requests Supreme Court review. We could then urge the Supreme Court to reconsider and overturn its own precedents in this area.

We have two additional opportunities to press ahead on the school prayer front:

- o We are now ready to resubmit the School Prayer Amendment in the same form it was introduced last year.
- o Senator Denton has introduced a statutory approach to the school prayer issue which, in its basic principle, is legally sound and politically promising:

The Denton Bill would require public schools that receive federal financial assistance to give equal opportunities and access to student groups who seek to meet for religious and non-religious purposes during non-instructional time.

- This bill follows the principle that states may not discriminate against religious speech -- a principle applied by the Supreme Court in Widmar for colleges, but rejected by the Fifth Circuit in Lubbock for high schools.
- The bill does not contradict any decision of the Supreme Court (the Supreme Court refused to review the Lubbock decision).

By vigorous support of the School Prayer Amendment and the Denton Bill, we can reassure our supporters and make major strides forward for prayer in the schools.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

March 7, 1983

FOR: EDWIN L. HARPER
FROM: MICHAEL M. UHLMANN
SUBJECT: Strategy on School Prayer

We have prepared the School Prayer Amendment package, including a fact sheet, and it is now ready for transmittal to the Hill. The President has pressed very strongly, of course, for this amendment over the past year, and we should make it clear that the amendment is a high priority. Expeditious hearings and a vote in the Senate Judiciary Committee would be important steps toward that end.

At the same time, we may have a very good opportunity to win a victory on a statute in the Senate and stoke the fires of support for a prayer amendment. The opportunity is the school prayer bill introduced by Senator Denton last month. The bill presents an excellent opportunity for the President to place his opponents on the defensive in the matter of school prayer:

- o The Denton Bill would require public schools that receive federal financial assistance to give equal opportunities and access to student groups who seek to meet for religious and nonreligious purposes during non-instructional time.
- o The bill follows the Supreme Court's principle that government may not discriminate against types of speech based on their content -- whether religious content, political content, or other form of content.

A similar bill introduced by Senator Hatfield last September during the midst of the debate over Senator Helms' school prayer jurisdiction-stripping measure drew favorable comments on the floor of the Senate from Senators Weicker and Baucus. In short, while the ACLU has opposed equal access and non-discrimination across the country, it is very hard for even the most liberal Senators to do so on the floor of Congress. We definitely have the upper hand on this aspect of the school prayer issue, and we should push it for all it is worth.

Although statutory approaches to the school prayer issue have generally been disregarded in the past as unconstitutional or ineffectual, the Denton and Hatfield approach is an exception:

- o It does not strip jurisdiction from the federal courts.
- o It does not contradict any decision of the Supreme Court.

The reason the Denton-Hatfield approach is feasible is that the Supreme Court has already ruled in the context of state universities that religious speech and religious student group meetings must be given the same treatment as non-religious speech and meetings. Thus far, the Supreme Court has declined to rule whether the same principle applies to public elementary and secondary schools. Denton and Hatfield would simply take the Supreme Court's principle for universities and apply it to public schools. There is no Supreme Court decision against doing this. Whether the Supreme Court would uphold the statute is probably about a fifty-fifty proposition, but if they strike it down it merely fuels the fires for an amendment.

Denton and Hatfield both follow the same basic principle of non-discrimination against religious speech, but there are differences between them:

- o Denton's bill applies to all federally assisted public schools; Hatfield's bill applies only to secondary schools.
- o Denton's bill protects religious speech of students and teachers; Hatfield's bill covers students only.

If we gave vigorous public support to the Denton Bill, or the Hatfield Bill (likely to be reintroduced soon), or a variation of them, we could accomplish a major victory for the President's announced objectives in the area of school prayer. We could place the other side in the position of opposing freedom of speech and favoring discrimination based on the content of speech.

Senator Hatch is now planning to hold joint hearings on this matter with his Labor and Human Resources Committee and his Subcommittee on the Constitution. Tentative date is April 28-29.

Recommendation: We should develop a legislative and communication strategy to give maximum support to some version of the Denton-Hatfield concept. We should not place ourselves in a position of choosing between the slightly different Hatfield and Denton approaches. We should rather favor the general principle that is common to both, and leave it to Senator Hatch and our other allies in the Senate to come up with the best specific statutory language.

School Prayer

FACT SHEET

On May 17, 1982, President Reagan submitted to the 97th Congress a proposed amendment to the Constitution that would restore the freedom of our citizens to pray in public institutions, including the public schools. Hearings were held on the President's amendment in the Senate Judiciary Committee, but no further action was taken in the 97th Congress.

The President has now submitted the same School Prayer Amendment to the 98th Congress. He has said he will introduce it "again and again" until it passes the Congress and is sent to the states for ratification.

BACKGROUND

The President seeks to restore the right of American school children to participate in voluntary school prayer, a right which is now prohibited by Supreme Court interpretations of the U.S. Constitution.

As the President has stated, "The First Amendment was written not to protect the people and their laws from religious values but to protect those values from government tyranny."

MAJOR CONCEPTS

Judicial rulings restricting prayer

The Supreme Court's 1962 and 1963 school prayer decisions prohibited prayer in the public schools on the premise that allowing such prayer violates the constitutional separation between church and state.

Since the early 1960's, lower federal court rulings have removed virtually all forms of voluntary worship from our nation's public schools.

- o The Supreme Court approved a lower court decision which barred students from participating, upon their own request and with their parents' consent, in a one-minute time of silent meditation at the start of the school day.
- o A federal court has held that a school district policy permitting students to conduct voluntary meetings for

"educational, religious, moral or ethical purposes," outside class hours, violates the Constitution.

- o A State court relying on Supreme Court precedents prohibited the reading of prayers from the Congressional Record in a high school gymnasium before the beginning of school.

The President believes that these decisions contradict the intent of the framers of the First Amendment and place a discriminatory restriction on students in the exercise of religious speech.

Language and effect of the President's amendment

The President's proposed constitutional amendment states that:

"Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer."

- o The amendment does not require school authorities to conduct or lead prayer; it permits them to choose. The selection of the particular circumstances for prayer would be left to the judgment of local communities based on a consideration of such factors as the preferences of parents, students, teachers, as well as other community interests.
- o The second sentence of the proposed amendment assures that no one need make any expression of religious beliefs which he or she does not hold, and that no person would be required, by any State or the federal government, to participate in prayer. The right not to pray is thus protected as well.

TO THE CONGRESS OF THE UNITED STATES:

On May 17, 1982, I transmitted for your consideration a proposed constitutional amendment to restore the simple freedom of our citizens to offer prayer in our public schools and institutions. Today I resubmit this amendment for your expeditious consideration. The public expression through prayer of our faith in God is a fundamental part of our American heritage and a privilege which should not be excluded by law from any American school, public or private.

One hundred fifty years ago, Alexis de Tocqueville found that all Americans believed that religious faith was indispensable to the maintenance of their republican institutions. Today, I join with the people of this nation in acknowledging this basic truth, that our liberty springs from and depends upon an abiding faith in God. This has been clear from the time of George Washington, who stated in his Farewell Address:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . And let us with caution indulge the supposition that morality can be maintained without religion. . . . [R]eason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

Nearly every President since Washington has proclaimed a day of public prayer and thanksgiving to acknowledge the many favors of Almighty God. We have acknowledged God's guidance on our

coinage, in our national anthem, and in the Pledge of Allegiance. As the Supreme Court stated in 1952, "We are a religious people whose institutions presuppose a Supreme Being."

The founders of our nation and the framers of the First Amendment did not intend to forbid public prayer. On the contrary, prayer has been part of our public assemblies since Benjamin Franklin's eloquent request that prayer be observed by the Constitutional Convention:

I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth -- that God governs in the affairs of men . . .

I also believe that without his concurring aid we shall succeed in this political building no better than the Builders of Babel: We shall be divided by our little partial local interests; our projects will be confounded, and we ourselves shall become a reproach and by word down to future ages. . . .

I therefore beg leave to move -- that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business. . . .

Just as Benjamin Franklin believed it was beneficial for the Constitutional Convention to begin each day's work with a prayer, I believe that it would be beneficial for our children to have an

opportunity to begin each school day in the same manner. Since the law has been construed to prohibit this, I believe that the law should be changed. It is time for the people, through their Congress and the state legislatures, to act, using the means afforded them by the Constitution.

The amendment I have proposed will remove the bar to school prayer established by the Supreme Court and allow prayer back in our schools. However, the amendment also expressly affirms the right of anyone to refrain from prayer. The amendment will allow communities to determine for themselves whether prayer should be permitted in their public schools and to allow individuals to decide for themselves whether they wish to participate in prayer.

I urge that this amendment be quickly adopted, for the vast majority of our people believe there is a need for prayer in our public schools and institutions. I look forward to working with Congress to achieve the passage of this amendment.

THE WHITE HOUSE,

March 8, 1983

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

March 7, 1983

FOR: EDWIN L. HARPER

FROM: ROBERT B. CARLESON

SUBJECT: Coverage of Federal Regulations
on Hospitals, Medicare

You have asked whether our inclusion of capital and education costs in the computation of prospective rate payments for Medicare will have the result of extending federal regulation to cover all hospitals that participate in the Medicare program.

The fact is that all hospitals participating in the Medicare or Medicaid program have been covered by federal regulations, such as Title VI and other civil rights laws, ever since the 1960s. Decisions by administrative law judges and federal courts have thus far upheld application of federal regulations to Medicare/Medicaid participating institutions.

There is, of course, a strong policy argument that payments to individuals, as in the Medicare program or student loan programs, should not create federal regulatory jurisdiction over the institutions where the individuals choose to utilize their federal benefits. Department of Justice is now taking a position in some cases concerning student loans that could result in a cutback in the scope of federal regulation that follows from federal payments to individuals. In the Medicare/Medicaid context, however, the Department of Justice filed a brief in June 1982 arguing that Medicare and Medicaid payments do constitute federal financial assistance and thus bring the recipient institution under the jurisdiction of federal civil rights laws. Officials at Justice are reconsidering their position in this case, and could decide to argue against the interpretation that Medicare and Medicaid are financial assistance to the institution.

To the extent that we bring capital and education costs into the computation of prospective rate payments for Medicare, we will strengthen the argument that Medicare and should continue to be considered federal financial assistance.

Recently, this issue came up in my working group on the new infanticide regulations. The Justice Department representative argued that Medicare and Medicaid should not be considered federal financial assistance. We decided not to attempt to resolve the issue at this stage, and the language of the new infanticide regulation finesses the issue by using ambiguous language acceptable to both HHS and Justice.

We will need to resolve the issue in CCHR or CCLP before enforcement of the new infanticide regulation begins in earnest.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

March 9, 1983

FOR: EDWIN MEESE III
EDWIN L. HARPER

FROM: MICHAEL M. UHLMANN

SUBJECT: The Crime Bill
("The Domestic Defense Act of 1983")

I. OVERVIEW OF BILL

A capsule summary of the bill is attached. It consists primarily of legislative initiatives previously supported by the Administration, with some new elements. The items marked with an asterisk involve some controversy and are discussed in part II of this memo.

Title I -- Bail Reform. The same as the proposal in S.2572 as approved by the Senate last year, with two modifications: (1) it eliminates the presumption of dangerousness with respect to certain non-violent drug offenses; and (2) it provides that a detention hearing will be held either on the court's own motion or when requested by the government.

Title II -- Sentencing Reform. The same as the proposal in S.2572 as approved by the Senate. Stylistic changes.

Title III -- Exclusionary Rule. Identical to the proposal submitted by the White House last year in S.2903.

Title IV -- Forfeiture Reform. The same as the provisions passed by the Senate last year as part of S.2572. Embodies the following Senate-made changes to our original proposal:

- o Establishes "Drug Assets Forfeiture Fund" and "Customs Assets Forfeiture Fund". These funds are capitalized by monies received from disposition of forfeited property, without the 25% set-aside limitation originally proposed. Funds can be used for a number of purposes including rewards to informants. Reward ceiling is \$250,000 rather than \$50,000 originally proposed.
- o Authorizes Customs Officers to carry firearms, execute warrants, and make arrests, consistent with FBI authority.
- o Authorizes administrative forfeiture in uncontested cases involving conveyances or items under \$100,000.

Title V -- Insanity Defense. This proposal, fundamentally different from our proposal last Congress, is very similar to Senator Thurmond's proposal, S.2902, of the 97th Congress. A modification of the old "M'Naghten" test, the proposal would limit the insanity defense to those cases in which the defendant could not "appreciate the nature and quality or the wrongfulness of his acts". While the Administration's mens rea proposal was substantively superior, Thurmond's approach has the broadest support on the Hill and among outside groups.

Title VI -- Reform of Federal Intervention in State Criminal Proceedings. Indentical to proposal submitted by the White House last year and introduced as S.2903.

Title VII -- Increased penalties for narcotics trafficking. Part A of this Title increases penalties for drug offenses and is identical to the provisions passed by the Senate in S.2572. Part B is entirely new. It would strengthen DEA's regulatory powers over the manufacture and distribution of legitimate drugs to prevent diversion into illegal channels. It would also reduce some regulatory burdens by requiring registration every three years rather than annually as under existing law.

- * Title VIII -- Justice Assistance Act. A new proposal which conforms with the understanding reached last fall in negotiations with Congress.

Title IX -- Surplus Property Amendments. The same as the provisions approved by Senate as part of S.2572.

- * Title X -- Labor Racketeering, Bribery and Extortion. Contains provisions from three bills endorsed by Justice Department during the 97th Congress.

- o Racketeering (S.1785): Expands the list of offenses which serve as a bar to certain union offices; extends duration of bar effective upon conviction by trial court, rather than after appellate process.
- o Extortion (S.2189): Amends Hobbs Act to make violent activities in connection with labor disputes federal offense. Exception for minor violence incident to otherwise peaceful activities. Reverses Enmons case.
- o Bribery (S.1630): Extends Taft-Hartley anti-bribery provisions to unions not previously covered by that act, e.g., airlines, railroads, federal employees.

Title XII -- Bank Secrecy Act Amendments. Identical to provisions passed by Senate as part of S.2572.

Title XIII - Federal Tort Claims Act Amendments. The same (with minor technical changes) as S.1775, introduced in the 97th

Congress and endorsed by the Administration. Authorizes damage actions for Constitutional torts by federal officials to be brought against U.S. rather than individual official. Government will have all defenses, including immunity, which would have been available to the individual.

Title XIV -- Miscellaneous Violent Crime Amendments. Most of the proposals were included in S.2572. Essentially, three new provisions:

- o Part H. Adds maiming and sodomy to Major Crimes Act. Fills gap in law applying to Indian reservations.
- o Part L. Fills a gap in existing law by making it an offense to escape from federal custody resulting from civil commitment.
- * o Part M. Extends extraterritorial jurisdiction to serious crimes committed overseas by military personnel and federal employees.

Title XV -- Miscellaneous Non-Violent Crime Amendments. Consists of 11 discrete amendments; 7 are taken from S.1630, which was supported by Justice in the 97th Congress; 4 provisions are new.

- o Part A. Establishes federal criminal sanctions for tampering with food, drugs or cosmetics so long as items are in the stream of commerce. These are amendments to Title 18 and should avoid reference to legislation committees other than Judiciary.
- o Part B. Based on a provision of Senate-passed S.2572, this provision follows the Supreme Court's recent ruling in Ferber that a showing of obscenity is not required for child pornography.
- o Part C. A new provision that fills a gap in existing law by making it an offense to frustrate law enforcement efforts by warning a person about a search or seizure.
- * o Part J. A new provision that would subject Indian reservations to state gambling law.

Title XVI -- Procedural Amendments. Contains 7 miscellaneous amendments, most of which were included in S.2572 or S.1630. There are three new elements.

- o Part B. Wiretap Amendments: Adds Deputy and Associate AG to those officials who can authorize taps. Adds currency offenses to list of predicate offenses.
- o Part E. Government Appeal of New Trial Orders. This proposal, recently cleared by OMB, would permit U.S. to appeal post-conviction new trial orders.

- o Part G. Change of Venue for Certain Tax Offenses. New provisions clarify circumstances under which defendant prosecuted for promoting illegal tax schedules can obtain change in venue.

II. ISSUES TO BE RESOLVED

Criminal Justice Assistance

As indicated above, the provisions in the draft bill conform generally to the negotiated understanding reached last fall with members from both Houses. The draft does a couple of things which, as far as I know, have not been previously discussed: (1) in collapsing the various advisory committees into one, it grandfathers 50% of the old membership; (2) it allows the committee members (rather than the President) to designate the Chairman. Neither item is worth throwing ourselves on a stake for, if it is otherwise crucial to passing the bill, but I did want you to be apprised of the change.

Labor Provisions

Department of Labor is concerned over the following elements of Title XI:

- o Expansion of the list of offenses that serve as a basis for debarment from union office under the Labor Management Reporting and Disclosure Act;
- o Extension of the Taft-Hartley bribery provisions to unions not previously covered by that Act: airlines, railroads, public employees;
- o Amendment of the Hobbs Act to make violence in connection with labor disputes a federal offense.

Labor agrees that these are substantively unexceptionable but believes that they are politically ill advised. Labor believes that they have no chance of success in the Congress and will do nothing more than provoke vociferous labor attacks on the bill as an "anti-union bill".

In addition, Labor wants to insert in the bill a Senate-passed provision that would give the department IG agents jurisdiction over labor racketeering offenses. Justice strongly opposes this and testified against it less than a month ago.

Extraterritoriality

Part M of Title XIV would make certain acts that are unlawful in the United States unlawful if committed overseas by military personnel or federal employees. The CIA has been harrassed in

the past through lawsuits by leftist organizations claiming, inter alia, that U.S. criminal laws have extraterritorial effect and thus proscribe various intelligence activities. The CIA therefore wants to make it clear that statutes on larceny, receiving stolen property, and breaking and entering do not prohibit overseas intelligence collection activities. The agency has proposed, and Justice has accepted an additional section in this Title stating that it shall not be construed to prohibit defense and intelligence activities that are performed in accordance with the Constitution, federal statutes, and Executive Orders.

Such an explicit provision will be a red flag and may encourage a spate of media stories that we are licensing improper intelligence activities overseas. Liberals may seize upon this as an excuse for opposing the bill.

Gambling on Indian reservations

U.S. Attorneys would like legislation subjecting gambling on Indian reservations to state laws so that these reservations do not become havens for organized crime. A month ago the Interior Department set up a task force at Justice's request to develop a solution to the gambling problem. On some reservations bingo is one of the only ways tribes can raise money for economic development. Interior would like to exclude this provision from the bill and defer the issue until the task force has had a chance to study it.