

EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
Washington, D.C. 20503-0001

LRM NO: 4227

FILE NO: 2225

**URGENT**

4/26/96

## LEGISLATIVE REFERRAL MEMORANDUM

Total Page(s): **26**

**TO:** Legislative Liaison Officer - See Distribution below  
*Melinda Haskins*

**FROM:** Janet FORSGREN *Janet Forsgren* (for) Assistant Director for Legislative Reference

**OMB CONTACT:** Melinda HASKINS 395-3923 Legislative Assistant's Line: 395-3923  
C=US, A=TELEMAIL, P=GOV+EOP, O=OMB, OU1=LRD, S=HASKINS, G=MELINDA, I=D  
haskins\_m@a1.eop.gov

**SUBJECT:** Executive Office of the President OMB Request for Views RE: HR3286, To help families defray adoption costs, and to promote the adoption of minority children

**DEADLINE:** 10 AM Friday, May 03, 1996

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President.

Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

**COMMENTS:** Please provide comments on H.R. 3286 in a form that we could use to prepare a Statement of Administration Position (SAP). The response deadline is firm. The bill has been referred to the House EEO, Resources, and Ways and Means committees. We understand that the bill may be considered by the House on May 8, and that the House Resources Committee deleted Title III of the bill at its markup on April 25. A copy of the Ways and Means Committee press release and the bill text, as introduced, is attached.

**AGENCIES:**

32-ENERGY - Bob Rabben - 2025866718  
52-HHS - Sondra S. Wallace - 2026907760  
59-INTERIOR - Jane Lyder - 2022086708  
61-JUSTICE - Andrew Fois - 2025142141  
76-National Economic Council - Sonyia Matthews - 2024562174  
118-TREASURY - Richard S. Carro - 2026221146

**EOP:**

Apfel\_K/Cassell\_M  
White\_B  
Fontenot\_K  
Ellertson\_C  
Cash\_L  
Lyons\_R  
Damus\_R  
Oliven\_L  
Haun\_D  
Kodi\_R  
James\_I  
Jukes\_J  
Jones\_Ron  
OMB-LA  
Murr\_J  
Forsgren\_J  
Barth\_M  
Bernstein\_M  
Warnath\_S  
Schmidt\_Mike  
Schroeder\_I  
Kagan\_E  
Kolaiian\_A

**RESPONSE TO  
LEGISLATIVE REFERRAL MEMORANDUM**

**LRM NO: 4227  
FILE NO: 2225**

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet.

If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

- (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
- (2) sending us a memo or letter.

Please include the LRM number shown above, and the subject shown below.

TO: Melinda HASKINS 395-3923  
 Office of Management and Budget  
 Fax Number: 395-6148  
 Branch-Wide Line (to reach legislative assistant): 395-3923

FROM: \_\_\_\_\_ (Date)  
 \_\_\_\_\_ (Name)  
 \_\_\_\_\_ (Agency)  
 \_\_\_\_\_ (Telephone)

**SUBJECT: Executive Office of the President OMB Request for Views RE: HR3286, To help families defray adoption costs, and to promote the adoption of minority children**

The following is the response of our agency to your request for views on the above-captioned subject:

- \_\_\_\_\_ Concur
- \_\_\_\_\_ No Objection
- \_\_\_\_\_ No Comment
- \_\_\_\_\_ See proposed edits on pages \_\_\_\_\_
- \_\_\_\_\_ Other: \_\_\_\_\_
- \_\_\_\_\_ FAX RETURN of \_\_\_\_\_ pages, attached to this response sheet

# **NEWS**

## **FROM THE COMMITTEE ON WAYS AND MEANS**

**FOR IMMEDIATE RELEASE**

**April 24, 1996**

**CONTACT: Ari Fleischer or Scott Brenner**

**(202) 225-8933**

### **The Adoption Promotion and Stability Act of 1996**

#### **Statement of Chairman Bill Archer**

Good afternoon.

In America today, there is no reason why any child should be denied a loving family. Unfortunately, there are more than 500,000 children lingering in foster care waiting to be adopted. And there is little hope for these kids when only one in 10 will be cleared for adoption this year.

There are many parents who want to adopt these kids but can't because they either don't have the money to pay the adoption fees, or because a federal regulation says they will not be good parents because their skin color is different from the child they want to adopt.

It's simply not right to deny a child the opportunity to grow up in a loving home because his parents are poor or are of a different race.

For these reasons, we are introducing the Adoption and Promotion and Stability Act of 1996. This legislation will help parents who want to adopt by providing them with a \$5,000 adoption tax credit to help cover many of the expenses involved in the adoption process. It will also put an end to the practice of delaying adoption, often for years, until the States can find racially matched parents for the adopted children.

There are hundreds of thousands of kids who want to be adopted and there are probably an equal number of parents who want to adopt them. This legislation will help to bring these families together. Our bill will make adoption easier and help find loving homes for hundreds of thousands of children in need.

I would also add that the \$5,000 adoption tax credit is part of the Contract with America. Republicans remain committed to fulfilling the promises we made to the American people, one important step at a time.

Thank you.

# NEWS

## FROM THE COMMITTEE ON WAYS AND MEANS

FOR IMMEDIATE RELEASE

April 24, 1996

CONTACT: Ari Fleischer or Scott Brenner

(202) 225-8933

### Fact Sheet

#### The Adoption Promotion and Stability Act of 1996

*"In America today, there is no reason why a child should be denied a loving family. There are many parents who want to adopt these kids but can't because they don't have the money to pay the adoption fees, or because some federal regulation says they will not be good parents because their skin color is different from the child they want to adopt. Our bill will make adoption easier and help find loving homes for hundreds of thousands of children in need."*

-Chairman Bill Archer

#### Title I: Adoption Tax Credit

To give a helping hand to middle-income families that seek to adopt a child, the bill provides a tax credit of up to \$5,000 to help defray the cost of one-time adoption expenses. According to the National Council for Adoption, the average cost of adopting a child within the United States is \$20,000, while the cost of adopting a child abroad can reach as high as \$36,000.

The credit is phased out for incomes between \$75,000 and \$115,000. In addition, the bill would provide that employees may receive an income tax exclusion, up to \$5,000 per child, for employer-provided adoption assistance. Adopting families would have 5 years to claim their credit, thereby making it more likely that moderate income families would be able to use the credit. Except in the case of special needs adoptions, the credit is denied for expenses that are covered by any Federal, State, or local grant program. This title is effective after December 31, 1996.

#### Title II: Interethnic Adoption

No child should languish in foster care, not even for a day, if a loving family stands ready to adopt that child. Unfortunately, partly because current adoption policies place an inordinate emphasis on "race matching", minority children remain in foster care on average more than twice as long as white children.

According to the Institute for Justice, there are currently 500,000 children in the foster care system, 49% of whom are minorities. Of those, over 30 percent are black, 14 percent are Hispanic, and roughly 5 percent are of other, non-white backgrounds. (Minorities constitute 17 percent of the general population.) Race matching necessarily leaves minority children, primarily black children, languishing in foster care, sometimes never finding a permanent home. Although extensive efforts have been made at recruiting adoptive black families, including subsidies, recruiting programs, and different qualifications than those used for white families, tens of thousands of black children are still waiting for homes.

The Child Welfare Research Center of the University of California at Berkeley found that 41.2% of black children wait more than four years to be adopted while 17.2% of white children remain in foster care for over four years.

In order to find loving homes for all children as fast as reasonable, this title prohibits a State or other entity that receives Federal assistance from *denying* to any person the opportunity to become an adoptive or foster parent on the basis of race, color, or national origin. If two otherwise qualified families seek to adopt children, race may be a factor in placing the child, but adoption agencies may not *delay* the placement of a child by waiting for a "race matched" parent to come along.

Similarly, no State or other entity receiving Federal funds can delay or deny the placement of a child for adoption or foster care, or otherwise discriminate in making a placement decision, on the basis of the race, color, or national origin of the adoptive or foster parent. State compliance with this provision would be subject to review by HHS as part of the regular review of State foster care and adoption programs; States found to be out of compliance would have an opportunity to correct their violations. If compliance is not achieved within time limits specified by the Secretary, states would undergo a series of graduated fines of 2 percent, 5 percent, and 10 percent, applied to federal funds received by the State under Title IV-E foster care and adoption programs, for the first, second, and third violations respectively. Private entities found to be in violation would be required to return all funds received in the fiscal year.

### **Title III: Indian Adoption**

This title exempts child custody proceedings that are the result of the voluntary placement of children for adoption by birthparents who do not maintain significant tribal affiliations from the application of the Indian Child Welfare Act (ICWA). ICWA would continue to be applied in the placement of children where at least one of the child's biological parents is of Indian descent and at least one of the child's biological parents maintains significant social, cultural, or political affiliation with the Indian tribe of which either parent is a member. In any child custody proceeding involving an Indian child, membership in an Indian tribe shall be effective from the actual date of admission to membership in the Indian tribe and shall not be given retroactive effect. This title is effective on the date of enactment and applies to all child custody proceedings that are not yet final.

**Title IV: Revenue Provisions**

**Foreign Trusts.** This provision, taken from the Balanced Budget Act of 1995, strengthens information reporting and anti-abuse rules directed at sophisticated tax planning techniques involving foreign trusts, their beneficiaries, and their grantors.

**Energy Subsidies.** Currently, businesses are allowed to exclude (i.e., are not taxed on) 65 percent of the amount of subsidies provided by a public utility for the purchase of any energy conservation measure. The bill would repeal this exclusion, generally for tax years after 1996. This provision was approved by the Congress as part of the Balanced Budget Act of 1995.

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1 of 1 items

CQ's WASHINGTON ALERT 04/25/96

\*\*\* DETAIL REPORT -- LEGISLATIVE ACTION, AMENDMENTS, SPEECHES \*\*\*

MEASURE: HR3286

SPONSOR: Molinari (R-NY)

OFFICIAL TITLE: A bill to help families defray adoption costs, and to promote the adoption of minority children.

INTRODUCED: 04/23/96

COSPONSORS: 6 (Dems: 0 Reps: 6 Ind: 0)

COMMITTEES: House Ways and Means  
House Resources  
House Economic and Educational Opportunities

LEGISLATIVE ACTION:

04/23/96 Referred to Committee on Economic and Educational Opportunities, Committee on Resources, Committee on Ways and Means (to the Committee on Ways & Means for a period ending not later than May 3, 1996; to the remaining committees, for a period not ending later than April 30, 1996, in each case for such provisions as fall within the jurisdiction of the committee concerned) (CR p. H3730)

There are no more items to display.

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BILL:HR3286

Results are: Bill number as entered

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- 13 DETAIL action, amendments, speeches
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| 4 SAVE bill numbers in a list        | 16 STATUS most recent major action   |
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104th CONGRESS  
2d Session

H. R. 3286

To help families defray adoption costs, and to promote the adoption of minority children.

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IN THE HOUSE OF REPRESENTATIVES

April 23, 1996

Ms. Molinari (for herself, Mr. Archer, Mr. Bunning of Kentucky, Ms. Pryce, Mr. Solomon, Mr. Tiahrt, and Mr. Shaw) introduced the following bill; which was referred to the Committee on Ways and Means for a period ending not later than May 3, 1996, and in addition to the Committees on Resources and Economic and Educational Opportunities for a period ending not later than April 30, 1996, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To help families defray adoption costs, and to promote the adoption of minority children.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Adoption Promotion and Stability Act of 1996".

SEC. 2. TABLE OF CONTENTS.

The table of contents of this Act is as follows:

Sec. 1. Short title.

Sec. 2. Table of contents.,

TITLE I--CREDIT FOR ADOPTION EXPENSES

Sec. 101. Credit for adoption expenses.

TITLE II--INTERETHNIC ADOPTION

Sec. 201. Removal of barriers to interethnic adoption.

TITLE III--CHILD CUSTODY PROCEEDINGS AFFECTED BY THE INDIAN CHILD WELFARE ACT OF 1978

Sec. 301. Inapplicability of the Indian Child Welfare Act of 1978 to

child custody proceedings involving a child whose parents do not maintain affiliation with their Indian tribe.

- Sec. 302. Membership and child custody proceedings.  
 Sec. 303. Effective date.

TITLE IV--REVENUE OFFSETS

- Sec. 400. Amendment of 1986 Code.

Subtitle A--Exclusion for Energy Conservation Subsidies Limited to Subsidies With Respect to Dwelling Units

- Sec. 401. Exclusion for energy conservation subsidies limited to subsidies with respect to dwelling units.  
 Subtitle B--Foreign Trust Tax Compliance

- Sec. 411. Improved information reporting on foreign trusts.

- Sec. 412. Modifications of rules relating to foreign trusts having one or more United States beneficiaries.

- Sec. 413. Foreign persons not to be treated as owners under grantor trust rules.

- Sec. 414. Information reporting regarding foreign gifts.

- Sec. 415. Modification of rules relating to foreign trusts which are not grantor trusts.

- Sec. 416. Residence of estates and trusts, etc.

TITLE I--CREDIT FOR ADOPTION EXPENSES

SEC. 101. CREDIT FOR ADOPTION EXPENSES.

(a) In General.--Subpart A of part IV of subchapter A of chapter 1 of the Internal Revenue Code of 1986 (relating to nonrefundable personal credits) is amended by inserting after section 22 the following new section:

SEC. 23. ADOPTION EXPENSES.

(a) Allowance of Credit.--In the case of an individual, there shall be allowed as a credit against the tax imposed by this chapter for the taxable year the amount of the qualified adoption expenses paid or incurred by the taxpayer during such taxable year.

(b) Limitations.--

(1) Dollar limitation.--The aggregate amount of qualified adoption expenses which may be taken into account under subsection (a) with respect to the adoption of a child shall not exceed \$5,000.

(2) Income limitation.--The amount allowable as a credit under subsection (a) for any taxable year shall be reduced (but not below zero) by an amount which bears the same ratio to the amount so allowable (determined without regard to this paragraph but with regard to paragraph (1)) as--

- (A) the amount (if any) by which the taxpayer's adjusted gross income (determined without regard to sections 911, 931, and 933) exceeds \$75,000, bears to  
 (B) \$40,000.

(3) Denial of double benefit.--

(A) In general.--No credit shall be allowed under subsection (a) for any expense for which a deduction or credit is allowable under any other provision of this chapter.

(B) Grants.--No credit shall be allowed under subsection (a) for any expense to the extent that funds for such expense are received under any Federal, State, or local program. The preceding sentence shall not apply to expenses for the adoption of a child with

special needs.

(C) Reimbursement.--No credit shall be allowed under subsection (a) for any expense to the extent that such expense is reimbursed and the reimbursement is excluded from gross income under section 137.

(c) Carryforwards of Unused Credit.--If the credit allowable under subsection (a) for any taxable year exceeds the limitation imposed by section 26(a) for such taxable year reduced by the sum of the credits allowable under this subpart (other than this section), such excess shall be carried to the succeeding taxable year and added to the credit allowable under subsection (a) for such taxable year. No credit may be carried forward under this subsection to any taxable year following the fifth taxable year after the taxable year in which the credit arose. For purposes of the preceding sentence, credits shall be treated as used on a first-in first-out basis.

(d) Definitions.--For purposes of this section--

(1) Qualified adoption expenses.--The term 'qualified adoption expenses' means reasonable and necessary adoption fees, court costs, attorney fees, and other expenses--

(A) which are directly related to, and the principal purpose of which is for, the legal adoption of an eligible child by the taxpayer, and

(B) which are not incurred in violation of State or Federal law or in carrying out any surrogate parenting arrangement.

Such term shall include expenses for a foreign adoption only if the child is actually adopted.

(2) Expenses for adoption of spouse's child not eligible.--The term 'qualified adoption expenses' shall not include any expenses in connection with the adoption by an individual of a child who is the child of such individual's spouse.

(3) Eligible child.--The term 'eligible child' means any individual--

(A) who has not attained age 18 as of the time of the adoption, or

(B) who is physically or mentally incapable of caring for himself.

(4) Child with special needs.--The term 'child with special needs' means any child if--

(A) a State has determined that the child cannot or should not be returned to the home of his parents, and

(B) such State has determined that there exists with respect to the child a specific factor or condition (such as his ethnic background, age, or membership in a minority or sibling group, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps) because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance.

(e) Married Couples Must File Joint Returns.--Rules similar to the rules of paragraphs (2), (3), and (4) of section 21(e) shall apply for purposes of this section.

(b) Exclusion of Amounts Received Under Employer's Adoption Assistance Programs.--Part III of subchapter B of chapter 1 of such Code (relating to items specifically excluded from gross income) is amended by redesignating section 137 as section 138 and by inserting after section 136 the following new section:

SEC. 137. ADOPTION ASSISTANCE PROGRAMS.

(a) In General.--Gross income of an employee does not include amounts paid or expenses incurred by the employee for qualified adoption expenses in connection with the adoption of a child by an employee if such amounts are furnished pursuant to an adoption assistance program.

(b) Limitations.--

(1) Dollar limitation.--The aggregate amount excludable from gross income under subsection (a) for all taxable years with respect to the adoption of any single child by the taxpayer shall not exceed \$5,000.

(2) Income limitation.--The amount excludable from gross income under subsection (a) for any taxable year shall be reduced (but not below zero) by an amount which bears the same ratio to the amount so excludable (determined without regard to this paragraph but with regard to paragraph (1)) as--

(A) the amount (if any) by which the taxpayer's adjusted gross income (determined without regard to this section and sections 911, 931, and 933) exceeds \$75,000, bears to

(B) \$40,000.

(c) Adoption Assistance Program.--For purposes of this section, an adoption assistance program is a plan of an employer--

(1) under which the employer provides employees with adoption assistance, and

(2) which meets requirements similar to the requirements of paragraphs (2), (3), and (5) of section 127(b).

An adoption reimbursement program operated under section 1052 of title 10, United States Code (relating to armed forces) or section 514 of title 14, United States Code (relating to members of the Coast Guard) shall be treated as an adoption assistance program for purposes of this section.

(d) Qualified Adoption Expenses.--For purposes of this section, the term 'qualified adoption expenses' has the meaning given such term by section 23(d).''

(c) Conforming Amendments.--

(1) The table of sections for subpart A of part IV of subchapter A of chapter 1 of such Code is amended by inserting after the item relating to section 22 the following new item:

Sec. 23. Adoption expenses.''

(2) The table of sections for part III of subchapter B of chapter 1 of such Code is amended by striking the item relating to section 137 and inserting the following:

Sec. 137. Adoption assistance programs.

Sec. 138. Cross reference to other Acts.''

(d) Effective Date.--The amendments made by this section shall apply to taxable years beginning after December 31, 1996.

## TITLE II--INTERETHNIC ADOPTION

### SEC. 201. REMOVAL OF BARRIERS TO INTERETHNIC ADOPTION.

(a) State Plan Requirements.--Section 471(a) of the Social Security Act (42 U.S.C. 671(a)) is amended--

(1) by striking 'and' at the end of paragraph (16);

(2) by striking the period at the end of paragraph (17) and inserting '; and'; and

(3) by adding at the end the following:

(18) not later than January 1, 1997, provides that neither the State nor any other entity in the State that receives funds from the Federal Government and is involved in adoption

or foster care placements may--

(A) deny to any person the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the person, or of the child, involved; or

(B) delay or deny the placement of a child for adoption or into foster care, or otherwise discriminate in making a placement decision, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

(b) Enforcement.--Section 474 of such Act (42 U.S.C. 674) is amended by adding at the end the following:

(d)(1) If a State's program operated under this part is found, as a result of a review conducted under section 1123, to have violated section 471(a)(18) during a quarter with respect to any person, then, notwithstanding subsection (a) of this section and any regulations promulgated under section 1123(b)(3), the Secretary shall reduce the amount otherwise payable to the State under this part, for the quarter and for each subsequent quarter before the 1st quarter for which the State program is found, as a result of such a review, not to have violated section 471(a)(18) with respect to any person, by--

(A) 2 percent of such otherwise payable amount, in the case of the 1st such finding with respect to the State;

(B) 5 percent of such otherwise payable amount, in the case of the 2nd such finding with respect to the State; or

(C) 10 percent of such otherwise payable amount, in the case of the 3rd or subsequent such finding with respect to the State.

(2) Any other entity which is in a State that receives funds under this part and which violates section 471(a)(18) during a quarter with respect to any person shall remit to the Secretary all funds that were paid by the State to the entity during the quarter from such funds.

(3) (A) Any individual who is aggrieved by a violation of section 471(a)(18) by a State or other entity may bring an action seeking relief from the State or other entity in any United States district court.

(B) An action under this paragraph may not be brought more than 2 years after the date the alleged violation occurred.

(4) This subsection shall not be construed to affect the application of the Indian Child Welfare Act of 1978.

(c) Civil Rights.--

(1) Prohibited conduct.--A person or government that is involved in adoption or foster care placements may not--

(A) deny to any individual the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the individual, or of the child, involved; or

(B) delay or deny the placement of a child for adoption or into foster care, or otherwise discriminate in making a placement decision, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

(2) Enforcement.--Noncompliance with paragraph (1) is deemed a violation of title VI of the Civil Rights Act of 1964.

(3) No effect on the Indian child welfare act of 1978.--

This subsection shall not be construed to affect the application of the Indian Child Welfare Act of 1978.

(d) Conforming Repeal.--Section 553 of the Howard M. Metzenbaum Multiethnic Placement Act of 1994 (42 U.S.C. 5115a) is repealed.

TITLE III--CHILD CUSTODY PROCEEDINGS AFFECTED BY THE INDIAN CHILD WELFARE ACT OF 1978

**SEC. 301. INAPPLICABILITY OF THE INDIAN CHILD WELFARE ACT OF 1978 TO CHILD CUSTODY PROCEEDINGS INVOLVING A CHILD WHOSE PARENTS DO NOT MAINTAIN AFFILIATION WITH THEIR INDIAN TRIBE.**

Title I of the Indian Child Welfare Act (25 U.S.C. 1911 et seq.) is amended by adding at the end the following:

Sec. 114. (a) This title does not apply to any child custody proceeding involving a child who does not reside or is not domiciled within a reservation unless--

(1) at least one of the child's biological parents is of Indian descent; and

(2) at least one of the child's biological parents maintains significant social, cultural, or political affiliation with the Indian tribe of which either parent is a member.

(b) The factual determination as to whether a biological parent maintains significant social, cultural, or political affiliation with the Indian tribe of which either parent is a member shall be based on such affiliation as of the time of the child custody proceeding.

(c) The determination that this title does not apply pursuant to subsection (a) is final, and, thereafter, this title shall not be the basis for determining jurisdiction over any child custody proceeding involving the child."

**SEC. 302. MEMBERSHIP AND CHILD CUSTODY PROCEEDINGS.**

Title I of the Indian Child Welfare Act (25 U.S.C. 1911 et seq.), as amended by section 301 of this title, is further amended by adding at the end the following:

Sec. 115. (a) A person who attains the age of 18 years before becoming a member of an Indian tribe may become a member of an Indian tribe only upon the person's written consent.

(b) For the purposes of any child custody proceeding involving an Indian child, membership in an Indian tribe shall be effective from the actual date of admission to membership in the Indian tribe and shall not be given retroactive effect."

**SEC. 303. EFFECTIVE DATE.**

The amendments made by this title shall take effect on the date of the enactment of this Act and shall apply with respect to any child custody proceeding in which a final decree has not been entered as of such date.

**TITLE IV--REVENUE OFFSETS**

**SEC. 400. AMENDMENT OF 1986 CODE.**

Except as otherwise expressly provided, whenever in this title an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Internal Revenue Code of 1986.

**Subtitle A--Exclusion for Energy Conservation Subsidies Limited to Subsidies With Respect to Dwelling Units**

**SEC. 401. EXCLUSION FOR ENERGY CONSERVATION SUBSIDIES LIMITED TO SUBSIDIES WITH RESPECT TO DWELLING UNITS.**

(a) In General.--Paragraph (1) of section 136(c) (defining energy conservation measure) is amended by striking "energy demand--" and

all that follows and inserting "energy demand with respect to a dwelling unit."

(b) Conforming Amendments.--

(1) Subsection (a) of section 136 is amended to read as follows:

(a) Exclusion.--Gross income shall not include the value of any subsidy provided (directly or indirectly) by a public utility to a customer for the purchase or installation of any energy conservation measure."

(2) Paragraph (2) of section 136(c) is amended--

(A) by striking subparagraph (A) and by redesignating subparagraphs (B) and (C) as subparagraphs (A) and (B), respectively, and

(B) by striking "and special rules" in the paragraph heading.

(c) Effective Date.--The amendments made by this section shall apply to amounts received after December 31, 1996, unless received pursuant to a written binding contract in effect on September 13, 1995, and at all times thereafter.

Subtitle B--Foreign Trust Tax Compliance

SEC. 411. IMPROVED INFORMATION REPORTING ON FOREIGN TRUSTS.

(a) In General.--Section 6048 (relating to returns as to certain foreign trusts) is amended to read as follows:

SEC. 6048. INFORMATION WITH RESPECT TO CERTAIN FOREIGN TRUSTS.

(a) Notice of Certain Events.--

(1) General rule.--On or before the 90th day (or such later day as the Secretary may prescribe) after any reportable event, the responsible party shall provide written notice of such event to the Secretary in accordance with paragraph (2).

(2) Contents of notice.--The notice required by paragraph (1) shall contain such information as the Secretary may prescribe, including--

(A) the amount of money or other property (if any) transferred to the trust in connection with the reportable event, and

(B) the identity of the trust and of each trustee and beneficiary (or class of beneficiaries) of the trust.

(3) Reportable event.--For purposes of this subsection--

(A) In general.--The term "reportable event" means--

(i) the creation of any foreign trust by a United States person,

(ii) the transfer of any money or property (directly or indirectly) to a foreign trust by a United States person, including a transfer by reason of death, and

(iii) the death of a citizen or resident of the United States if--

(I) the decedent was treated as the owner of any portion of a foreign trust under the rules of subpart E of part I of subchapter J of chapter 1, or

(II) any portion of a foreign trust was included in the gross estate of the decedent.

(B) Exceptions.--

(i) Fair market value sales.--

Subparagraph (A)(ii) shall not apply to any transfer of property to a trust in exchange for consideration of at least the fair market value of the transferred property. For purposes of the preceding sentence, consideration other than cash shall be taken into account at its fair market value and the rules of section 679(a)(3) shall apply.

(ii) Deferred compensation and charitable trusts.--Subparagraph (A) shall not apply with respect to a trust which is--

(I) described in section 402(b), 404(a)(4), or 404A, or

(II) determined by the Secretary to be described in section 501(c)(3).

(4) Responsible party.--For purposes of this subsection, the term 'responsible party' means--

(A) the grantor in the case of the creation of an inter vivos trust,

(B) the transferor in the case of a reportable event described in paragraph (3)(A)(ii) other than a transfer by reason of death, and

(C) the executor of the decedent's estate in any other case.

(b) United States Grantor of Foreign Trust.--

(1) In general.--If, at any time during any taxable year of a United States person, such person is treated as the owner of any portion of a foreign trust under the rules of subpart E of part I of subchapter J of chapter 1, such person shall be responsible to ensure that--

(A) such trust makes a return for such year which sets forth a full and complete accounting of all trust activities and operations for the year, the name of the United States agent for such trust, and such other information as the Secretary may prescribe, and

(B) such trust furnishes such information as the Secretary may prescribe to each United States person (i) who is treated as the owner of any portion of such trust or (ii) who receives (directly or indirectly) any distribution from the trust.

(2) Trusts not having United States agent.--

(A) In general.--If the rules of this paragraph apply to any foreign trust, the determination of amounts required to be taken into account with respect to such trust by a United States person under the rules of subpart E of part I of subchapter J of chapter 1 shall be determined by the Secretary.

(B) United States agent required.--The rules of this paragraph shall apply to any foreign trust to which paragraph (1) applies unless such trust agrees (in such manner, subject to such conditions, and at such time as the Secretary shall prescribe) to authorize a United States person to act as such trust's limited agent solely for purposes of applying sections 7602, 7603, and 7604 with respect to--

(i) any request by the Secretary to examine records or produce testimony related to the proper treatment of amounts required to be taken into account under the rules referred to in subparagraph (A), or

(ii) any summons by the Secretary for such records or testimony.

The appearance of persons or production of records by

reason of a United States person being such an agent shall not subject such persons or records to legal process for any purpose other than determining the correct treatment under this title of the amounts required to be taken into account under the rules referred to in subparagraph (A). A foreign trust which appoints an agent described in this subparagraph shall not be considered to have an office or a permanent establishment in the United States, or to be engaged in a trade or business in the United States, solely because of the activities of such agent pursuant to this subsection.

(C) Other rules to apply.--Rules similar to the rules of paragraphs (2) and (4) of section 6038A(e) shall apply for purposes of this paragraph.

(c) Reporting by United States Beneficiaries of Foreign Trusts.--

(1) In general.--If any United States person receives (directly or indirectly) during any taxable year of such person any distribution from a foreign trust, such person shall make a return with respect to such trust for such year which includes--

(A) the name of such trust,

(B) the aggregate amount of the distributions so received from such trust during such taxable year, and

(C) such other information as the Secretary may prescribe.

(2) Inclusion in income if records not provided.--

(A) In general.--If adequate records are not provided to the Secretary to determine the proper treatment of any distribution from a foreign trust, such distribution shall be treated as an accumulation distribution includible in the gross income of the distributee under chapter 1. To the extent provided in regulations, the preceding sentence shall not apply if the foreign trust elects to be subject to rules similar to the rules of subsection (b)(2)(B).

(B) Application of accumulation distribution rules.--For purposes of applying section 668 in a case to which subparagraph (A) applies, the applicable number of years for purposes of section 668(a) shall be  $\frac{1}{2}$  of the number of years the trust has been in existence.

(d) Special Rules.--

(1) Determination of whether United States person receives distribution.--For purposes of this section, in determining whether a United States person receives a distribution from a foreign trust, the fact that a portion of such trust is treated as owned by another person under the rules of subpart E of part I of subchapter J of chapter 1 shall be disregarded.

(2) Domestic trusts with foreign activities.--To the extent provided in regulations, a trust which is a United States person shall be treated as a foreign trust for purposes of this section and section 6677 if such trust has substantial activities, or holds substantial property, outside the United States.

(3) Time and manner of filing information.--Any notice of return required under this section shall be made at such time and in such manner as the Secretary shall prescribe.

(4) Modification of return requirements.--The Secretary is authorized to suspend or modify any requirement of this section if the Secretary determines that the United States has no significant tax interest in obtaining the required

information.''

(b) Increased Penalties.--Section 6677 (relating to failure to file information returns with respect to certain foreign trusts) is amended to read as follows:

**SEC. 6677. FAILURE TO FILE INFORMATION WITH RESPECT TO CERTAIN FOREIGN TRUSTS.**

(a) Civil Penalty.--In addition to any criminal penalty provided by law, if any notice or return required to be filed by section 6048--

(1) is not filed on or before the time provided in such section, or

(2) does not include all the information required pursuant to such section or includes incorrect information, the person required to file such notice or return shall pay a penalty equal to 35 percent of the gross reportable amount. If any failure described in the preceding sentence continues for more than 90 days after the day on which the Secretary mails notice of such failure to the person required to pay such penalty, such person shall pay a penalty (in addition to the amount determined under the preceding sentence) of \$10,000 for each 30-day period (or fraction thereof) during which such failure continues after the expiration of such 90-day period. In no event shall the penalty under this subsection with respect to any failure exceed the gross reportable amount.

(b) Special Rules for Returns Under Section 6048(b).--In the case of a return required under section 6048(b)--

(1) the United States person referred to in such section shall be liable for the penalty imposed by subsection (a), and

(2) subsection (a) shall be applied by substituting '5 percent' for '35 percent'.

(c) Gross Reportable Amount.--For purposes of subsection (a), the term 'gross reportable amount' means--

(1) the gross value of the property involved in the event (determined as of the date of the event) in the case of a failure relating to section 6048(a),

(2) the gross value of the portion of the trust's assets at the close of the year treated as owned by the United States person in the case of a failure relating to section 6048(b)(1), and

(3) the gross amount of the distributions in the case of a failure relating to section 6048(c).

(d) Reasonable Cause Exception.--No penalty shall be imposed by this section on any failure which is shown to be due to reasonable cause and not due to willful neglect. The fact that a foreign jurisdiction would impose a civil or criminal penalty on the taxpayer (or any other person) for disclosing the required information is not reasonable cause.

(e) Deficiency Procedures Not To Apply.--Subchapter B of chapter 63 (relating to deficiency procedures for income, estate, gift, and certain excise taxes) shall not apply in respect of the assessment or collection of any penalty imposed by subsection (a).''

(c) Conforming Amendments.--

(1) Paragraph (2) of section 6724(d) is amended by striking 'or' at the end of subparagraph (S), by striking the period at the end of subparagraph (T) and inserting ', or'', and by inserting after subparagraph (T) the following new subparagraph:

(U) section 6048(b)(1)(B) (relating to foreign trust reporting requirements).''

(2) The table of sections for subpart B of part 111 of subchapter A of chapter 61 is amended by striking the item relating to section 6048 and inserting the following new item:

Sec. 6048. Information with respect to certain foreign trusts.''

(3) The table of sections for part I of subchapter B of chapter 68 is amended by striking the item relating to section 6677 and inserting the following new item:

Sec. 6677. Failure to file information with respect to certain foreign trusts.''

(d) Effective Dates.--

(1) Reportable events.--To the extent related to subsection (a) of section 6048 of the Internal Revenue Code of 1986, as amended by this section, the amendments made by this section shall apply to reportable events (as defined in such section 6048) occurring after the date of the enactment of this Act.

(2) Grantor trust reporting.--To the extent related to subsection (b) of such section 6048, the amendments made by this section shall apply to taxable years of United States persons beginning after the date of the enactment of this Act.

(3) Reporting by United States beneficiaries.--To the extent related to subsection (c) of such section 6048, the amendments made by this section shall apply to distributions received after the date of the enactment of this Act.

SEC. 412. MODIFICATIONS OF RULES RELATING TO FOREIGN TRUSTS HAVING ONE OR MORE UNITED STATES BENEFICIARIES.

(a) Treatment of Trust Obligations, Etc.--

(1) Paragraph (2) of section 679(a) is amended by striking subparagraph (B) and inserting the following:

(B) Transfers at fair market value.--To any transfer of property to a trust in exchange for consideration of at least the fair market value of the transferred property. For purposes of the preceding sentence, consideration other than cash shall be taken into account at its fair market value.''

(2) Subsection (a) of section 679 (relating to foreign trusts having one or more United States beneficiaries) is amended by adding at the end the following new paragraph:

(3) Certain obligations not taken into account under fair market value exception.--

(A) In general.--In determining whether paragraph (2)(B) applies to any transfer by a person described in clause (ii) or (iii) of subparagraph (C), there shall not be taken into account--

(i) except as provided in regulations, any obligation of a person described in subparagraph (C), and

(ii) to the extent provided in regulations, any obligation which is guaranteed by a person described in subparagraph (C).

(B) Treatment of principal payments on obligation.--Principal payments by the trust on any obligation referred to in subparagraph (A) shall be taken into account on and after the date of the payment in determining the portion of the trust attributable to the property transferred.

(C) Persons described.--The persons described in this subparagraph are--

(i) the trust,

(ii) any grantor or beneficiary of the trust, and

(iii) any person who is related (within

the meaning of section 643(i)(2)(B) to any grantor or beneficiary of the trust.''

(b) Exemption of Transfers to Charitable Trusts.--Subsection (a) of section 679 is amended by striking 'section 404(a)(4) or 404A' and inserting 'section 6048(a)(3)(B)(ii)''.

(c) Other Modifications.--Subsection (a) of section 679 is amended by adding at the end the following new paragraphs:

(4) Special rules applicable to foreign grantor who later becomes a united states person.--

(A) In general.--If a nonresident alien individual has a residency starting date within 5 years after directly or indirectly transferring property to a foreign trust, this section and section 6048 shall be applied as if such individual transferred to such trust on the residency starting date an amount equal to the portion of such trust attributable to the property transferred by such individual to such trust in such transfer.

(B) Treatment of undistributed income.--For purposes of this section, undistributed net income for periods before such individual's residency starting date shall be taken into account in determining the portion of the trust which is attributable to property transferred by such individual to such trust but shall not otherwise be taken into account.

(C) Residency starting date.--For purposes of this paragraph, an individual's residency starting date is the residency starting date determined under section 7701(b)(2)(A).

(5) Outbound trust migrations.--If--

(A) an individual who is a citizen or resident of the United States transferred property to a trust which was not a foreign trust, and

(B) such trust becomes a foreign trust while such individual is alive,

then this section and section 6048 shall be applied as if such individual transferred to such trust on the date such trust becomes a foreign trust an amount equal to the portion of such trust attributable to the property previously transferred by such individual to such trust. A rule similar to the rule of paragraph (4)(B) shall apply for purposes of this paragraph.''

(d) Modifications Relating to Whether Trust has United States Beneficiaries.--Subsection (c) of section 679 is amended by adding at the end the following new paragraph:

(3) Certain united states beneficiaries disregarded.--A beneficiary shall not be treated as a United States person in applying this section with respect to any transfer of property to foreign trust if such beneficiary first became a United States person more than 5 years after the date of such transfer.''

(e) Technical Amendment.--Subparagraph (A) of section 679(c)(2) is amended to read as follows:

(A) in the case of a foreign corporation, such corporation is a controlled foreign corporation (as defined in section 957(a)),''.

(f) Regulations.--Section 679 is amended by adding at the end the following new subsection:

(d) Regulations.--The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section.''

(g) Effective Date.--The amendments made by this section shall apply to transfers of property after February 6, 1995.

SEC. 413. FOREIGN PERSONS NOT TO BE TREATED AS OWNERS UNDER GRANTOR TRUST RULES.

(a) General Rule.--

(1) Subsection (f) of section 672 (relating to special rule where grantor is foreign person) is amended to read as follows:

(f) Subpart Not To Result in Foreign Ownership.--

(1) In general.--Notwithstanding any other provision of this subpart, this subpart shall apply only to the extent such application results in an amount being currently taken into account (directly or through 1 or more entities) under this chapter in computing the income of a citizen or resident of the United States or a domestic corporation.

(2) Exceptions.--

(A) Certain revocable and irrevocable trusts.--

Paragraph (1) shall not apply to any trust if--

(i) the power to revest absolutely in the grantor title to the trust property is exercisable solely by the grantor without the approval or consent of any other person or with the consent of a related or subordinate party who is subservient to the grantor, or

(ii) the only amounts distributable from such trust (whether income or corpus) during the lifetime of the grantor are amounts distributable to the grantor or the spouse of the grantor.

(B) Compensatory trusts.--Except as provided in regulations, paragraph (1) shall not apply to any portion of a trust distributions from which are taxable as compensation for services rendered.

(3) Special rules.--Except as otherwise provided in regulations prescribed by the Secretary--

(A) a controlled foreign corporation (as defined in section 957) shall be treated as a domestic corporation for purposes of paragraph (1), and

(B) paragraph (1) shall not apply for purposes of applying section 1296.

(4) Recharacterization of purported gifts.--In the case of any transfer directly or indirectly from a partnership or foreign corporation which the transferee treats as a gift or bequest, the Secretary may recharacterize such transfer in such circumstances as the Secretary determines to be appropriate to prevent the avoidance of the purposes of this subsection.

(5) Special rule where grantor is foreign person.--If--

(A) but for this subsection, a foreign person would be treated as the owner of any portion of a trust, and

(B) such trust has a beneficiary who is a United States person,

such beneficiary shall be treated as the grantor of such portion to the extent such beneficiary has made transfers of property by gift (directly or indirectly) to such foreign person. For purposes of the preceding sentence, any gift shall not be taken into account to the extent such gift would be excluded from taxable gifts under section 2503(b).

(6) Regulations.--The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this subsection, including regulations providing that paragraph (1) shall not apply in appropriate cases.

(2) The last sentence of subsection (c) of section 672 of such Code is amended by inserting "subsection (f) and" before "sections 674".

(b) Credit for Certain Taxes.--Paragraph (2) of section 665(d) is amended by adding at the end the following new sentence: "Under rules or regulations prescribed by the Secretary, in the case of any foreign trust of which the settlor or another person would be treated as owner of any portion of the trust under subpart E but for section 672(f), the term 'taxes imposed on the trust' includes the allocable amount of any income, war profits, and excess profits taxes imposed by any foreign country or possession of the United States on the settlor or such other person in respect of trust gross income."

(c) Distributions by Certain Foreign Trusts Through Nominees.--

(1) Section 643 is amended by adding at the end the following new subsection:

(h) Distributions by Certain Foreign Trusts Through Nominees.-- For purposes of this part, any amount paid to a United States person which is derived directly or indirectly from a foreign trust of which the payor is not the grantor shall be deemed in the year of payment to have been directly paid by the foreign trust to such United States person."

(2) Section 665 is amended by striking subsection (c).

(d) Effective Date.--

(1) In general.--Except as provided by paragraph (2), the amendments made by this section shall take effect on the date of the enactment of this Act.

(2) Exception for certain trusts.--The amendments made by this section shall not apply to any trust--

(A) which is treated as owned by the grantor or another person under section 676 or 677 (other than subsection (a)(3) thereof) of the Internal Revenue Code of 1986, and

(B) which is in existence on September 19, 1995.

The preceding sentence shall not apply to the portion of any such trust attributable to any transfer to such trust after September 19, 1995.

(e) Transitional Rule.--If--

(1) by reason of the amendments made by this section, any person other than a United States person ceases to be treated as the owner of a portion of a domestic trust, and

(2) before January 1, 1997, such trust becomes a foreign trust, or the assets of such trust are transferred to a foreign trust,

no tax shall be imposed by section 1491 of the Internal Revenue Code of 1986 by reason of such trust becoming a foreign trust or the assets of such trust being transferred to a foreign trust.

#### SEC. 414. INFORMATION REPORTING REGARDING FOREIGN GIFTS.

(a) In General.--Subpart A of part III of subchapter A of chapter 61 is amended by inserting after section 6039E the following new section:

#### SEC. 6039F. NOTICE OF LARGE GIFTS RECEIVED FROM FOREIGN PERSONS.

(a) In General.--If the value of the aggregate foreign gifts received by a United States person (other than an organization described in section 501(c) and exempt from tax under section 501(a)) during any taxable year exceeds \$10,000, such United States person shall furnish (at such time and in such manner as the Secretary shall prescribe) such information as the Secretary may prescribe regarding each foreign gift received during such year.

(b) Foreign Gift.--For purposes of this section, the term 'foreign gift' means any amount received from a person other than a United States person which the recipient treats as a gift or bequest. Such term shall not include any qualified transfer (within the meaning

of section 2503(e)(2)).

(c) Penalty for Failure To File Information.--

(1) In general.--If a United States person fails to furnish the information required by subsection (a) with respect to any foreign gift within the time prescribed therefor (including extensions)--

(A) the tax consequences of the receipt of such gift shall be determined by the Secretary in the Secretary's sole discretion from the Secretary's own knowledge or from such information as the Secretary may obtain through testimony or otherwise, and

(B) such United States person shall pay (upon notice and demand by the Secretary and in the same manner as tax) an amount equal to 5 percent of the amount of such foreign gift for each month for which the failure continues (not to exceed 25 percent of such amount in the aggregate).

(2) Reasonable cause exception.--Paragraph (1) shall not apply to any failure to report a foreign gift if the United States person shows that the failure is due to reasonable cause and not due to willful neglect.

(d) Cost-of-Living Adjustment.--In the case of any taxable year beginning after December 31, 1996, the \$10,000 amount under subsection (a) shall be increased by an amount equal to the product of such amount and the cost-of-living adjustment for such taxable year under section 1(f)(3), except that subparagraph (B) thereof shall be applied by substituting '1995' for '1992'.

(e) Regulations.--The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section.

(b) Clerical Amendment.--The table of sections for such subpart is amended by inserting after the item relating to section 6039E the following new item:

Sec. 6039F. Notice of large gifts received from foreign persons.

(c) Effective Date.--The amendments made by this section shall apply to amounts received after the date of the enactment of this Act in taxable years ending after such date.

#### SEC. 415. MODIFICATION OF RULES RELATING TO FOREIGN TRUSTS WHICH ARE NOT GRANTOR TRUSTS.

(a) Modification of Interest Charge on Accumulation Distributions.--Subsection (a) of section 668 (relating to interest charge on accumulation distributions from foreign trusts) is amended to read as follows:

(a) General Rule.--For purposes of the tax determined under section 667(a)--

(1) Interest determined using underpayment rates.--The interest charge determined under this section with respect to any distribution is the amount of interest which would be determined on the partial tax computed under section 667(b) for the period described in paragraph (2) using the rates and the method under section 6621 applicable to underpayments of tax.

(2) Period.--For purposes of paragraph (1), the period described in this paragraph is the period which begins on the date which is the applicable number of years before the date of the distribution and which ends on the date of the distribution.

(3) Applicable number of years.--For purposes of paragraph (2)--

(A) In general.--The applicable number of years with respect to a distribution is the number determined by dividing--

- (i) the sum of the products described in subparagraph (B) with respect to each undistributed income year, by
- (ii) the aggregate undistributed net income.

The quotient determined under the preceding sentence shall be rounded under procedures prescribed by the Secretary.

(B) Product described.--For purposes of subparagraph (A), the product described in this subparagraph with respect to any undistributed income year is the product of--

- (i) the undistributed net income for such year, and
- (ii) the sum of the number of taxable years between such year and the taxable year of the distribution (counting in each case the undistributed income year but not counting the taxable year of the distribution).

(4) Undistributed income year.--For purposes of this subsection, the term 'undistributed income year' means any prior taxable year of the trust for which there is undistributed net income, other than a taxable year during all of which the beneficiary receiving the distribution was not a citizen or resident of the United States.

(5) Determination of undistributed net income.-- Notwithstanding section 666, for purposes of this subsection, an accumulation distribution from the trust shall be treated as reducing proportionately the undistributed net income for undistributed income years.

(6) Periods before 1996.--Interest for the portion of the period described in paragraph (2) which occurs before January 1, 1996, shall be determined--

- (A) by using an interest rate of 6 percent, and
- (B) without compounding until January 1, 1996.

(b) Abusive Transactions.--Section 643(a) is amended by inserting after paragraph (6) the following new paragraph:

(7) Abusive transactions.--The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this part, including regulations to prevent avoidance of such purposes.

(c) Treatment of Loans From Trusts.--

(1) In general.--Section 643 (relating to definitions applicable to subparts A, B, C, and D) is amended by adding at the end the following new subsection:

(i) Loans From Foreign Trusts.--For purposes of subparts E, C, and D--

(1) General rule.--Except as provided in regulations, if a foreign trust makes a loan of cash or marketable securities directly or indirectly to--

- (A) any grantor or beneficiary of such trust who is a United States person, or
- (B) any United States person not described in subparagraph (A) who is related to such grantor or beneficiary,

the amount of such loan shall be treated as a distribution by such trust to such grantor or beneficiary (as the case may be).

(2) Definitions and special rules.--For purposes of this subsection--

- (A) Cash.--The term 'cash' includes foreign

currencies and cash equivalents.

(B) Related person.--

(i) In general.--A person is related to another person if the relationship between such persons would result in a disallowance of losses under section 267 or 707(b). In applying section 267 for purposes of the preceding sentence, section 267(c)(4) shall be applied as if the family of an individual includes the spouses of the members of the family.

(ii) Allocation.--If any person described in paragraph (1)(B) is related to more than one person, the grantor or beneficiary to whom the treatment under this subsection applies shall be determined under regulations prescribed by the Secretary.

(C) Exclusion of tax-exempts.--The term 'United States person' does not include any entity exempt from tax under this chapter.

(D) Trust not treated as simple trust.--Any trust which is treated under this subsection as making a distribution shall be treated as not described in section 651.

(3) Subsequent transactions regarding loan principal.--If any loan is taken into account under paragraph (1), any subsequent transaction between the trust and the original borrower regarding the principal of the loan (by way of complete or partial repayment, satisfaction, cancellation, discharge, or otherwise) shall be disregarded for purposes of this title."

(2) Technical amendment.--Paragraph (8) of section 7872(f) is amended by inserting ", 643(i)," before "or 1274" each place it appears.

(d) Effective Dates.--

(1) Interest charge.--The amendment made by subsection (a) shall apply to distributions after the date of the enactment of this Act.

(2) Abusive transactions.--The amendment made by subsection (b) shall take effect on the date of the enactment of this Act.

(3) Loans from trusts.--The amendment made by subsection (c) shall apply to loans of cash or marketable securities after September 19, 1995.

SEC. 416. RESIDENCE OF ESTATES AND TRUSTS, ETC.

(a) Treatment as United States Person.--

(1) In general.--Paragraph (30) of section 7701(a) is amended by striking subparagraph (D) and by inserting after subparagraph (C) the following:

(D) any estate or trust if--

(i) a court within the United States is able to exercise primary supervision over the administration of the estate or trust, and

(ii) in the case of a trust, one or more United States fiduciaries have the authority to control all substantial decisions of the trust."

(2) Conforming amendment.--Paragraph (31) of section 7701(a) is amended to read as follows:

(31) Foreign estate or trust.--The term 'foreign estate' or 'foreign trust' means any estate or trust other than an estate or trust described in section 7701(a)(30)(D)."

(3) Effective date.--The amendments made by this subsection

shall apply--

(A) to taxable years beginning after December 31, 1996, or

(B) at the election of the trustee of a trust, to taxable years ending after the date of the enactment of this Act.

Such an election, once made, shall be irrevocable.

(b) Domestic Trusts Which Become Foreign Trusts.--

(1) In general.--Section 1491 (relating to imposition of tax on transfers to avoid income tax) is amended by adding at the end the following new flush sentence:

If a trust which is not a foreign trust becomes a foreign trust, such trust shall be treated for purposes of this section as having transferred, immediately before becoming a foreign trust, all of its assets to a foreign trust.''

(2) Penalty.--Section 1494 is amended by adding at the end the following new subsection:

(c) Penalty.--In the case of any failure to file a return required by the Secretary with respect to any transfer described in section 1491 with respect to a trust, the person required to file such return shall be liable for the penalties provided in section 6677 in the same manner as if such failure were a failure to file a return under section 6048(a).''

(3) Effective date.--The amendments made by this subsection shall take effect on the date of the enactment of this Act.

<all>

EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
Washington, D.C. 20503-0001

LRM NO: 3879

FILE NO: 480

3/22/96

LEGISLATIVE REFERRAL MEMORANDUM

Total Page(s): 17

TO: Legislative Liaison Officer - See Distribution below:

FROM: Janet R. Forsgren (for) Assistant Director for Legislative Reference

OMB CONTACT: Anna BRIATICO 395-7687 Legislative Assistant's line (for simple responses): 395-7362  
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briatico\_a@a1.eop.gov

SUBJECT: Equal Employment Opportunity Comm. Proposed Report RE: HR849, Age  
Discrimination in Employment Amendments of 1995

DEADLINE: 5 p.m. Monday, March 25, 1996

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before  
advising on its relationship to the program of the President.

Please advise us if this item will affect direct spending or receipts for purposes of the  
"Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: Attached is a draft EEOC report on H.R. 849 as currently drafted. It is our understanding  
that H.R. 849 may be considered on the Senate floor as early as next Thursday, March 28th  
(under terms of the Unanimous Consent Agreement on H.R. 849).

I have also attached copies  
of proposed amendments to H.R. 849 which may be offered on the Senate floor. Please  
provide comments on these amendments as well as the draft report. Thanks.

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**RESPONSE TO  
LEGISLATIVE REFERRAL  
MEMORANDUM**

LRM NO: 3879  
FILE NO: 480

If your response to this request for views is simple (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet.

If the response is simple and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

- (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
- (2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: Anna BRIATICO 395-7887  
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 Fax Number: 395-6148  
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FROM: \_\_\_\_\_ (Date)  
 \_\_\_\_\_ (Name)  
 \_\_\_\_\_ (Agency)  
 \_\_\_\_\_ (Telephone)

**SUBJECT: Equal Employment Opportunity Comm. Proposed Report RE: HR849, Age Discrimination in Employment Amendments of 1995**

The following is the response of our agency to your request for views on the above-captioned subject:

- \_\_\_\_\_ Concur
- \_\_\_\_\_ No Objection
- \_\_\_\_\_ No Comment
- \_\_\_\_\_ See proposed edits on pages \_\_\_\_\_
- \_\_\_\_\_ Other: \_\_\_\_\_
- \_\_\_\_\_ FAX RETURN of \_\_\_\_\_ pages, attached to this response sheet

DRAFT, March 22, 1996

March X, 1996

The Honorable  
United States Senate  
Washington, D.C. 20510

Dear Senator

I am writing to express my opposition to a provision in H.R. 849, the Age Discrimination in Employment Amendments of 1995, which would require the Equal Employment Opportunity Commission (EEOC) to conduct a study of abilities tests for public safety jobs and issue advisory guidelines for the administration of these tests.

It is my view that the study and guidelines provisions should be opposed for several reasons. At the outset, I am concerned about the expenditure of \$5 million dollars on a study which is very similar to the study on this subject that the Commission recently completed, at Congress' direction, at a cost of over \$1 million. Conducted in concert with the Department of Labor, that study carefully analyzed many, if not most, of the issues enumerated in H.R. 849, and: (1) concluded that age is a poor predictor of performance; (2) identified critical performance criteria for public safety jobs; (3) listed several tests that could be used to measure these criteria; and (4) explained that these tests can be properly validated in accordance with current legal and professional standards.

Secondly, insofar as the bill contemplates the creation or identification of a "safe harbor" test for public safety officials, or "safe harbor" elements for such tests to include, critics of the previous study fail to take into account that it is virtually impossible as a technical matter to identify or develop such a test or tests for the broad range of public safety jobs across the country. To be valid, these tests must be measured against particular job functions. To create or identify such a test or elements of such a test, assumptions would have to be made about how local police and fire departments structure their workplaces. For the guidelines to be useful to them, these departments then would have to structure their jobs to conform with assumptions in the guidelines. Setting job standards for state and local public safety departments is an inappropriate function for the federal government, including the EEOC.

Third, the expenditure proposed by H.R. 849 raises concerns, especially given the enormous challenges the Commission currently faces: Nearly 100,00 charges of employment discrimination will be filed with us this fiscal year and our pending inventory will include approximately 100,00 charges during this same period. If Congress is willing to appropriate to the Commission an additional \$5

million, these funds could make a significant difference in our ability to fulfill our mission. Absent a supplemental appropriation, the Commission does not have the funds to conduct this study.

Finally, it is unnecessary and duplicative for the EEOC to issue advisory guidelines. The EEOC has adopted the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. 1607 (1978) which provides specific standards of validity that tests should meet that result in adverse impact. While the Uniform Guidelines do not apply directly to age discrimination, the Age Act regulations incorporate the Uniform Guidelines standards. These standards are working well and need neither replacing nor updating.

Thank you for your consideration of this letter. The Office of Management and Budget advises that there is no objection to the submission of this report to the Congress, from the standpoint of the Administration's programs.

Sincerely,

Gilbert F. Casellas  
Chairman

Proposed Amendments to  
H.R. 849 which may be  
offered on the Senate floor  
as early as March 28th.

Q:\ALD\ALD96.109

S.I.C.

AMENDMENT NO. \_\_\_\_\_ Calendar No. \_\_\_\_\_

Purpose: To amend the Age Discrimination in Employment Act of 1967 to clarify that institutions of higher education may offer age-based voluntary early retirement incentive benefits for tenured faculty.

IN THE SENATE OF THE UNITED STATES—104th Cong., 2d Sess.

(no.) \_\_\_\_\_

(title) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Referred to the Committee on \_\_\_\_\_  
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENTS intended to be proposed by Mr. ASHCROFT

Viz:

- 1 Strike the section heading of section 4 and insert the
- 2 following:
- 3 **SEC. 4. VOLUNTARY EARLY RETIREMENT INCENTIVE BENE-**
- 4 **FITS.**
- 5 Section 4(l) of the Age Discrimination in Employ-
- 6 ment Act of 1967 (29 U.S.C. 623(l)) is amended by add-
- 7 ing at the end the following new paragraph:

O:\ALD\ALD96.109

H.L.C.

2

1       “(4) It shall not be a violation of subsection (a), (b),  
2 (c), (e), or (i) solely because a plan or arrangement of  
3 an institution of higher education (as defined in section  
4 1201(a) of the Higher Education Act of 1965 (20 U.S.C.  
5 1141(a))) offers employees who are serving under a con-  
6 tract of unlimited tenure (or similar arrangement provid-  
7 ing for unlimited tenure) benefits on voluntary early re-  
8 tirement that are reduced or eliminated on the basis of  
9 age.”.

10 **SEC. 5. EFFECTIVE DATES.**

11       At the end of section 5 (as so redesignated), add the  
12 following:

13       (c) **EFFECT ON CAUSES OF ACTION EXISTING BE-**  
14 **FORE DATE OF ENACTMENT**—The amendment made by  
15 section 4 shall not apply with respect to any cause of ac-  
16 tion arising under the Age Discrimination in Employment  
17 Act of 1967 prior to the date of enactment of this Act.

O:\ALD\ALD99.112

S.L.C.

AMENDMENT NO. \_\_\_\_\_

Calendar No. \_\_\_\_\_

Purpose: To provide a substitute amendment.

IN THE SENATE OF THE UNITED STATES—104th Cong., 2d Sess.

**H.R. 849**

To amend the Age Discrimination in Employment Act of 1967 to reinstate an exemption for certain bona fide hiring and retirement plans applicable to State and local firefighters and law enforcement officers, and for other purposes.

Referred to the Committee on Labor and Human Resources  
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended  
to be proposed by Senator Coats

Viz:

- 1 Strike all after the enacting clause and insert the fol-
- 2 lowing:
- 3 **SECTION 1. SHORT TITLE.**
- 4 This Act may be cited as the "Age Discrimination
- 5 in Employment Amendments of 1996".
- 6 **SEC. 2. AGE DISCRIMINATION AMENDMENT.**
- 7 (a) **REPEAL OF REPEALER.**—Section 3(b) of the Age
- 8 Discrimination in Employment Amendments of 1986 (29
- 9 U.S.C. 623 note) is repealed.

ONALD\ALD98.112

S.L.C.

2

1 (b) EXEMPTION.—Section 4(j) of the Age Discrimi-  
2 nation in Employment Act of 1967 (29 U.S.C. 623(j)),  
3 as in effect immediately before December 31, 1993—

4 (1) is reenacted as such section; and

5 (2) as so reenacted, is amended in paragraph  
6 (1) by striking “attained the age” and all that fol-  
7 lows through “1983, and” and inserting the follow-  
8 ing: “attained—

9 “(A) the age of hiring or retirement, re-  
10 spectively, in effect under applicable State or  
11 local law on March 3, 1983; or

12 “(B)(i) if the individual was not hired, the  
13 age of hiring in effect on the date of such fail-  
14 ure or refusal to hire under applicable State or  
15 local law enacted after the date of enactment of  
16 the Age Discrimination in Employment Amend-  
17 ments of 1996; or

18 “(ii) if applicable State or local law was  
19 enacted after the date of enactment of the Age  
20 Discrimination in Employment Amendments of  
21 1996 and the individual was discharged, the  
22 higher of—

23 “(I) the age of retirement in effect on  
24 the date of such discharge under such law;  
25 and

1                   “(II) age 55; and”.

2           (c) CONSTRUCTION.—Nothing in the repeal, reenact-  
3   ment, and amendment made by subsections (a) and (b)  
4   shall be construed to make lawful the failure or refusal  
5   to hire, or the discharge of, an individual pursuant to a  
6   law that—

7           (1) was enacted after March 3, 1983 and before  
8   the date of enactment of the Age Discrimination in  
9   Employment Amendments of 1996; and

10          (2) lowered the age of hiring or retirement, re-  
11   spectively, for firefighters or law enforcement officers  
12   that was in effect under applicable State or local law  
13   on March 3, 1983.

14   SEC. 8. STUDY AND GUIDELINES FOR PERFORMANCE  
15                   TESTS.

16          (a) STUDY.—Not later than 3 years after the date  
17   of enactment of this Act, the Chairman of the Equal Em-  
18   ployment Opportunity Commission (referred to in this sec-  
19   tion as “the Chairman”) shall conduct, directly or by con-  
20   tract, a study, and shall submit to the appropriate com-  
21   mittees of Congress a report based on the results of the  
22   study that shall include—

23           (1) a list and description of all tests available  
24   for the assessment of abilities important for the

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H.L.C.

4

1 completion of public safety tasks performed by law  
2 enforcement officers and firefighters;

3 (2) a list of the public safety tasks for which  
4 adequate tests described in paragraph (1) do not  
5 exist;

6 (3) a description of the technical characteristics  
7 that the tests shall meet to be in compliance with  
8 applicable Federal civil rights law and policies;

9 (4) a description of the alternative methods  
10 that are available for determining minimally accept-  
11 able performance standards on the tests;

12 (5) a description of the administrative stand-  
13 ards that should be met in the administration, scor-  
14 ing, and score interpretation of the tests; and

15 (6) an examination of the extent to which the  
16 tests are cost-effective, are safe, and comply with the  
17 Federal civil rights law and policies.

18 (b) **ADVISORY GUIDELINES.**—Not later than 4 years  
19 after the date of enactment of this Act, the Chairman shall  
20 develop and issue, based on the results of the study re-  
21 quired by subsection (a), advisory guidelines for the ad-  
22 ministration and use of physical and mental fitness tests  
23 to measure the ability and competency of law enforcement  
24 officers and firefighters to perform the requirements of the  
25 jobs of the officers and firefighters.

9.

1 (c) CONSULTATION REQUIREMENT; OPPORTUNITY  
2 FOR PUBLIC COMMENT.—

3 (1) CONSULTATION.—The Chairman shall, dur-  
4 ing the conduct of the study required by subsection  
5 (a), consult with—

6 (A) the Deputy Administrator of the Unit-  
7 ed States Fire Administration;

8 (B) the Director of the Federal Emergency  
9 Management Agency;

10 (C) organizations that represent law en-  
11 forcement officers, firefighters, and employers  
12 of the officers and firefighters; and

13 (D) organizations that represent older indi-  
14 viduals.

15 (2) PUBLIC COMMENT.—Prior to issuing the  
16 advisory guidelines required in subsection (b), the  
17 Chairman shall provide an opportunity for public  
18 comment on the proposed advisory guidelines.

19 (d) DEVELOPMENT OF STANDARDS FOR WELLNESS  
20 PROGRAMS.—Not later than 2 years after the date of en-  
21 actment of this Act, the Chairman shall propose advisory  
22 standards for wellness programs for law enforcement offi-  
23 cers and firefighters.

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S.L.C.

6

1 (a) AUTHORIZATION OF APPROPRIATIONS.—There is  
2 authorized to be appropriated \$5,000,000 to carry out this  
3 section.

4 **SEC. 4. EFFECTIVE DATES.**

5 (a) GENERAL EFFECTIVE DATE.—Except as pro-  
6 vided in subsection (b), this title and the amendments  
7 made by this title shall take effect on the date of enact-  
8 ment of this Act.

9 (b) SPECIAL EFFECTIVE DATE.—The repeal made by  
10 section 2(a) and the reenactment made by section 2(b)(1)  
11 shall take effect on December 31, 1993.

*Jeffords*

AMENDMENT NO. \_\_\_\_\_

Calendar No. \_\_\_\_\_

Purpose: To provide a substitute amendment.

IN THE SENATE OF THE UNITED STATES—104th Cong., 2d Sess.

**H.R. 849**

To amend the Age Discrimination in Employment Act of 1967 to reinstate an exemption for certain bona fide hiring and retirement plans applicable to State and local firefighters and law enforcement officers, and for other purposes.

Referred to the Committee on \_\_\_\_\_  
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended  
to be proposed by JEFFORDS

Viz:

- 1 Strike all after the enacting clause and insert the fol-
- 2 lowing:
- 3 **SECTION 1. SHORT TITLE.**
- 4 This Act may be cited as the "Age Discrimination
- 5 in Employment Amendments of 1996".
- 6 **SEC. 2. REINSTATEMENT OF EXEMPTION.**
- 7 Section 4 of the Age Discrimination in Employment
- 8 Act of 1967 (29 U.S.C. 623) is amended by inserting after
- 9 subsection (i) the following:

1       “(J)(1) It shall not be unlawful for an employer that  
2 is a State, a political subdivision of a State, an agency  
3 or instrumentality of a State or a political subdivision of  
4 a State, or an interstate agency to fail or refuse to hire  
5 or to discharge any individual because of such individual's  
6 age if—

7               “(A)(i) such action is taken with respect to the  
8 employment of an individual as a firefighter or as a  
9 law enforcement officer;

10              “(ii) the individual has attained the age of hir-  
11 ing or retirement, respectively, in effect under appli-  
12 cable State or local law on March 3, 1983, and

13              “(iii) if the individual is discharged—

14                   “(I) the State, political subdivision, or  
15 other entity has established the system de-  
16 scribed in paragraph (2); and

17                   “(II) the individual has not made the dem-  
18 onstration specified in paragraph (2); and

19              “(B) such action is taken pursuant to a bona  
20 fide hiring or retirement plan that is not a subter-  
21 fuge to evade the purposes of this Act.

22       “(2) To meet the requirements of paragraph  
23 (1)(A)(iii)(I), an entity shall establish a system through  
24 which firefighters and law enforcement officers employed  
25 by the entity shall participate in a physical fitness and

1 testing program carried out by the entity and shall peri-  
 2 odically demonstrate physical and mental fitness in order  
 3 to continue employment. It shall not be unlawful for the  
 4 entity to require such a firefighter or officer to make such  
 5 a demonstration, or make such a demonstration more fre-  
 6 quently, on attaining a specified age. No entity shall estab-  
 7 lish a system under this paragraph that requires a fire-  
 8 fighter or officer, regardless of age, to make such a dem-  
 9 onstration more frequently than twice a year.

10       “(3) If an entity specified in paragraph (1) dem-  
 11 onstrates compliance with the applicable guidelines de-  
 12 scribed in section 3 of the Age Discrimination in Employ-  
 13 ment Amendments of 1996—

14               “(A) the entity shall be considered to meet the  
 15 requirements of paragraph (1)(A)(iii)(I); and

16               “(B) a firefighter or law enforcement officer  
 17 employed by the entity who seeks to demonstrate  
 18 physical and mental fitness as described in para-  
 19 graph (2) shall demonstrate such fitness on the  
 20 basis of the tests specified in the guidelines.

21       “(4) As used in this subsection, the term ‘demon-  
 22 strate’ means meet the burdens of production and per-  
 23 suation.”.

**1 SEC. 8. ADVISORY GUIDELINES.**

2 Not later than 180 days after the date of enactment  
3 of this Act, the Chairman of the Equal Employment Op-  
4 portunity Commission shall issue final regulations specify-  
5 ing advisory guidelines for the administration and use of  
6 physical and mental fitness tests to measure the ability  
7 and competency of law enforcement officers and fire-  
8 fighters to perform the requirements of their jobs.

9 ~~[OR]~~

10 (a) INTERIM REGULATIONS.—Not later than 90 days  
11 after the date of enactment of this Act, the Chairman of  
12 the Equal Employment Opportunity Commission shall  
13 issue interim final regulations specifying advisory guide-  
14 lines for the administration and use of physical and mental  
15 fitness tests to measure the ability and competency of law  
16 enforcement officers and firefighters to perform the re-  
17 quirements of their jobs.

18 (b) FINAL REGULATIONS.—Not later than 180 days  
19 after the date of enactment of this Act, the Chairman shall  
20 ~~issue final regulations specifying such guidelines.~~

EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
Washington, D.C. 20503-0001

LRM NO: 4032  
FILE NO: 2145

# URGENT

4/10/96

LEGISLATIVE REFERRAL MEMORANDUM

Total Page(s): 5

TO: Legislative Liaison Officer - See Distribution below:

FROM: Janet FORSGREN

*B. Pelluci* (for) Assistant Director for Legislative Reference

OMB CONTACT: Melinda HASKINS 395-3923 Legislative Assistant's line (for simple responses): 395-3923  
C=US, A=TELEMAIL, P=GOV+EOP, O=OMB, OU1=LRD, S=HASKINS, G=MELINDA, I=D  
haskins\_m@a1.eop.gov

SUBJECT: HHS Proposed Report RE: S1643, Older Americans Act Amendments of 1996

# URGENT

DEADLINE: Noon Friday, April 12, 1996

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President.

Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: Please provide your comments on the attached HHS report on S. 1643. A Senate Labor and Human Resources Committee markup of S. 1643 is scheduled on Wednesday, April 17. If we do not receive comments from you by the deadline, we will assume that you have no objection to this letter. (Note this letter replaces the HHS letter on the yet-to-be introduced version of this bill that was circulated on 2/23/96 but never cleared. See LRM 3573.)

AGENCIES:

7-AGRICULTURE - Marvin Shapiro - 2027201516  
24-Corporation for Natl and Community Service - Gene Sofer - 2026085000  
30-EDUCATION - Jack Kristy - 2024018313  
59-INTERIOR - Jane Lyder - 2022086708  
61-JUSTICE - Andrew Fois - 2026142141  
62-LABOR - Robert A. Shapiro - 2022198201  
76-National Economic Council - Sonyla Matthews - 2024582174

EOP:

{ Apfel\_K  
Cassell\_M  
White\_B  
Fontenot\_K  
Smith\_C  
VanWise\_P  
Fairhall\_L  
Beard\_B  
Kodi\_R  
James\_I  
Eyd\_A  
Ben-Ami\_J  
OMB-LA  
Damus\_R  
Ash\_M  
Wamath\_S  
Kagan\_E  
Murr\_J  
Forsgren\_J  
Schroeder\_I  
Seldman\_E  
Dean\_S  
Lau\_E

**RESPONSE TO  
LEGISLATIVE REFERRAL MEMORANDUM**

**LRM NO: 4032  
FILE NO: 2145**

If your response to this request for views is simple (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet.  
If the response is simple and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

- (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
- (2) sending us a memo or letter.

Please include the LRM number shown above, and the subject shown below.

**TO: Melinda HASKINS 395-3923**  
**Office of Management and Budget**  
**Fax Number: 395-8148**  
**Branch-Wide Line (to reach legislative assistant): 395-3923**

**FROM:** \_\_\_\_\_ (Date)  
 \_\_\_\_\_ (Name)  
 \_\_\_\_\_ (Agency)  
 \_\_\_\_\_ (Telephone)

**SUBJECT: HHS Proposed Report RE: S1643, Older Americans Act Amendments of 1996**

The following is the response of our agency to your request for views on the above-captioned subject:

- \_\_\_\_\_ Concur
- \_\_\_\_\_ No Objection
- \_\_\_\_\_ No Comment
- \_\_\_\_\_ See proposed edits on pages \_\_\_\_\_
- \_\_\_\_\_ Other: \_\_\_\_\_
- \_\_\_\_\_ FAX RETURN of \_\_\_\_\_ pages, attached to this response sheet

The Honorable Nancy Landon Kassebaum  
Chairman, Committee on Labor  
and Human Resources  
United States Senate  
Washington, DC 20510

Dear Madam Chairman:

We take this opportunity to inform you of the views of the Department of Health and Human Services (HHS) on S. 1643, which amends the Older Americans Act of 1965 (OAA).

We support your efforts to reauthorize the Act legislation that has historically enjoyed bipartisan support -- and look forward to continuing to work with you and your colleagues to achieve consensus on this important matter. We applaud aspects of S. 1643 that incorporate Administration recommendations to streamline the Act through the consolidation of title III and to enhance State and local flexibility through new waiver authority and the elimination of certain Federal requirements. We welcome consolidation of responsibility for aging programs through the transfer of the Senior Community Service Employment Program (SCSEP) from the Department of Labor (DOL) to HHS' Administration on Aging (AoA). We are in accord with the State option to permit or require cost-sharing for a number of services for elderly individuals above an income threshold, the authorization of a nationwide toll-free eldercare telephone line, and provisions for the protection of vulnerable elderly individuals. We are encouraged by these and other provisions of S. 1643.

However, we are concerned about other provisions of S. 1643 that eliminate or weaken essential safeguards the Act now provides for America's elderly.

#### Protecting the Vulnerable

The OAA has been a primary source of funds for critical protections and services for vulnerable older Americans. We believe it is important to retain the ombudsman, elder abuse and legal services programs as separate components with specific authorizations as in current law. By eliminating the Elder Rights Protection for Vulnerable Older Individuals title, we are concerned that your bill will not guarantee comprehensive elder rights protections.

#### Preparing for an Aging Society

Title IV of the OAA (Training, Research, and Discretionary Projects and Programs) has been used consistently over the years to test and develop the majority of OAA programs and services upon which older persons and their families rely to maintain their independence and dignity. Such successful programs include the area agency on aging concept; home and community-based long-term care services; congregate and home-delivered meals; long-

Page 2 - The Honorable Nancy Landon Kassebaum

term care ombudsmen to help protect older persons from abuse and exploitation; adult day care; and information and referral systems to connect older persons and their families to the services they need.

While we applaud your recognition of the importance of innovative approaches and best practices, the provisions of S. 1643 are not an adequate substitute for the programmatic and fiscal authorizations in the current Act. It is important to retain specific research and demonstration authority and funding if we are to face the growing challenges of an aging society.

#### Consolidation of Nutrition Programs

We welcome the increased authorization of funds for nutrition services, including nutrition services for Native Americans. Nutrition programs would be further enhanced by transferring the Nutrition Program for the Elderly from the Department of Agriculture to AoA, as recommended in the Administration's bill. We hope you will incorporate this transfer into S. 1643.

#### Senior Employment Programs

To prepare for our aging society, we must maintain our commitment to provide training and employment opportunities to low-income seniors. The Senior Community Service Employment Program (SCSEP) provides these services to thousands of low-income seniors. The provision in S. 1643 transferring the administration of the program from the Department of Labor to AoA is consistent with the Administration's bill, and this consolidation will further the goal of bringing aging programs together under AoA. This Department is committed to ensuring the effectiveness and efficient operation of this program.

We strongly oppose the elimination of the authority to provide direct grants to national sponsors and believe that such an action would significantly diminish the effectiveness of the program. The national sponsors have many years of experience in administering the SCSEP and have demonstrated an exceptional ability to reach out to diverse communities. The Administration believes the program should continue to be carried out through grants to both the States and national sponsors because both are able to address distinct interests and target populations and to develop differing employment prospects and training opportunities.

The Administration also is concerned about the extension of cost-sharing to the nutrition program, and by the elimination of the Federal Council on Aging as well as the authority to convene a White House Conference on Aging. While we appreciate the willingness of the Committee to incorporate low-income minority

Page 3 - The Honorable Nancy Landon Kassebaum

targeting language in the bill, we would prefer retention of current law as contained in the Administration's proposal.

We all share a strong commitment to improving services to seniors. We appreciate the efforts of you and your Committee to work toward a bipartisan reauthorization that will move us closer to achieving this common goal.

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

Sincerely,

Donna E. Shalala

**URGENT****EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
Washington, D.C. 20503-0001**

3/18/96

**LEGISLATIVE REFERRAL MEMORANDUM**

LRM NO: 3812

FILE NO: 480

Total Page(s): 5

TO: Legislative Liaison Officer - See Distribution below:

FROM: Janet FORSGREN *Janet K. Forsgren* (for) Assistant Director for Legislative ReferenceOMB CONTACT: Anna BRIATICO 395-7887 Legislative Assistant's line (for simple responses): 395-7362  
C=US, A=TELAMAIL, P=GOV+EOP, O=OMB, OU1=LRD, S=BRIATICO, G=ANNA, I=M  
briatico\_a@a1.eop.govSUBJECT: Equal Employment Opportunity Comm. Proposed Report RE: HR849, Age  
Discrimination in Employment Amendments of 1995**DEADLINE: 10 a.m. Tuesday, March 19,1996**In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before  
advising on its relationship to the program of the President.Please advise us if this item will affect direct spending or receipts for purposes of the  
"Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.COMMENTS: Attached is a draft EEOC report on H.R. 849 that is scheduled for markup by the Senate  
Labor Committee on Wednesday, March 20th. The letter highlights one proposed amendment  
that EEOC has learned will be offered during the markup.**DISTRIBUTION LIST: EDUCATION**AGENCIES: 61-JUSTICE - Andrew Fois - 2025142141  
62-LABOR - Robert A. Shapiro - 2022198201  
76-National Economic Council - Sonyia Matthews - 2024562174  
92-Office of Personnel Management - James N. Woodruff - 2026061424  
118-TREASURY - Richard S. Carro - 2026221146EOP: B.Litan/K.Kizer  
A. Rhinesmith  
S. Redburn  
Susan Carr  
Bob Damus  
Joe Lackey  
OMB LA  
David Haun  
Steve Warnath  
Carol Rasco  
John Angell  
Elena Kagan  
Tracey Thornton  
Janet Forsgren  
Jim Murr

**RESPONSE TO  
LEGISLATIVE REFERRAL  
MEMORANDUM**

LRM NO: 3812  
FILE NO: 480

If your response to this request for views is simple (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet.

If the response is simple and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

- (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
- (2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: Anna BRIATICO 395-7887  
 Office of Management and Budget  
 Fax Number: 395-6148  
 Branch-Wide Line (to reach legislative assistant): 395-7362

FROM: \_\_\_\_\_ (Date)  
 \_\_\_\_\_ (Name)  
 \_\_\_\_\_ (Agency)  
 \_\_\_\_\_ (Telephone)

SUBJECT: Equal Employment Opportunity Comm. Proposed Report RE: HR849, Age  
 Discrimination in Employment Amendments of 1995

The following is the response of our agency to your request for views on the above-captioned subject:

- \_\_\_\_\_ Concur
- \_\_\_\_\_ No Objection
- \_\_\_\_\_ No Comment
- \_\_\_\_\_ See proposed edits on pages \_\_\_\_\_
- \_\_\_\_\_ Other: \_\_\_\_\_
- \_\_\_\_\_ FAX RETURN of \_\_\_\_\_ pages, attached to this response sheet

OFFICE OF  
THE CHAIRMANEQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
WASHINGTON, D.C. 20507DRAFT

March xx, 1996

The Honorable Nancy L. Kasschaum  
Chairman  
Committee on Labor and Human Resources  
United States Senate  
Washington, D.C. 20510

Dear Chairman Kasschaum:

H.R. 849

I am writing to express my opposition to a proposed amendment to S. 553, the Age Discrimination in Employment Amendments of 1995, which would permit institutions of higher education to offer early retirement incentives (ERI's) with an upper age limit for participants. The opinion expressed in this letter is limited solely to this amendment and does not state a position regarding the underlying bill.

My opposition to this proposal is based on the fact that it would permit age-based, arbitrary distinctions in employee benefit plans which would disadvantage older workers. For example, a college or university would be able to offer \$50,000 as an ERI to professors who are between fifty and fifty-five years old, but could choose to deny it to persons who are older. Such a distinction would run contrary to the express purpose of the Age Discrimination in Employment Act (ADEA), one of the laws enforced by the Equal Employment Opportunity Commission.

Supporters of the amendment argue that, because of the protections afforded faculty under the tenure system, institutions of higher education have a unique need to be able to offer age-capped incentives to encourage older employees to retire voluntarily. However, under current law, employers already are free to offer incentives to encourage faculty to retire. Most importantly, the ADEA permits employers to impose a minimum age for any retirement program, including early retirement incentive programs. Moreover, such benefits may be offered for a limited time (e.g., during the 1996-97 school year) thereby assuring that the ERI will not become a financial liability.

In addition, Section 4 of the ADEA offers flexibility to employers to structure certain ERI's to take into account the relative needs of younger and older employees. Section 4(1)(1)(B)(i) of the ADEA allows employers to offer ERI's that eliminate all or part of the

The Honorable Nancy L. Kassebaum  
Page Two

actuarial reduction for early retirement, and Section 4(i)(1)(B)(ii) allows employers to offer social security supplement ERI's, providing "bridge" payments until the retirees reach age 62 or 65. In both plans, older retirees receive lower levels of benefits than do younger retirees (and generally persons over the age of 65 receive no benefits whatsoever from these ERI's).

The plans permitted under these provisions differ significantly from the plans that would be legalized by the proposed amendment. Most importantly, current law requires that older workers be treated no worse than younger workers. More particularly, the Section 4(i)(1)(B) provisions apply in situations in which older workers are already entitled to higher benefits than are younger workers and merely allow the employer to raise younger workers up to, but not beyond, the total level of benefits available to older workers. On the other hand, the proposed amendment would allow plans in which an employer would give a greater total level of benefits to younger workers, a result that was expressly rejected by Congress when the Older Workers Benefit Protection Act of 1990 was enacted.

I am also concerned that it would be difficult to limit the proposed exemption to higher education institutions. The arguments raised by the higher education community are no different from those that could be raised by a wide variety of other employers, particularly those who administer collectively bargained seniority systems, in both the public and private sectors. Many of these employers share an interest in encouraging the retirement of older employees to create opportunities for younger employees. The answer, of course, to all of these employers is that they already have sufficient flexibility to structure retirement programs to meet their legitimate business needs.

Rather than carving out a substantial exception to the core ADEA principle of non-discrimination on the basis of age, I urge Congress to reject this proposal and continue its bipartisan support for the proposition that older workers should not be discriminated against in the provision of retirement benefits.

Thank you for your consideration of these comments.

Sincerely,

Gilbert F. Casellas  
Chairman

**The Honorable Nancy L. Kassebaum**  
**Page Three**

**cc: The Honorable Edward M. Kennedy**  
**Ranking Minority Member**

**The Honorable James Jeffords**  
**The Honorable Claiborne Pell**  
**The Honorable Dan Coats**  
**The Honorable Christopher Dodd**  
**The Honorable Judd Gregg**  
**The Honorable Paul Simon**  
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**The Honorable Spencer Abraham**  
**The Honorable Slade Gorton**

**URGENT**

**EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
Washington, D.C. 20503-0001**

LRM NO: 2479

FILE NO: 857

9/11/95

**LEGISLATIVE REFERRAL MEMORANDUM**

Total Page(s): 10

**TO:** Legislative Liaison Officer - See Distribution below:

**FROM:** Janet FORSGREN

(for) *Janet L. Forsgren*

Assistant Director for Legislative Reference

**OMB CONTACT:** Anna BRIATICO 395-7887

Legislative Assistant's line (for simple responses): 395-7382

**SUBJECT:** JUSTICE Proposed Report RE: HR 2277 - Legal Aid Act of 1995

**DEADLINE:** 12:30 PM Monday, September 11, 1995

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President.

Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

**COMMENTS:** PLEASE NOTE --- SHORT DEADLINE !!! The Office of White House Counsel and the Department of Justice have been working together to create the attached draft letter on HR 2277 to be transmitted to Chairman Hyde before tomorrow's markup by the House Judiciary Committee. Please review the attached draft and contact me if you have any comments/concerns by 12:30 p.m. TODAY. I will forward the comments to the appropriate parties. Thanks.

★ ★ ★

★★

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**RESPONSE TO  
LEGISLATIVE REFERRAL MEMORANDUM**

**LRM NO: 2479**

**FILE NO: 857**

If your response to this request for views is simple (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet.

If the response is simple and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

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- (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
- (2) sending us a memo or letter.

Please include the LRM number shown above, and the subject shown below.

TO: Anna BRIATICO 395-7887  
 Office of Management and Budget  
 Fax Number: 395-6148  
 Branch-Wide Line (to reach legislative assistant): 395-7362

FROM: \_\_\_\_\_ (Date)  
 \_\_\_\_\_ (Name)  
 \_\_\_\_\_ (Agency)  
 \_\_\_\_\_ (Telephone)

SUBJECT: JUSTICE Proposed Report RE: , HR 2277 Legal Aid Act of 1995

The following is the response of our agency to your request for views on the above-captioned subject:

- \_\_\_\_\_ Concur
- \_\_\_\_\_ No Objection
- \_\_\_\_\_ No Comment
- \_\_\_\_\_ See proposed edits on pages \_\_\_\_\_
- \_\_\_\_\_ Other: \_\_\_\_\_
- \_\_\_\_\_ FAX RETURN of \_\_\_\_\_ pages, attached to this response sheet



Office of the Attorney General  
Washington, D. C. 20530

September 11, 1995

The Honorable Henry J. Hyde  
Chairman  
Committee on the Judiciary  
United States House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

By this letter and its Appendix we want to convey the Administration's vigorous ~~opposition~~ to H.R. 2277, the Legal Aid Act of 1995. We urge the Committee, in the strongest terms possible, to reject this proposed legislation.

Against the 21-year success of the Legal Services Corporation in delivering a broad array of needed legal services to poor and low-income citizens throughout the country at levels of economy, efficiency, and effectiveness rarely realized in either public or private management, the Legal Aid Act of 1995 would, for no reason except ~~philosophical protest and political punishment~~:

- (i) disqualify from eligibility for legal services entire categories of poor and low-income people;
- (ii) disallow from federally funded services many critical causes of action ranging from adoption to constitutional challenges;
- (iii) dismantle the well-tested and extraordinarily efficient and effective Legal Services Corporation grants to, and management of, some 300 legal services providers across the nation, and substitute for that system a wholly untested block grant structure to be managed by the Department of Justice and operated through the States; and
- (iv) set an appropriations course to end federally funded legal services.

To so narrow the availability and scope of publicly funded legal services, and to scrap a successful system and replace it with a yet-to-be-developed set of both federal and state bureaucracies, is ~~meanspirited~~ and shortsighted. The Legal Aid Act of 1995 makes a mockery of the essential American principle "Equal Justice Under Law." If enacted, the bill will mean for

millions the loss of effective, community based legal services and the certainty of continuing and aggravated problems that will cost us dearly in other ways down the line.

We urge you, Chairman Hyde, for these reasons and others detailed in the accompanying Appendix, to oppose this bill and lead the Committee to reject it.

Sincerely,

Janet Reno  
Attorney General

Abner Mikva  
Counsel to the President

cc: The Honorable John Conyers, Jr.  
Ranking Minority Member

2277AG.VL4: OPD DRAFT 9/10/95 11:50 PM

**APPENDIX****I. BACKGROUND**

Approximately 50% of all low-income households today face at least one problem having a legal dimension. The legal problems low income people most frequently face include housing problems, family and domestic matters, credit and creditor problems, problems concerning benefits conferred by law, and health and health care-related problems.

Low-income people, however, are very often denied access to justice because they cannot afford legal help. Nearly three-fourths of the low-income people with legal needs do not get help in the civil justice system; not because the Legal Services Corporation is functioning poorly, or because it has diverted its resources to matters other than direct client representation, but simply because it and the entire civil justice system are overburdened.

When Congress passed the Legal Services Authorization Act in 1974 it was responding to a clear need and acknowledging that a large part of society was barred from effective access to the legal system. For the last 21 years the Corporation has directly channeled federal funding to nonprofit legal services programs serving indigent persons whose rights need protecting. There are more than 300 of these programs nationwide, operating from nearly 12,000 neighborhood law offices.

Corporation programs operate through small, community-based and locally staffed offices headed by independent boards that include members of the local bar and other representative quarters of the community. These offices are available to low-income people in every county of every state, and function as law firms tailored to meet the needs of each community, and the people who staff these offices develop expertise and accumulate institutional and community knowledge that cannot be replaced.

The management of the Corporation is a model for efficient and effective public funding. Only 3% of the Corporation's budget is spent on administrative functions; the remaining 97% is channeled directly to the community-based legal service providers for the delivery of legal services to people in need. This extraordinary ratio of administrative costs to program funding leaves very little room for improvement.

Legal Services Corporation providers nationwide handle over 1.7 million cases each year, improving the lives of families and the quality of life in their communities. Program providers help

families secure safe housing, prevent illegal evictions, and protect clients' health, educational, and employment rights. Approximately 33% of all legal services program cases involve issues of family law; 22% involve protection of housing rights; and more than 75% involve or directly affect the rights of children.

In May of this year the Deputy Attorney General testified before one of your Subcommittees to the continuing need for a strong and independent Legal Services Corporation. Judge Mikva also testified to that need, based on his observations from legislative bodies for nearly 20 years and from the federal bench for an additional 15 years. In July Alan Bersin, the United States Attorney for the Southern District of California, also testified to the important role the Corporation plays in law enforcement.

## II. THE ILL-CONCEIVED PROVISIONS OF H.R. 2277

Against this backdrop of legal needs and the Corporation's extraordinary record of service and efficiency, the provisions of H.R. 2277 are badly flawed and, indeed, senseless.

### A. LIMITATIONS AND RESTRICTIONS ON THE PROVISION OF LEGAL SERVICES

The bill so severely limits all aspects of representation that the fundamental concept of a lawyer having the independence to zealously represent his or her client would simply not apply to the bill's supposed beneficiaries. The following examples, while not comprehensive, are among the most troubling in the bill:

#### 1. "QUALIFIED" CLIENTS

The bill dramatically limits those who may even apply for legal services, excluding entire categories of now-eligible people who are the most likely to be in need. Its definition of a "qualified client"--a client who is eligible to receive legal assistance from a provider--is limited to United States citizens and certain aliens admitted for permanent residence. This definition would unconscionably deprive many legally-admitted, low-income aliens of access to the civil justice system while they are lawfully in the United States.

#### 2. "QUALIFIED" CAUSES OF ACTION.

The bill's listing of "qualified" causes of action which may be funded by grant money is not only very small but, most extraordinarily, excludes a number of commonly brought and long-eligible claims such as paternity, adoption, foster care, guardianship, hiring discrimination and wage claims, as well as

actions to protect the rights of the physically disabled. Clients with legal problems that do not fit neatly into a pre-designated pigeonhole are foreclosed from representation, no matter how meritorious their cases. ✓

Equally offensive is the specific exclusion of "any challenge to the constitutionality of any statute." This limitation is illogical and unjustifiable; it should be the right of every citizen and legal immigrant to have meaningful access to the protection of the Constitution regardless of his or her financial means. Under the bill, if a state were to pass a statute denying a particular group due process or equal protection, or blurring the line between church and state or limiting free speech, low-income persons would be denied the constitutional protections they are due and that are available to those with money. ✓

### 3. LIMITATIONS ON A STATE'S USE OF ITS OWN MONEY.

One of the bill's most wrongheaded provisions dictates that if a state receives grant money ~~from the~~ federal government and also distributes its own funds to legal service providers the state must require that only "qualified clients," as defined under the federal bill, receive "qualified legal services," again as defined under the bill, pursuant to the bill's laundry list of restrictions limiting the uses of federal grant money. In other words, the federal government restricts in the bill the rights of all 50 states to spend their own money as they wish in funding legal services, including actions between two residents of a given state--or between that state and one of its citizens--in a case pending in that state's own courts.

This extraordinary provision is overreaching and inconsistent with the underlying idea that states are capable of regulating the administration of the legal affairs of their citizens with greater efficiency and wisdom than the Corporation's community-based offices. While the thrust of the bill appears to be to provide states with more discretion and

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✓ Further, even within the context of this limited set of eligible cases the bill restricts attorneys representing poor and low-income persons from engaging in numerous, perfectly legal activities on their behalf.

✓ Indeed, if a pending case were to have a constitutional issue injected by an opponent or late-arriving third party, an attorney funded with grant money would be placed in the ethical bind of having to forego the assertion of a meritorious defense or withdraw from the case leaving his or her client to attempt a pro se defense.

more authority, the logic behind this provision limiting state authority is difficult to fathom.

#### 4. ATTORNEYS FEES

The bill anomalistically provides that legal service providers may not, under any circumstances, collect attorneys fees from parties in litigation initiated by their clients. Thus in the case of a state statute that automatically awards fees to prevailing plaintiffs as part of an enforcement mechanism, or a state court judge who seeks to award discretionary attorneys fees against a private attorney for engaging in frivolous conduct wasting the court's time and that of a publicly-funded legal services provider, the provider is barred from accepting the compensatory award. This provision again treads, without reason, on state practice.

#### B. THE SYSTEM OF BLOCK GRANTS

We are very strongly opposed to the bill's system of block grants to be administered by unknown state entities.

First, this proposal would not save money. The bill would allow each state to retain as an administrative fee 5% of each federal grant it processes. Currently, however, only 3% of the Corporation's budget is spent on administrative functions with the remainder going directly to the delivery of legal services. The Corporation involves a staff of approximately 125 experienced people and operates at an exceptionally high level of economy, efficiency and effectiveness. None of these important and rarely achieved goals would be served by dissolving this small, experienced and specialized group and providing for a larger fee to be charged by the states.

Second, jeopardizing the well-established system of neighborhood law offices with experienced attorneys trained to meet local legal needs would be extremely wasteful. To disrupt the current, proven structure for providing legal services to the poor and replace it with an as-yet undeveloped system that by its very nature would involve or create a new layer of bureaucracy in each of the fifty states would decrease both the quality and quantity of legal services available to the poor and the working poor. Years of institutional knowledge and expertise would be lost.

Third, the bill's provisions for individual contracts obtained by bids risk the result of second-class justice. Because it appears that only individuals may bid on these contracts, low-income persons will lose the benefit of the expertise developed by local legal services offices over the last 21 years. The critical function of these local offices as magnets, or clearinghouses, would also be destroyed, thwarting

the approximately 130,000 attorneys nationwide engaging in pro bono activities each year but needing a mechanism to do so. Similarly, the bill's proposed contracts are for a short duration--one year--which presents the very real danger of lack of continuity in representation and disruption to pending cases.

Fourth, the involvement of state governmental units in the administration of legal services for private persons would present the inevitable potential for conflicts of interest. Legal providers would hesitate to represent clients whose cases, while highly meritorious, challenge a flawed law or governmental practice. A provider whose funding could be terminated for advancing a legitimate claim on behalf of his or her client is put in an unfair position.

Finally, oversight would not be improved. This Committee has for 20 years very capably overseen the operations of the Corporation. To delegate this important function to unspecified state bureaucracies with no experience in such oversight simply is not responsible.<sup>3/</sup>

**C. THE JUSTICE DEPARTMENT'S ADMINISTRATION OF THE GRANT PROGRAM**

We are also very strongly opposed to the provision that the Department of Justice administer the grant system.

First, this system would not increase efficiency or save money. As stated above, the Corporation consumes only 3% of its budget on administrative expenses. The bill allows states to withhold 5% of all grant amounts as administrative expenses; this amount is in addition to the increased costs the Justice Department would incur in overseeing this program, and that the public would have to bear.

Second, involvement in the delivery of legal services to poor and low-income people is outside the scope of, and fundamentally inconsistent with, the primary mission of the Justice Department. The Department's primary mission and primary responsibilities are criminal and civil law enforcement directly and exclusively in the interests of the United States and its constituent executive branch agencies. Even indirect involvement in the litigation of private interests has never been the job of the Department.

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<sup>3/</sup> Further, because the bill provides for a 50% decrease in funding from 1996 to 1997 and no funding for 1998, states may lack the incentive to create permanent, efficient offices to administer these grants.

Third, the independent and exclusive mission of the Corporation is an important aspect of its professionalism and effectiveness for its clients. Access to independent legal advice and services is the essence of the civil justice equality we are trying to achieve, and that goal is best achieved by a single-purpose entity such as the Corporation.

Fourth, it makes no sense to federalize, or involve state governments in, functions relating to the network of legal services programs that operate so efficiently and effectively at the community level. At a time when the Justice Department is grappling with so many issues pertaining to law enforcement, public safety and justice reform, and is trying to consolidate functions and simplify its operations, the addition of a substantial and wholly unrelated administrative task would be inconsistent with the goal shared by all agencies--reducing size and doing more with less.

#### D. THE APPROPRIATION CEILING

Finally, the bill imposes for fiscal years 1996 and 1997 increasingly lower ceilings--\$278 million and \$141 million respectively--on future appropriations for the grant program. This is yet another indication of the sponsors' not-so-secret intent to terminate federally funded legal services altogether. This year's appropriation of \$400 million, while far greater than the 1996 and 1997 authorizations provided in H.R. 2277, fell far short of the funding truly needed. If the Committee is serious about legal services, however their delivery is structured, any reauthorization bill should simply authorize the appropriation of such sums as may be necessary rather than impose an artificial ceiling.

#### CONCLUSION

For the reasons outlined above, the Administration vigorously opposes passage of H.R. 2277, the Legal Aid Act of 1995, and respectfully urges the Committee to defeat it and to reauthorize the Legal Services Corporation.

EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
Washington, D.C. 20503-0001

LRM NO: 2924

FILE NO: 1570

10/24/95

LEGISLATIVE REFERRAL MEMORANDUM

Total Page(s): 16

TO: Legislative Liaison Officer - See Distribution below:

FROM: James JUKES *J/L*

(for) Assistant Director for Legislative Reference

OMB CONTACT: Ingrid SCHROEDER 395-3883

Legislative Assistant's line (for simple responses): 395-3454

SUBJECT: JUSTICE Proposed Testimony on Religious Freedom in Schools

**DEADLINE: 5:30pm Tuesday, October 24, 1995**

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President.

Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" revisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: The attached testimony is for a Senate Judiciary hearing tomorrow, October 25th. Walter Dellinger is the witness.

Justice advises that they have been working with Sec. Riley and White House Counsel on the attached testimony.

Education - please show the testimony to Judy Winston.

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*JIM HURR*

**RESPONSE TO  
LEGISLATIVE REFERRAL  
MEMORANDUM**

LRM NO: 2924

FILE NO: 1570

If your response to this request for views is simple (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet.

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FROM: \_\_\_\_\_ (Date)  
 \_\_\_\_\_ (Name)  
 \_\_\_\_\_ (Agency)  
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SUBJECT: JUSTICE Proposed Testimony on Religious Freedom in Schools

The following is the response of our agency to your request for views on the above-captioned subject:

- \_\_\_\_\_ Concur
- \_\_\_\_\_ No Objection
- \_\_\_\_\_ No Comment
- \_\_\_\_\_ See proposed edits on pages \_\_\_\_\_
- \_\_\_\_\_ Other: \_\_\_\_\_
- \_\_\_\_\_ FAX RETURN of \_\_\_\_\_ pages, attached to this response sheet

*Justice (Walter Dellinger)*  
**DRAFT TESTIMONY ON RELIGION IN SCHOOLS**  
*for 10/25/95 S. Judiciary Hearing*

Mr. Chairman, and Members of the Committee:

In a country as diverse as ours, we must take care that well-intended discussion about the role of religion in public life -- and especially in public schools -- does not have the effect of heightening religious tensions and undermining our sense of shared community. Before the country embarks on what has the potential to be a very divisive debate on this subject, it is important that we share a common understanding of the kind and amount of religious activity that already is permissible in the public schools.

To this end, I welcome the opportunity to testify today about the President's directive of last July<sup>1</sup> and the guidelines subsequently issued by Secretary of Education Riley to each of the country's school districts.<sup>2</sup> The Administration's Guidelines make a significant contribution to resolving problems that have arisen in this area, by clarifying, for students and parents as well as educators, the degree to which current law both permits and protects private religious expression by students on school grounds.

My testimony today will focus on the legal framework that governs this area of the law and is incorporated into the Guidelines themselves. Specifically, I will discuss the two basic obligations imposed by the First Amendment on school officials in their dealings with religion: first, that they themselves refrain from organizing or promoting religious activity;

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<sup>1</sup> President's Memorandum for the Secretary of Education and the Attorney General on the Subject of Religious Expression in Public Schools (July 12, 1995).

<sup>2</sup> Letter from Richard W. Riley, Secretary of Education, to Superintendents of United States School Districts (Aug. 10, 1995) ("Guidelines").

and second, that they permit students, acting on their own, to express their religious beliefs free of discrimination based on the religious content of their activity.

I also will address the question of enforcement of the Guideline principles, because this has become an issue since the Guidelines were distributed. Finally, I will say just a few words about the inadvisability of amending the Constitution to permit greater government involvement in religious activity.

#### I.

As both the President and the Secretary of Education have remarked, there has been some genuine confusion on the part of school officials and the public generally about the nature and extent of religious activity currently permitted in public schools. Contributing to the misinformation that surrounds the subject have been certain quite exaggerated claims that the courts have expelled God and religion from the nation's schools.<sup>3</sup> Though far from correct, these statements have helped to create a climate in which some school officials may feel obliged to discriminate against the private religious expression of their students by, for instance, denying student religious groups the same right to meet on school premises as other student groups, or prohibiting students who can discuss politics or any other subject with each other from discussing religion. These actions, of course, generally are inconsistent with the legally protected liberties of students, and they rightfully generate concern.

What we end up with is a most counterproductive dynamic. Mistaken beliefs that children in public school lack all religious liberties feed efforts to "restore" those liberties by

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<sup>3</sup> This is by no means a new phenomenon. I made the same observation in 1983, when I testified on proposed constitutional amendments dealing with school prayer. Hearings on S.J. Res. 73 and S.J. Res. 212 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 367 (1983) (statement of Walter E. Dellinger) ("1983 Hearings").

authorizing or even requiring school officials to promote student religious activity -- a response that overshoots the mark and is itself in conflict with core First Amendment values.

The Administration's Guidelines provide a way out of this dilemma. By clarifying that current law does not preclude private religious activity by students, but rather permits and protects such activity, the Guidelines can help to prevent instances in which school officials mistakenly discriminate against student religious expression. At the same time, the Guidelines make clear that official school involvement in religious activity is forbidden, and that student religious liberty includes the right not to be pressured to participate in religious exercises.

The distinction drawn by the Guidelines between private religious activity by students, on the one hand, and official encouragement of such activity, on the other, is at the heart of the legal principles that govern this area, and deserves some elaboration here. Justice Hugo Black, writing for the Supreme Court in the case of Engel v. Vitale, started with a basic premise that remains as sound today as it was in 1962:

[I]n this country, it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.<sup>4</sup>

Working from that principle, the Supreme Court concluded that the government may not conduct or sponsor official prayer exercises in the public schools. Even where students are permitted to "opt out" of such religious activities, the Court reasoned, official promotion of religion intrudes on the freedom of conscience of religious minorities and nonbelievers:

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<sup>4</sup> 370 U.S. 421, 425 (1962).

When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.<sup>5</sup>

This bedrock principle against official support or endorsement of religion, however, is coupled with a second and equally important principle protecting private expressions of religious belief. As Justice O'Connor explained in 1990, in the course of upholding the Equal Access Act, "[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."<sup>6</sup>

At least since 1981, it has been plain that this principle operates to protect private religious speech by students against official discrimination. In that year, in Widmar v. Vincent, the Supreme Court held that a public university could not deny a student religious group that wished to meet and pray on campus the same right of access to university facilities afforded secular student groups.<sup>7</sup> Adoption of an "equal access" policy for religious groups, the Court ruled, was not only permitted under the Establishment Clause -- it also was required under the Free Speech Clause.<sup>8</sup>

As you may recall, Mr. Chairman, I appeared before you twelve years ago -- as a professor of law -- and testified that I believed that the same constitutional principles would

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<sup>5</sup> Id. at 430-31; see also Abington School Dist. v. Schempp, 374 U.S. 203, 224-25 (1963).

<sup>6</sup> Westside Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990).

<sup>7</sup> 454 U.S. 263 (1981).

<sup>8</sup> Id. at 269-75, 277.

and should apply in public secondary schools as in colleges and universities.<sup>9</sup> Congress agreed in 1984 by passing the Equal Access Act, which provides that a secondary school receiving federal funds may not refuse access to student religious groups if it otherwise permits student extracurricular clubs to meet on its premises.<sup>10</sup> The Supreme Court emphatically endorsed the principle of equal access when it upheld the constitutionality of the Act in Mergens. "We think that secondary school students are mature enough to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."<sup>11</sup>

Just last Term, the Court on two separate occasions reaffirmed and elaborated on its commitment to the equal access principle, both in and out of the public school context. In Capitol Square Review and Advisory Board v. Pinette, the Court held that a town could not prohibit a private party from displaying a religious symbol in a public forum otherwise open for expressive activity, clarifying that "private religious speech . . . is as fully protected under the Free Speech Clause as secular private expression."<sup>12</sup> And in Rosenberger v. Rector and Visitors of the University of Virginia, the Court extended the equal access principle beyond direct access to university facilities to reach university payments made to outside contractors on behalf of student groups.<sup>13</sup> Student religious publications, the Court concluded, could not be excluded from a state university program that generally subsidized

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<sup>9</sup> See 1983 Hearings at 60-61 (statement of Walter E. Dellinger).

<sup>10</sup> 20 U.S.C. §§ 4071-4074.

<sup>11</sup> 496 U.S. at 250 (plurality opinion).

<sup>12</sup> 115 S. Ct. 2440, 2446 (1995).

<sup>13</sup> 115 S. Ct. 2510, 2523-34 (1995).

printing costs; such a bar on religious perspectives was neither required by the Establishment Clause nor consistent with the Free Speech Clause.<sup>14</sup>

In short, what should have been clear from the start is now firmly established Supreme Court law: the same principles that prohibit official religious exercises in the public schools permit and indeed protect student religious activity and expression. This is the critical point that sometimes is lost in the debate over religion in the public schools, and it is the point on which the Administration's Guidelines turn. By informing educators across the country that it is not in fact the case that the Constitution expels God from public school, the President and the Secretary of Education have taken a critical and long overdue step toward resolving the confusion that both animates and undermines debate on this subject.

It is fair to ask what these principles, as incorporated in the Guidelines, will mean as a practical matter for our country's school children. To some extent, of course, it is difficult to answer that question in the abstract; application of the equal access principle, like any legal principle, will in many cases depend on the specific factual context at issue, and in some cases require the making of very careful judgments. Having said that, however, it is possible to set out in broad terms some of the ways in which the Guidelines and the legal principles they encapsulate protect the religious liberties of public school students.

First, student religious groups are entitled to hold meetings at their schools just as other extracurricular groups are allowed to meet. They may come together to discuss their religious beliefs with each other and to read religious scriptures, and they may meet to pray together. Moreover, the equal access to which student religious groups are entitled includes

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<sup>14</sup> Id. at 2524-25.

the same right as other groups to use the school's public address system, bulletin boards, and other forms of media to publicize their meetings.

The prohibition on official discrimination applies to other forms of student religious expression and activity, as well. Students who can talk to each other about politics can talk to each other about religion. Students who can choose any topic for an assignment can choose a religious topic, where it otherwise meets the school's criteria. And in the informal settings in which they generally may engage in the nondisruptive activities of their choice, students may choose to pray.

Finally, the bar on official promotion of religion does not require that the subject of religion be excluded from the classroom altogether. In plainest terms, a school need not attempt to teach about the abolitionist movement without teaching also about its wellsprings in religious sources, and a school need not exclude from a lesson about the civil rights period any mention of the strength that movement drew from a network of African-American churches in the South.

Likewise, schools are not precluded from teaching civic values and virtues to their students, even when those same values are held also by some religions. Schools cannot bear the full responsibility for transmitting the moral code that holds us together as a community; parents, of course, must take the lead. But the public schools may and should teach our children, explicitly and clearly, the shared values that define our national character.

Given all of this -- all of the latitude and protection afforded already to religious expression in public schools -- I think it is fair to turn around the question I posed initially, and ask what, as a practical matter, would be added by a constitutional amendment or some

other form of congressional intervention. What we have now, in simplest terms, is a legal regime that distinguishes between private religious activity, which is protected, and official government compulsion or endorsement of religious activity, which is prohibited. Against this backdrop, the primary effect of congressional action could only be to blur, or to abandon altogether, the line that separates the private from the governmental, carving out new space for government to intrude in the religious activities and choices of its citizens. And this brings us, I think, to the very heart of the debate, once the misinformation that surrounds the subject is cleared away. If we remain committed to both the principles embodied in the Guidelines -- the principle protecting private religious activity against discrimination, and also the principle protecting individual religious choice from the sphere of government influence -- then we should let the Guidelines do their work, clarifying the current status of the law, before we even think about fundamentally changing that law.

## II.

One issue that has arisen since the Guidelines were issued in August is the question of their enforceability. Specifically, the Guidelines have been criticized as inadequate on the grounds that they do not contain any mechanism for enforcement of the principles they set out.

In a very important respect, this criticism is misplaced. It is true that the Guidelines do not include an enforcement provision, and that they are offered by the Department of Education to school districts as guidance rather than as a federal mandate. That does not mean, however, that the principles incorporated into the Guidelines are not themselves

enforceable. As discussed above, those principles encapsulate existing constitutional and statutory law that can itself be invoked and enforced in court.

When a student's constitutional rights, as clarified in the Guidelines, are violated by a school, the student can enforce those rights in court by way of a § 1983 action. Section 1983 provides a federal cause of action when state or local officials, acting under color of law, violate a person's federal rights.<sup>15</sup> One example of the availability of this avenue of enforcement is Rosenberger. Ronald Rosenberger, a University of Virginia student and a publisher of Wide Awake: A Christian Perspective at the University of Virginia, brought his § 1983 action to the Supreme Court, where the equal access principle was enforced to require that the university allow student religious publications to participate in a program subsidizing printing costs.

Similarly, students can enforce in court the statutory rights that are incorporated in the Guidelines. The Equal Access Act, discussed above, provides student religious groups with an additional vehicle for challenging discrimination in the provision of access to school facilities. In the recent case of Ceniceros v. Board of Trustees of the San Diego Unified School District,<sup>16</sup> for instance, a student religious group, joined by the Department of Justice as amicus, challenged a high school's denial of its request to meet in an empty classroom during the school lunch period. Here again, the Ninth Circuit enforced the equal access principle reflected in the Guidelines, holding that the school must provide its student religious group with the same access afforded other student groups. Another statutory source

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<sup>15</sup> 42 U.S.C. § 1983.

<sup>16</sup> 1995 WL 569636 (9th Cir. Sept. 28, 1995).

of the Guideline principles is the Religious Freedom Restoration Act, or "RFRA". Under that statute, enacted in 1993 with the strong support of President Clinton, all government bodies and officials -- including school districts and public school officials -- must refrain from imposing substantial burdens on religious exercise except where they are advancing a compelling governmental interests by the means least restrictive of religious liberty.<sup>17</sup> Once again, the statute specifically provides for enforcement of this standard in judicial proceedings.<sup>18</sup>

Those who complain about a lack of enforceability must have something more in mind than private enforcement of the Guideline principles in court. And it is at this point, I think, that serious concerns about local control of public education begin to arise. As the Supreme Court has often recognized, public education in our country is committed to the control of state and local authorities, and to individual teachers and parents.<sup>19</sup> Any effort by the federal government to enforce the Guideline principles would be inconsistent with this fundamental understanding of the value of local autonomy, and inevitably would lead to greater federal bureaucratic intervention in local school district affairs.

Some of the same concerns would be implicated by additional statutes or special procedural rules designed to facilitate federal law suits by students against their schools and teachers. Though the federal courts should -- and do, as the cases discussed above attest -- stand ready to enforce the "transcendent imperatives of the First Amendment" against school

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<sup>17</sup> 42 U.S.C. § 2000bb-1(a),(b).

<sup>18</sup> *Id.* at § 2000bb-1(c).

<sup>19</sup> See *Mergens*, 496 U.S. at 240-41; *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

officials,<sup>20</sup> we cannot expect federal judges to intervene in every conflict that arises between students and their teachers, second-guessing the decisions teachers must make as a matter of routine as they prepare classroom curricula and grade student work. Ultimately, the most difficult and most important work of protecting the religious rights of all our students must be done in the classroom, on a daily basis, by individual teachers under the supervision of local school officials. It is on their careful judgment that we must rely, at least in the first instance. What the federal government can do, and what the Guidelines will do, is ensure that their judgment is informed by a full understanding of what the law permits and requires of them in their dealings with religion.

III.

Finally, I would like to address what I understand are current proposals to amend the Constitution to alter or clarify the First Amendment principles discussed above, in an effort to allow for some greater governmental role in support of religious activity. Because there is at this time no official proposed amendment before you, I will put to one side the specific concerns that may be raised by the content of any such amendment. Rather, my discussion will be limited to the more general concerns that would be raised by any effort to resolve the issues identified here by way of a constitutional amendment.

First, and critically important, a constitutional amendment would not and could not solve the problem to which it is primarily directed. Most of the objections voiced by the witnesses who have appeared before you go not so much to the content of the law as it now exists, but rather to the question of compliance with or enforcement of that law. That is,

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<sup>20</sup> Island Trees Union Free Sch. Dist. v. Pico, 457 U.S. 853, 864 (1982) (opinion of Brennan, J.).

you have heard arguments that even if the Supreme Court has properly interpreted the First Amendment to protect private religious activity and expression in public schools, other courts, governmental actors, and school officials have failed to give effect to the governing legal norm.

It may well be the case that in the religion context, as with all civil rights and civil liberties, law that is well-established at the Supreme Court level sometimes is misapplied or underenforced at a more localized level, whether through mistakes of interpretation or, in the courts, as a result of the very judicial restraint we often extol. But if underenforcement is the problem, then constitutional amendment of the First Amendment is not the answer. The new constitutional standard, like the old one, will be subject to underenforcement at the hands of those who apply it on a regular basis, and students will continue to bear the burdens of litigation in order to vindicate their rights. Constitutional amendments are not self-enforcing, and nothing about any of the proposed amendments I have seen would remedy this problem.

It also has been suggested that an amendment might serve to clarify the law, essentially codifying the general principles the Supreme Court is now in the process of elucidating. The theory here is that an amendment could speed the pace of constitutional clarification, slowed now by an unwillingness or inability on the part of the Supreme Court to lay down simple, bright-line rules. Again, I think it most unlikely that any amendment could accomplish this goal. Where the Supreme Court has difficulty setting forth a bright-line rule, it is most often because none is available; even when broad principles are well-established, their application often turns on the specific factual contexts presented. Unless

proponents have in mind an amendment considerably more detailed than any we have seen before, it simply cannot clarify in advance the difficult questions that will continue to arise with respect to religious activity in the schools. Indeed, a constitutional amendment might well prove downright counterproductive on this score, destabilizing the legal framework that has emerged at the Supreme Court level over the past twenty years and generating new ambiguity while its scope and meaning are tested in the courts.

Second, and equally important, even if we were to assume that constitutional amendment might help to address the problems identified here, any such amendment would remain an ill-advised departure from a constitutional history marked by a deep reluctance to amend our most fundamental law. The Bill of Rights was ratified in 1792. Since that time, over two hundred years ago, the Bill of Rights has never once been amended. And this is no historical accident, nor a product only of the difficulty of the amendment process itself. Rather, our historic unwillingness to tamper with the Bill of Rights reflects a reverence for the Constitution that is both entirely appropriate and fundamentally at odds with turning that document into a forum for divisive cultural battles.

The Framers themselves understood that resort to the amendment process was to be sparing and reserved for "great and extraordinary occasions."<sup>21</sup> In the Federalist Papers, James Madison warned against using the amendment process as a device for correcting every perceived constitutional defect -- a practice that could not help but undermine the role of the Supreme Court.<sup>22</sup> This note of caution should carry special weight where, as here, the

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<sup>21</sup> The Federalist No. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961).

<sup>22</sup> See id. at 314.

constitutional defect perceived -- to the extent that there is one at all -- appears to be primarily that the Supreme Court is not moving quite quickly enough to clarify its First Amendment jurisprudence. That certain Supreme Court decisions are decided on narrow grounds, with careful attention to the particular facts of each case, may slow the pace of case law development, but it is consistent with a long tradition of judicial restraint and should not invoke resort to the amendment process here.

Finally, and perhaps of particular interest in this context, Madison objected especially to amendment on issues that inflamed public passion, fearing that such actions might threaten "the constitutional equilibrium of the government."<sup>23</sup> The deliberations before this Committee have been a model of civility and thoughtful discourse, and for this the Committee is to be commended. Once a proposed constitutional amendment is sent to the 50 state capitals, however, it is in important respects out of your hands, and the nature of that discourse may change, and may change for the worse. Any amendment that is perceived as an effort to redefine the relationship between religion and public education has the potential to generate a deeply divisive debate across this nation, setting one religious group against another and leaving religious minorities feeling like outsiders in their own communities and country. This prospect alone should be sufficient to convince you that we should adhere in this context to our historical unwillingness to amend the Bill of Rights.

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<sup>23</sup> *Id.* at 315-17.