Collection: Roberts, John G.: Files
Folder Title: JGR/Enrolled Bills –
(11/25/1985-12/12/1985)
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THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release November 25, 1985

The President today signed the following legislation:

H.R. 3038 which provides $60,826 million in budget authority for the Department of Housing and Urban Development, the Environmental Protection Agency, the Veterans Administration, the National Aeronautics and Space Administration, and sundry independent agencies for the fiscal year ending September 30, 1986;

H.R. 3447 which extends and amends the Congressional Award Program; and

S.J. Res. 228 which delays until March 1, 1986, the validity of any letter of offer regarding proposed sales of advanced weapons systems to Jordan unless direct and meaningful peace negotiations between Israel and Jordan are underway.

# # #

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release November 25, 1985

STATEMENT BY THE PRESIDENT

I have today signed H.R. 3038, a bill providing for appropriations for the Department of Housing and Urban Development and several independent agencies, including the Federal Emergency Management Agency (FEMA). This bill would also authorize FEMA, through a new "national board," to oversee an emergency food and shelter program.

I am deeply concerned about the membership of the Board. Under this bill, the Board is to be composed of seven members who would be officers of the Executive Branch because the Board will perform executive functions. If read literally, the bill would permit six private organizations to appoint members of the Board, in violation of the appointments clause of the Constitution (Article II, Section 2, Clause 2). In order to avoid this constitutional infirmity, I direct the Director of FEMA to construe this provision as granting him complete discretionary authority to determine who should be appointed to the national board. The organizations mentioned in the bill may make recommendations, but only the Director, as the "head of a department," _id._, is authorized to appoint members to the Board.

The bill also provides, in Section 413, that "[n]o part of any appropriation contained in this Act shall be available to implement, administer, or enforce any regulation which has been disapproved pursuant to a resolution of disapproval duly adopted in accordance with the applicable law of the United States." The "applicable law of the United States" includes, of course, the Constitution and the decision of the Supreme Court in _INS v. Chadha_. Under the Constitution and that decision, the "resolution of disapproval" referred to in Section 413 must be a joint resolution presented to the President for approval or disapproval.

# # # # # #

THE WHITE HOUSE

WASHINGTON

December 10, 1985

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: H. LAWRENCE GARRETT, III
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Report Regarding S. 1562 and S. 1134

Counsel's Office has reviewed the above-referenced report, and has no legal objection to it.

ID # __________ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: Brandon Blum

☐ **MI Mail Report** **User Codes: (A)** ______ **(B)** ______ **(C)** ______

Subject: DOJ report re: S.1562 and S.1134

ROUTE TO: ACTION DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUHOLL	ORIGINATOR	85/12/09			/ /
	Referral Note:				
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	Referral Note:				
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	Referral Note:				
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Code = "A"
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Comments:

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Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

OFFICE OF MANAGEMENT AND BUDGET
ROUTE SLIP

TO ✓ Fred Fielding	Take necessary action ☐
John Cooney	Approval or signature ☐
Karen Wilson	Comment ☐
	Prepare reply ☐
	Discuss with me ☐
	For your information ☐
	See remarks below ☐

FROM Branden Blum B   DATE 12/9/85

REMARKS

The attached DOJ draft report discusses various formulations of the "constructive knowledge" standard in connection with S. 1562 (the False Claims Act Amendments) and S. 1134 (the Civil Fraud Remedies Act).

DOJ concludes that the language contained in S. 1134 as reported by the Senate Governmental Affairs Committee is the most precise and should be included in both bills.

S. 1562 is tentatively scheduled for markup by the Senate Judiciary Committee on 12/12/85.

Please review the attached and provide me with any comments by 2:00 p.m. -- Tuesday -- 12/10/85.

OMB FORM 4

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Charles McC. Mathias
United States Senate
Washington, D.C. 20510

Dear Senator Mathias:

This is in response to your letter to Richard Willard of November 25, 1985 regarding the meaning and consistency of the various anti-fraud legislative proposals currently pending in the Senate. The two most significant bills -- Senator Grassley's False Claims Act Amendments (S. 1562) and Senator Cohen's Civil Fraud Remedies Act (S. 1134) -- are identical to Justice Department proposals and are strongly supported by the Administration. We feel that it is particularly important that S. 1562 be acted upon by the Judiciary Committee in this session of the Congress so as to ensure that there is adequate time to complete congressional action next year.

As you know, the False Claims Act is the basic statute governing fraud against the United States. In the 122 years of its existence, we have identified several improvements which would enhance the ability of the United States to prosecute fraud. In addition, conflicting court decisions in the various circuits have created some confusion as to the required burden of proof and standard of scienter, among other matters. Consequently, the False Claims Act Amendments proposed by the Department -- and incorporated in S. 1562 -- would resolve these inconsistencies and anomolies while also reinforcing our civil anti-fraud efforts.

However, we have also recognized that it is often not cost-effective to prosecute relatively small fraud cases in the federal courts. Consequently, we have supported Senator Cohen's Civil Fraud Remedies Act which would create a "mini-False Claims Act" authorizing an administrative remedy for frauds involving under $100,000. This bill restates the relevant provisions of the False Claims Act while also creating an elaborate administrative mechanism for the enforcement of such small fraud cases.

Because these two bills have been considered by separate committees and because they were originally conceived independently, their terms are not always identical. The Department of Justice agrees that the bills should be in harmony in their essential features. To that end, we have encouraged the staffs of the two committees to consult in order to bring their bills into conformity. As there seems to be general agreement that this should be done, we are confident that the bills will be consistent by the end of the legislative process.

The seven different formulations of constructive knowledge attached to your letter are, in our view, fairly similar. They basically reflect various stages of the Congressional debate and consideration of this complex issue, particularly in the progress of S. 1134 through the Governmental Affairs Committee. The fundamental issue in designing a standard of knowledge is to reach not only defendants with actual or constructive knowledge of a fraudulent claim, but also defendants who insulate themselves from that knowledge which a prudent person should have before submitting a claim upon the Government. It is this problem of defining constructive knowledge, or of dealing with the "ostrich" -- the individual who ignores or fails to inquire about readily discoverable facts which would alert him that fraudulent claims are being submitted -- that has led to the various formulations of the standard of knowledge.

It should be noted that the debate has narrowed to a small window on what was once a broad spectrum of possible standards of culpability: an intentional scheme to cheat, only actual knowledge of falsity, gross negligence, mere negligence, or a per se liability for any mistatement. After much study and debate, a strong consensus evolved that it is appropriate to attach special civil remedies to those who have actual knowledge of falsity and those who have constructive knowledge of it. Even with this agreement in principle, an extraordinary amount of time has been devoted to crafting a statutory standard designed to assure the skeptical that mere negligence could not be punished by an overzealous agency and that artful defense counsel could not urge that the statute actually required some form of intent as an essential ingredient of proof.

Consideration of this issue was not always furthered by hypotheticals, which participants in the debate sometimes used to demonstrate the "horrors" that might result under a proposed formulation. It is probably safe to say that black and white cases are not helpful in assessing shades of gray. Under any standard, the facts are critical -- and frequently the outcome is determined based on colorations, nuances of circumstantial evidence, or cumulative impressions that are difficult to articulate, let alone anticipate by legislative craftsmanship.

Eventually, these various hypotheticals focused more and more on the "busy executive syndrome," i.e., on the personal liability of a high level official in a large corporation who merely signs a claim or certification prepared by underlings, and on the hapless bookkeeper, who simply prepares a claim for submission to the government based upon the records or instructions of others. In fact, the law has managed to assess and discern the differences between the cheat and the blameless, even under less precise statutory standard currently contained in the False Claims Act. See, e.g., United States v. Aerodex, Inc., 469 F.2d 1001 (5th Cir. 1972) (corporate division head held liable, chief executive officer not liable); United States v. Priola, 272 F.2d 589 (5th Cir. 1959) (partner, having clerical duties, found not personally liable). The Committee's formulation in S. 1134 does not distort or bias that very fundamental assessment; it does help to refine it.

The Department's initial proposals -- both in the Program Fraud bill and the False Claims Act Amendments -- simply used the "knows or has reason to know" formula. The accompanying section by section analysis explained that this would reach someone who acted in "reckless disregard of the truth in submitting the false claim" -- a formulation which we believed would cover someone who insulated themselves by design from knowledge about the truth or falsity of a claim.

Our reference to "reckless disregard" reflected the shared assumption of the Department and the sponsors of the bills that mistake, inadvertence or mere negligence in the submission of a false claim would not be actionable under either bill. In other words, in either of these two civil proceedings, the Government would have to prove something more than mere negligence but less than specific intent to defraud. We believe that "reckless disregard," (or "gross negligence," a phrase which we believe defines the same standard of conduct) accurately captures the proper level of scienter. It should be noted, however, that there are cases in which reckless disregard is construed as requiring an intentional, deliberate, or willful act -- a considerable escalation of the scienter requirement. To avoid an opportunity for such a misconstruction, we subsequently urged the adoption of a gross negligence standard which appears to be less susceptible to this misinterpretation. Generally, however, we found that each is used to define the other; i.e., reckless disregard often is defined as gross negligence and gross negligence frequently is said to require a reckless disregard. These terms, and "blind or total indifference," or "carelessness in the extreme," and the like all serve to focus, without any of them precisely delineating, the assessment required of the fact-finder.

Implicit in all these formulations however is our strongly-held belief that anyone submitting a claim to the Government has some duty -- which will vary depending on the nature of the claim and the sophistication of the applicant -- to make such reasonable and prudent inquiry as is necessary to be reasonably certain that he is in fact entitled to the money sought.

This concept of an affirmative responsibility or "duty" has been recognized in much of the caselaw interpretating the False Claims Act. In United States v. Cooperative Grain and Supply Co., 476 F.2d 47 (8th Cir. 1973), the court held that "[t]he applicant for public funds has a duty to read the regulations or otherwise be informed of the basic requirements of eligibility." Id . at 55. In United States v. Klein, Civ. No. 1035-51 (D. N.J. Feb. 2, 1953), a case involving a false claim arising out of the sale of substandard milk to the Government, the court noted:

> At no time did [the defendant] take it upon himself to make any investigation as to whether the milk that he was receiving was of the quality which he solemnly promised the United States Government under his contract it would receive. If he did not know that was he was delivering was not the kind of milk that was in the contract, it was the grossest kind of carelessness and negligence upon is part, for which he must assume the responsibility of knowledge.

It should be stressed that the duty of inquiry recognized in S. 1134 was expressly qualified to avoid oppressive requirements of verification. The phrase, "reasonable and prudent . . . under the circumstances," was intended to establish a "light" obligation to inquire rather than to create a heavy duty to reverify.

Thus, the final formulation of the knowledge standard contained in S. 1134 as reported out of the Governmental Affairs Committee embodied all of these concepts. Under it, a defendant "knows or has reason to know" that a claim was false if he had actual knowledge of its falsity or if he:

". . . acts in gross negligence of the duty to make such inquiry as would be reasonable and prudent to conduct under the circumstances to ascertain the true and accurate basis of the claim or statement.

This definition embodies the two fundamental concepts which any definition of constructive knowledge should contain: the Government must prove more than mere negligence and the defendant must make some limited inquiry to determine whether his claim is accurate.

One criticism lodged against this standard is based upon the inclusion of "reasonable and prudent" which are terms often associated with a simple negligence standard. the fear is therefore that something less than gross negligence will result from these terms' inclusion. In fact, an assessment of gross negligence requires that the fact-finder first consider the simple negligence form of conduct against which the alleged gross deviation is to be measured. Thus, we do not view this formulation as contradictory; rather, it protects the potential defendant because it makes clear that the duty of inquiry is a limited one.

Nonetheless, if this continues to be a subject of concern, an alternative could be constructed which would provide, ". . . acts in gross negligence of the duty . . . to ascertain the true and accurate basis of the claim or statement". It could be made clear in the committee report that this is a reference to the inherent duty of a citizen to turn square corners when dealing with the government, and citing to Cooperative Grain and the other cases. Such a change would not appreciably affect the level of culpability, but would remove the initial (and false) impression that the formulation reaches conduct which does not rise to the level of gross negligence because of the reference to reasonable and prudent inquiry, i.e., the facial contradiction would be eliminated.

In conclusion, we believe that this last formulation of the constructive knowledge -- that contained in S. 1134 as reported by the Governmental Affairs Committee -- is the most precise and therefore should be adopted by the sponsors of both bills. We would be pleased to respond further should you have additional questions or wish to discuss these issues further.

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

Sincerely,

PHILLIP D. BRADY
Acting Assistant Attorney General

cc: Senator Thurmond
Senator Biden
Senator Grassley
Senator Metzenbaum
Senator Roth
Senator Eagleton
Senator Cohen
Senator Levin

THE WHITE HOUSE

WASHINGTON

December 10, 1985

MEMORANDUM FOR THE FILE

FROM: JOHN G. ROBERTS

SUBJECT: Revised DOE Draft Report on H.R. 1524, the Employee Polygraph Protection Act

On November 27, 1985, I orally advised Branden Blum that I had no objection to the above-referenced proposed Energy Department report.

Attachment

ID # ______________ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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Date Correspondence Received (YY/MM/DD) ___ / ___ / ___

Name of Correspondent: James Muir

☐ **MI Mail Report** **User Codes:** (A) ________ (B) ________ (C) ________

Subject: Revised DOE draft report on H.R. 1524, the Employee Polygraph Protection act

ROUTE TO: ACTION DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUHOLL	ORIGINATOR	85/11/27			/ /
	Referral Note:				
CUAT 18	R	85/11/27		S	85/12/02
	Referral Note:				
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

November 26, 1985

LEGISLATIVE REFERRAL MEMORANDUM

TO: SEE ATTACHED DISTRIBUTION LIST

SUBJECT: REVISED Department of Energy draft report on H.R. 1524, as ordered reported, the Employee Polygraph Protection Act.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than December 2, 1985.

(NOTE -- The scope of the proposed Energy amendment has, in response to agency comments, been narrowed to apply only to Energy, as opposed to all agencies.)

Direct your questions to Branden Blum (395-3454), the legislative attorney in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: Fred Fielding, John Cooney, Karen Wilson, Phil Hanna, Arnold Donahue, Tom Palmieri

DISTRIBUTION LIST

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*Department of Education (07)	JoAnne Durako	732-2670
*Department of Health and Human Services (14)	Frances White	245-7750
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*Department of the Interior (16)	Norma Perry	343-6797
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*General Services Administration (13)	Ted Ebert	566-1250
NASA (19)	Toby Costanzo	453-1080
Office of Personnel Management (22)	Bob Moffit	632-6516

AGENCY	CONTACT	PHONE NUMBER
*United States Postal Service (11)	Fred Eggleston	268-2958
Central Intelligence Agency		
National Security Council		
Office of Science & Technology Policy		

*Agency not included on Legislative Referral Memorandum (dated 11/13/85) circulating the first version of the Energy draft report.

Department of Energy
Washington, DC 20585

Honorable Augustus F. Hawkins
Chairman
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The purpose of this letter is to submit Department of Energy views regarding H.R. 1524, cited as the "Employee Polygraph Protection Act of 1985", as ordered reported by the Committee on Education and Labor.

The Act prohibits the use of polygraph tests for hiring, discharging or disciplining employees in the private sector. The prohibitions in the bill do not apply to Federal, State or local governments. The bill also exempts consultants and contractors employed to perform intelligence or counterintelligence functions by the Federal Bureau of Investigation of the Department of Justice, Department of Defense, Central Intelligence Agency and National Security Agency.

The Department of Energy would oppose H.R. 1524 unless it were amended to exempt Department of Energy contractor employees engaged in work related to the national defense or national security. National security activities of the department include the research, development, testing, and manufacture of all U.S. nuclear weapons; the verification of international arms control agreements; the control of sensitive technology transfers, and the dissemination of classified information. In cooperation with the Department of Navy, DOE also develops nuclear ship-propulsion systems. A large percentage of our work relating to national defense and national security is performed by employees of contractors to the Department of Energy. Because DOE contractor employees are not covered by any of the exemptions in the bill, they would not be subject to any polygraph tests under this legislation. Because of the importance to national defense of the work performed by DOE national security contractors, we believe that it would be most unwise to preclude their use of polygraph tests. To avoid that result, the following amendment is suggested:

Insert the following new subsection on page 6, between lines 7 and 8.

"(d) Exemption for Department of Energy Contractors.

"This Act shall not prohibit the administration in the performance of any work related to the national security of a polygraph examination to an employee of a contractor to the Department of Energy. For purposes of this section, contractor includes a contractor or cost reimbursenment contractor or any subcontractor thereof."

Enactment of H.R. 1524 would not have a significant impact upon the budgetary requirements of the Department of Energy.

The Office of Management and Budget has advised that, from the standpoint of the President's program, there is no objection to presentation of this report for the consideration of the Committee.

Sincerely,

J. Michael Farrell
General Counsel

ID # ______________ CU

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CORRESPONDENCE TRACKING WORKSHEET

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Name of Correspondent: Gary Wester

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Subject: Section 12 of the Senate Version of the farm bill

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
	WHolland	ORIGINATOR	85/12/10			
		Referral Note:				
	WAT18	I	85/12/13			
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AGENCY FOR INTERNATIONAL DEVELOPMENT
WASHINGTON, D.C. 20523
OFFICE OF THE GENERAL COUNSEL 12/13

Fred Fielding -

Section 129 of the Senate version of the Farm bill is enclosed. This is pursuant to your conversation with Peter McPherson of AID this morning.

Gary Winter
647-8404

subsection is in effect, the President shall report to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate on the status of such agreement and the progress being made to implement private, free enterprise agricultural policies for long-term agricultural development in such country.".

(b) The amendment made by this section shall be effective during the period beginning October 1, 1985, and ending September 30, 1989.

SPECIAL ASSISTANT FOR AGRICULTURAL TRADE AND FOOD AID

SEC. 129. (a)(1) The President shall appoint, by and with the advice and consent of the Senate, a Special Assistant to the President for Agricultural Trade and Food Aid (hereafter in this section referred to as the "Special Assistant").

(2) The Special Assistant shall serve in the Executive Office of the President.

(3) As an exercise of the rulemaking power of the Senate, any nomination to the position of Special Assistant shall be—

(A) submitted to the Senate for confirmation; and

(B) referred to the Committee on Agriculture, Nutrition, and Forestry.

(4) The Special Assistant shall—

(A) serve at the pleasure of the President;

(B) be entitled to receive the same allowances as a chief of mission; and

(C) have the rank of Ambassador Extraordinary and Plenipotentiary.

(b) The Special Assistant shall—

(1) assist and advise the President in order to improve and enhance food assistance programs carried out in the United States and foreign countries;

(2) coordinate and streamline the manner in which food assistance programs are carried out by the Department of Agriculture and the Agency for International Development, in order to improve their overall effectiveness;

(3) make recommendations to the President on measures to be taken to increase use of United States agricultural commodities and the products thereof through food assistance programs;

(4) advise the President on agricultural trade;

(5) serve as a member of the Development Coordination Committee;

(6) serve as Chairman of the Food Aid Subcommittee of such Committee; and

(7) issue to departments and agencies of the Federal Government policy guidelines on basic issues of

food assistance policy, to the extent necessary to assure the coordination of food assistance programs, consistent with law, and with the advice of such Subcommittee.

(c) The Special Assistant may—

(1) solicit information and advice from private and governmental sources and recommend a plan to the President and Congress on measures that should be taken—

(A) to promote the export of United States agricultural commodities and the products thereof; and

(B) to expand export markets for United States agricultural commodities and the products thereof;

(2) develop and recommend to the President national agricultural policies to foster and promote the United States agricultural industry and to maintain and increase the strength of this vitally important sector of the United States economy; and

(3)(A) appraise the various programs and activities of the Federal Government, as they affect the United States agricultural industry, for the purpose of determining the extent to which such programs and activities are contributing or not contributing to such industry; and

(B) make recommendations to the President and Congress with respect to the effectiveness of such programs and activities in contributing to such industry.

(d) Section 5312 of title 5, United States Code, is amended by adding at the end thereof the following new item:

"Special Assistant for Agricultural Trade and Food Aid.".

TITLE II—DAIRY

FEDERAL MILK MARKETING ORDERS

SEC. 201. Section 101(b) of the Agriculture and Food Act of 1981 (Public Law 97–98; 7 U.S.C. 608c note) is amended by striking out "1985" and inserting in lieu thereof "1989".

LEGAL STATUS OF PRODUCER HANDLERS

SEC. 202. The legal status of producer handlers of milk under the Agricultural Adjustment Act, as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 et seq.)), shall be the same subsequent to the adoption of the amendment made by section 201 as it was prior thereto.

THE WHITE HOUSE

WASHINGTON

December 11, 1985

MEMORANDUM FOR DAVID L. CHEW
STAFF SECRETARY

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: S. 1639 -- Gold Bullion Coin Act of 1985

Counsel's Office has reviewed the proposed veto message for S. 1639, and finds no objection to it from a legal perspective. It is true that the veto message would constitute rather damning evidence of a violation of GATT if the veto is overridden, but there seems to be little room to argue that the bill would not violate GATT in any event.

A word of caution: the return veto should only be used if the bill is vetoed before Congress adjourns sine die. If the bill is not vetoed before then, it will be necessary to craft a pocket veto statement, taking into account the pendency of the pocket veto litigation before the Supreme Court.

ID # 330362 CU

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Name of Correspondent: Dave Chew

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Subject: S. 1369 - Gold Bullion Coin Act of 1985

ROUTE TO: **ACTION** **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUHOLL	ORIGINATOR	85,12,11			/ /
	Referral Note:				
Curat 18	R	85,12,11		S	85,12,12 10 am
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Document No. 330362

WHITE HOUSE STAFFING MEMORANDUM

DATE: 12/11/85 **ACTION/CONCURRENCE/COMMENT DUE BY:** 10:00 a.m. 12/12/85

SUBJECT: S. 1369 - Gold Bullion Coin Act of 1985

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☑	McFARLANE	☑	☐
REGAN	☐	☑	OGLESBY	☑	☐
MILLER	☐	☐	RYAN	☐	☐
BUCHANAN	☑	☐	SPEAKES	☐	☑
CHAVEZ	☑	☐	SPRINKEL	☐	☐
CHEW	☐ P	☑ SS	SVAHN	☑	☐
DANIELS	☑	☐	THOMAS	☑	☐
FIELDING	☑	☐	TUTTLE	☐	☐
HENKEL	☐	☐	CLERK	☐	☑
HICKS	☐	☐		☐	☐
KINGON	☑	☐		☐	☐
LACY	☐	☐		☐	☐

REMARKS: Please give your recommendations to my office by 10:00 a.m. tomorrow on the bill and veto message. Thanks.

RESPONSE:

David L. Chew
Staff Secretary
Ext. 2702

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

DEC 11 1985

MEMORANDUM FOR THE PRESIDENT

SUBJECT: Enrolled Bill S. 1639 - Gold Bullion Coin Act of 1985
Sponsors - Sen. Exon (D) Nebraska and 16 others

Last Day for Action

December 17, 1985 - Tuesday

Purpose

To authorize the minting of gold bullion coins.

Agency Recommendations

Office of Management and Budget	Disapproval (Veto message attached)
Department of Commerce	Disapproval (Veto message attached)
Department of State	Disapproval (Veto message attached)
United States Trade Representative	Disapproval (Veto message attached)
Department of the Treasury	No objection
Council of Economic Advisers	No objection
Federal Emergency Management Agency	No objection
General Services Administration	No comment

Discussion

-- Background

During consideration earlier this year of H.R. 1460, the "Anti-Apartheid Act of 1985," a provision was added that would have authorized the Treasury to mint and sell gold bullion coins as replacements for South African Krugerrands, the importation of which that bill would have statutorily prohibited. The Administration did not express a position on the gold coin provisions of H.R. 1460; however, we strongly opposed the bill as a whole. Although a conference report on H.R. 1460 was filed and passed the House, the bill was not enacted.

On September 9, 1985, you issued Executive Order 12532, concerning economic sanctions against South Africa. Section 5(b) of the Executive Order directed the Treasury Department to conduct a study "regarding the feasibility of minting and issuing gold coins with a view toward expeditiously seeking legislative authority to accomplish the goal of issuing such coins." The results of that study, along with proposed legislation, were forwarded by Treasury to you in early November. The Office of Management and Budget (OMB) circulated Treasury's draft bill to a number of interested agencies for review and comment.

On November 14th, the Senate passed the enrolled bill, which is similar to the gold coin provisions of H.R. 1460, by voice vote, without hearings and without obtaining the views of the Administration. The House then passed the bill, also by voice vote, under suspension of the rules, a procedure that permits no floor amendments. For reasons that are explained in greater detail below, this enrolled bill is so inferior to Treasury's proposal that it warrants your disapproval.

-- <u>Description of the Enrolled Bill</u>

o The Department of the Treasury would be authorized to mint four different gold coins with face values of fifty, twenty-five, ten, and five dollars. These coins would contain one ounce, one-half ounce, one-fourth ounce, and one-tenth ounce of gold, respectively.

o Treasury would be permitted to design the coins; however, the fifty-dollar coin would be required to have a design "symbolic of Liberty," on one side, and a design "representing a family of eagles," on the other.

o Treasury would be required to sell the coins to the public at prices sufficient to recover production costs and taking into account the market value of gold bullion at the time of sale.

o Gold used in producing the coins would have to be obtained from gold newly-mined in the United States, its territories, or possessions. Treasury could use gold held in the United States' reserves only if newly-mined gold is not available at the average world price for gold.

o Proceeds in excess of production costs would be deposited in the general fund of the Treasury "for the sole purpose of reducing the national debt."

o Sales would not begin until October 1, 1986.

-- <u>Agency Views</u>

The principal international trade agencies -- the Departments of Commerce and State and the United States Trade Representative -- recommend a veto of S. 1639. In its enrolled bill views letter, the State Department says that the provision of the bill that would require Treasury to obtain gold for the coins from domestic sources would violate the Agreement on Government Procurement ("the Agreement") under the General Agreement on Tariffs and Trade, which states, in part, that:

> [T]he Parties [to the Agreement] shall provide immediately and unconditionally to the products and suppliers of other Parties offering products originating within the customs territories (including free zones) of the Parties, treatment no less favorable than: (a) that accorded to domestic products and suppliers; and (b) that accorded to products and suppliers of any other Party.

According to State, approval of the enrolled bill could raise serious questions about the willingness of the United States to abide by its international agreements and could send a misleading signal to our trading partners at a time when the United States is attempting to convene a new round of multilateral trade negotiations. State believes that, if approved, S. 1639 would leave the United States open to unnecessary criticism and retaliation.

The Department of Commerce and the United States Trade Representative recommend disapproval for the same reasons as the State Department. Commerce says that approval of the enrolled bill may adversely affect discussions with Canada that are scheduled to begin next year on the establishment of a comprehensive trade area, and that enactment of S. 1639 would be contrary to an agreement that you reached with Prime Minister Mulroney that neither the United States nor Canada would support "buy national" requirements. In its enrolled bill views letter, the United States Trade Representative notes that it apprised the Congress of the negative impact that enactment of S. 1639 would have on our international obligations; however, Congress chose to pass the bill, anyway.

The Department of the Treasury supports a gold coin program and has no objection to approval of the enrolled bill. Treasury does acknowledge the international trade ramifications of S. 1639 but defers to the Department of State and the United States Trade Representative in that regard.

-- <u>Discussion</u>

I concur in the recommendations of the major trade agencies and recommend that you disapprove S. 1639. We are convinced that our trading partners, especially Canada, would, in fact, consider the enrolled bill to be in direct contravention of the United States' obligations under the Agreement on Government Procurement. Treasury's draft bill, by contrast, would have allowed firms from countries signatory to the Agreement, such as Canada, to bid on contracts to provide gold for coins; it would not have permitted firms from non-signatory countries, such as South Africa and the Soviet Union, to bid on these contracts.

In addition, by requiring the Treasury to use newly-mined gold in producing gold coins, and concomitantly restricting Treasury's discretion to use gold held in the United States' reserves, S. 1639 would deny the United States a potentially major revenue source. (Gold held in reserve is carried on the books at about $42 per ounce. Because the current market rate for gold is about $320 per ounce, sale of large numbers of coins produced from gold held in reserve could increase receipts substantially. Indeed, Treasury estimates that the use of gold in the reserves could, over the next ten years, increase revenues to the Government by up to $5 billion.)

I have attached a veto message for your consideration. It incorporates the best features of the messages that the other agencies prepared and is presented in a format that is suitable for transmittal to the Congress. In addition to explaining the reasons for disapproval of S. 1639, our veto message emphasizes the Administration's wish to work with the Congress to enact an acceptable bill.

* * * * *

The enrolled bill passed both Houses by voice vote.

James C. Miller III
Director

Enclosures

TO THE UNITED STATES SENATE:

I am returning without my approval S. 1639, the "Gold Bullion Coin Act of 1985."

I strongly support enactment of legislation that would permit the Department of the Treasury to mint and sell gold bullion coins. Indeed, when I issued Executive Order 12532, concerning economic sanctions against South Africa, on September 9, 1985, I specifically requested that the Treasury conduct a study "regarding the feasiblility of minting and issuing gold coins with a view toward expeditiously seeking legislative authority to accomplish the goal of issuing such coins." Legislation prepared pursuant to this directive was under review within the Administration at the time S. 1639 was passed by the Congress.

S. 1639 is unacceptable, because it would violate an important international agreement to which the United States is a party. By requiring the Treasury Department to purchase newly-mined domestic gold to produce gold coins, the bill would clearly and unambiguously contravene the Agreement on Government

Procurement ("the Agreement") under the General Agreement on Tariffs and Trade, which generally guarantees each party to the Agreement equal access to government procurement contracts. For the United States intentionally to violate such a basic and major international agreement would send the wrong signal to our trading partners, would call into question our willingness to honor our formal commitments, and would expose the United States to harmful retaliation.

The United States is the world's largest trading nation. Our actions and our leadership have an important influence on the development of international trade. We have undertaken a major initiative to convene a new round of international trade negotiations, with a view toward eliminating unnecessary barriers to trade. If we are to succeed, we must demonstrate by our actions that the United States takes its international obligations seriously.

I am concerned that, aside from its international trade implications, the provision of S. 1639 that would generally require the Treasury Department to use newly-mined domestic gold in producing gold coins would inappropriately restrict the Government's discretion to use gold held in the United States reserves in producing these coins. In my view, such a restriction would needlessly deny the United States a potentially major source of revenue. At a time when we are considering new and innovative ways to eliminate the deficit over the next several years, a restriction of this nature would be particularly unfortunate and ill-advised.

I want again to stress my personal support for legislation to permit the production and sale of gold coins. I am keenly aware that, because the importation of South African Krugerrands has been prohibited by Executive Order 12532, American investors both want and need an alternative domestic source of gold coins. S. 1639 is not, however, the way to go about it.

I urge the Congress to give early and favorable consideration to legislation that does not contain the objectionable features that I have identified. In this way, we can ensure enactment of a bill that accomplishes our mutual goal -- making domestic gold coins available to Americans -- without violating an important international agreement to which the United States is signatory, while at the same time providing the Treasury with adequate flexibility in obtaining necessary bullion.

THE WHITE HOUSE

WASHINGTON

December 12, 1985

MEMORANDUM FOR DAVID L. CHEW
STAFF SECRETARY

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: H.R. 2965 -- Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Bill, 1986

Counsel's Office has reviewed the above-referenced enrolled bill, and finds no objection to it from a legal perspective.

ID # ______________ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: Dave Chew

☐ **MI Mail Report** **User Codes: (A)** ______ **(B)** ______ **(C)** ______

Subject: H.R. 2965 - Departments of Commerce, Justice, and State, the Judiciary, & related Agencies Appropriations Bill, 1986

ROUTE TO: Office/Agency (Staff Name)	ACTION: Action Code	Tracking Date YY/MM/DD	DISPOSITION: Type of Response	Code	Completion Date YY/MM/DD
CU Hall	ORIGINATOR	85/12/12			/ /
	Referral Note:				
Cust 18	R	85/12/12		S	85/12/12
	Referral Note:				ASAP
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ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
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DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments:

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
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Document No. ____________

WHITE HOUSE STAFFING MEMORANDUM

DATE: 12/12/85 **ACTION/CONCURRENCE/COMMENT DUE BY:** ASAP

SUBJECT: H.R. 2965 - Departments of Commerce, Justice, and State, the Judiciary, and related Agencies Appropriations Bill, 1986

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	✓	McFARLANE	✓	☐
REGAN	☐	✓	OGLESBY	✓	☐
MILLER	☐	☐	RYAN	☐	☐
BUCHANAN	✓	☐	SPEAKES	☐	✓
CHAVEZ	☐	☐	SPRINKEL	☐	☐
CHEW	☐ P	✓ SS	SVAHN	✓	☐
DANIELS	✓	☐	THOMAS	✓	☐
FIELDING	✓	☐	TUTTLE	☐	☐
HENKEL	☐	☐	______	☐	☐
HICKS	✓	☐	______	☐	☐
KINGON	✓	☐	______	☐	☐
LACY	☐	☐	______	☐	☐

REMARKS: Please give your recommendations to my office ASAP!

RESPONSE:

David L. Chew
Staff Secretary
Ext. 2702

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

DEC 12 1985

MEMORANDUM FOR THE PRESIDENT

SUBJECT: Enrolled Bill H.R. 2965 -- Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Bill, 1986
Sponsor: Rep. Whitten (D), Mississippi

Last Day for Action

December 12, 1985

Purpose

This bill provides $12,000 million for the Departments of Commerce, Justice, and State, the Judiciary, and related programs in other departments, and many independent agencies.

Highlights

- o The bill total for discretionary programs is slightly below the 1986 Congressional Budget Resolution that we are using as our benchmark.
- o Objectionable language provisions included in the House or Senate bills were modified or deleted in Conference in response to the Administration's urging.

Agency Recommendations

Office of Management and Budget	Approval
Department of Commerce	Approval (informally)
Department of Justice	Approval (informally)
Department of State	Approval (informally)
Other Affected Agencies	Approval (assumed)

Summary of Congressional Action

	(in millions of dollars) Congressional Budget Resolution	Enrolled Bill	Congressional Change
Discretionary Programs...	11,734	11,731	-3
Entitlements/Mandatory Programs...............	-26 1/	269	295
Total, Budget authority	11,708	12,000	291

1/ Includes $269 million in reductions, primarily for the Small Business Administration, that require legislative action by other committees in order to achieve the savings.

Discussion

I. Funding Levels

- o While the Administration did not request funding for the Economic Development Administration assistance programs, the conferees reduced the funding $56 million below the level of funding in 1985.

- o Although the Administration proposed that the Legal Services Corporation be terminated, the enrolled bill provides $306 million, a reduction of $7 million below the 1985 level.

- o The Conference version of the bill provides funding for the Small Business Administration $343 million below the 1985 level. Although the total amount of funds provided, $466 million, exceeds that requested in the President's budget request, it is lower than levels agreed to by the Administration as represented in S.408, the Senate-passed authorization bill.

- o Based on our strong insistence, the conferees brought the bill total for discretionary programs below the Administration benchmark. This was achieved, in part, by reductions of $13 million below the House-passed bill and $4 million below the Senate-passed bill in the United States Information Agency.

- o The Conference version provides funds for Justice Assistance that exceeds the Resolution level by $52 million. This is due, in part, to the Congress providing funds for Juvenile Justice grants that the Administration did not request.

II. Language Provisions

- Objectionable language expressing the sense of the Congress concerning the Department of Justice's Vertical Restraint Guidelines is included in the enrolled bill. This language is an inappropriate expression of congressional judgment on antitrust enforcement policy made through the appropriations process. The statement represents an inappropriate attempt by Congress to construct a post hoc history of its policy preferences that the court may or may not find persuasive in making their determinations.

- An objectional proviso in the House version concerning the payment of Standard Level User Charges for the main Department of State was removed in the Conference version of the bill.

- The conferees eliminated undesirable restrictions on the authority of the Legal Services Corporation Board of Directors that had been included in the House version, but requires the Appropriations Committee to be notified in advance of significant changes in grantee funding levels, regional offices, and related matters.

Recommendation

The conferees made a concerted effort and succeeded in bringing the bill total below the level of the 1986 Congressional Budget Resolution. Objectionable language provisions included in the House and Senate bills were modified or deleted in Conference in response to the Administration's urging. Although it exceeds the Administration's request, the bill is an acceptable compromise between the Administration and the Congress.

I recommend that you sign the enrolled bill.

James A. Baker III
Director

THE WHITE HOUSE

WASHINGTON

December 12, 1985

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: CIA Draft Report on H.R. 3321, a Bill to Codify the Provisions of Title 8 of the United States Code Relating to the Immigration and Naturalization Laws

Counsel's Office has reviewed the above-referenced draft report, and finds no objection to it from a legal perspective.

ID # ______________ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: James C Murr

☐ **MI Mail Report** **User Codes: (A)** ______ **(B)** ______ **(C)** ______

Subject: CIA draft on H.R. 3321 a bill to codify the provisions of Title 8 of US Code relating to the immigration + naturalization laws

ROUTE TO: Office/Agency (Staff Name)	ACTION: Action Code	ACTION: Tracking Date YY/MM/DD	DISPOSITION: Type of Response	DISPOSITION: Code	DISPOSITION: Completion Date YY/MM/DD
CUHOLL	ORIGINATOR	85/12/12			/ /
	Referral Note:				
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ACTION CODES:
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C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
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Comments: ______________________

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

December 11, 1985

LEGISLATIVE REFERRAL MEMORANDUM

TO: LEGISLATIVE LIAISON OFFICER

Department of Justice - Jack Perkins (633-2113)
Department of State - Lee Ann Berkenbile (632-0430)
National Security Council
Department of Defense - Werner Windus (697-1305)

SUBJECT: Central Intelligence Agency draft report on H.R. 3321, a bill to codify the provisions of Title 8 of the United States Code relating to the immigration and naturalization laws.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than December 17, 1985.

Direct your questions to Branden Blum (395-3454), the legislative attorney in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: John Cooney, Arnold Donahue, Tara Treacy, Jim Barie, Fred Fielding, Sue Thau

Central Intelligence Agency

Washington, D.C. 20505

DRAFT

Mr. Edward F. Willett, Jr.
Law Revision Counsel
House of Representatives
Washington, D.C. 20515

Dear Mr. Willett:

I am writing to provide you the comments of the Central Intelligence Agency on H.R. 3321, a bill to revise, codify and enact without substantive change the provisions of Title 8 of the United States Code relating to the immigration and naturalization laws.

The Agency has carefully reviewed the provisions of H.R. 3321. While it has no general objections to the bill, there are two items of concern to the Agency which I wish to bring to your attention.

<u>Section 7 of the CIA Act Ought Not To Be Included in H.R. 3321's Codification of the Immigration Laws</u>

Under current law, the Director of Central Intelligence (acting in conjunction with the Attorney General and the Commissioner of Immigration and Naturalization) is vested with the authority to cause the admission to permanent resident alien status of up to one hundred persons per year, without regard to their inadmissibility under the immigration laws, if that admission is "in the interest of national security or essential to the furtherance of the national intelligence mission". This authority was granted to the Director by the Central Intelligence Agency Act of 1949, Act of June 20, 1949 and is found in Title 50 of the United States Code, the Title relating to national security affairs (50 U.S.C.§403h).

The authority granted by Section 7 is vital to the Agency's mission. As such, Section 7 has traditionally been viewed as part of the core of the laws providing for the intelligence operations of the United States, not as a part of the laws governing immigration. The Congress has recognized this on several occasions. For example, in 1949, during its consideration of the CIA Act of that year, the Congress saw fit to include Section 7 in that Act, rather than in the immigration laws of the time. Again, in 1952, when considering the Immigration and Nationality Act of that year, the Congress did not include Section 7 in that Act but determined that it should remain in the CIA Act.

H.R. 3321 would alter this situation by repealing Section 7 and reenacting it (with some substantive change as noted below) as Section 1314 of the newly-codified Title 8 relating to immigration and naturalization. This would have the effect of removing this important intelligence authority from the body of intelligence laws and placing it within the general immigration laws. Section 7, however, is a central part of the former; its relationship to the latter is, on the other hand, only secondary. As such, the Agency believes that Section 7 should remain as part of the intelligence laws. It should not be transferred to the general immigration laws, especially through the vehicle of codification legislation which, by nature, affords little opportunity to give full recognition to such important considerations.

No Change Should Be Made in the Substance of Section 7

Not only would H.R. 3321 transfer the authority contained in Section 7 to the generally immigration laws, it would also make two substantive changes in that authority. The Agency is seriously concerned about these changes and believes, in any event, that substantive changes, such as these, ought not be made through the vehicle of codification legislation.

Section 7 currently provides in pertinent part as follows:

> Whenever the Director...shall determine that the entry of a particular alien...is in the interest of national security or essential to the furtherance of the national intelligence mission, such alien...shall be given entry into the United States for permament residence without regard to (his) inadmissibility under the immigration or any other laws and regulations or to the failure to comply with such laws and regulations pertaining to admissibility (emphasis added)....

Section 1314 provides in pertinent part as follows:

> (1) Notwithstanding another law or regulation on the exclusion or the requirements for admission of aliens, the Attorney General shall admit an alien... to the United States for lawful permanent residence if the Attorney General and the Director decide that the admission of the alien is--(A) in the interest of the United States security; or (B) essential to the United States intelligence mission (emphasis added)....

By deleting the phrase "furtherance of" from the language in Section 7 used to describe the operative standard for exercise of this authority, Section 1314 narrows the scope of admissions which can be made under the authority. Further, the change, from Section 7 to Section 1314, in the language used to describe the field of exclusions which can be overridden by exercise of this authority arguably narrows that field. The effect of these changes would be to restrict the scope and flexibility of this important authority. Such a restriction represents a substantive change in existing law and one which is of very serious concern to the Agency. Accordingly, the Agency objects to the inclusion of Section 1314 in H.R. 3321.

I hope that the Office of the Law Revision Counsel will give these comments careful consideration in its review of H.R. 3321. Any questions should be directed to Mr. Steven Hermes, Chief, Legislation Division, Office of Legislative Liaison (351-6126).

The Agency appreciates the opportunity to comment on this important legislation.

With respect to whether or not codification is advisable while Congress is actively considering major immigration reform legislation, we defer to the views of the Deparment of Justice.

Sincerely,

Charles A. Briggs
Director, Office of Legislative Liaison