The original documents are located in Box 36, folder "Office of Management and Budget - General (3)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

DATE: DEC 3 1 1975

TO: Phil Buchen

FROM: Cal Collier

Attached correspondence to
James Reynolds of AIMS, FYI.

OMB FORM 38
REV AUG 73

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

OMB

DEC 3 1 1975

Mr. James J. Reynolds
President
American Institute of Merchant Shipping
1625 K Street, N.W., Suite 1000
Washington, D. C. 20006

Dear Mr. Reynolds:

This is in reply to your letters of November 25 and December 10 to the President, on the issue of the proposed Rules for Measurement of Vessels submitted by the Panama Canal Company for Presidential approval.

The Office of Management and Budget is in the process of soliciting the views of other Federal agencies regarding the Panama Canal Company proposal. These issues will then be presented to the President to assist him in his decision. Additionally, the President will be apprised of the views of the maritime industry, including AIMS, and congressional concerns. The industry views, of course, are quite fully presented in the formal record of the Panama Canal Company's proceedings.

Your November 25 letter refers to the fact that the Panama Canal Company's fiscal year 1975 financial statement has not been released by the Company. We have discussed this with Company officials and are informed that the statement is now available and has been forwarded to interested parties.

Please be assured that your views will be brought to the attention of the President. I understand that you have already been in communication with David Bray on this issue and have provided him with a more detailed statement of your position. If you have additional comments or questions, please feel free to contact him.

Thank you very much for your views.

Sincerely,

(Signed) Calvin J. Collier

Calvin J. Collier
Associate Director for
Economics and Government

cc: Phil Buchen

AMERICAN INSTITUTE OF MERCHANT SHIPPING
1625 K Street, N.W., Suite 1000, Washington, D.C. 20006
Phone: 202/783-6410

December 10, 1975

The President
The White House
Washington, D. C. 20500

Dear Mr. President:

Revised Panama Canal Rules for Measurement of Vessels

I have the honor to convey to you the enclosed message received last evening from the President of the International Chamber of Shipping based in London expressing the deep concern of ocean shipping operators flying the flags of 25 free world nations over the proposed revisions in rules for measurement of vessels transiting the Panama Canal.

We respectfully suggest that these views be considered along with those conveyed to you on November 25, 1975 on behalf of the United States-flag Merchant Marine.

Very truly yours,

James J. Reynolds
President

Enclosure

THE WHITE HOUSE,

WASHINGTON DC

SIR,

PANAMA CANAL COMPANY - PROPOSED CHANGES IN
RULES FOR MEASUREMENT OF VESSELS FOR THE PANAMA CANAL

AS CHAIRMAN OF THE INTERNATIONAL CHAMBER OF SHIPPING (ICS) I HAVE THE HONOUR TO ADDRESS YOU ON A MATTER OF MAJOR CONCERN TO THE INTERNATIONAL SHIPPING INDUSTRY, NAMELY "PROPOSED CHANGES IN RULES FOR MEASUREMENT OF VESSELS FOR THE PANAMA CANAL".

ICS IS AN ORGANISATION REPRESENTING SHIPOWNERS' ASSOCIATIONS IN 25 MARITIME NATIONS, TOGETHER COVERING SOME TWO-THIRDS OF THE WORLD'S MERCHANT TONNAGE. THE AMERICAN INSTITUTE OF MERCHANT SHIPPING (AIMS) IS A PROMINENT MEMBER OF ICS.

ICS WAS ONE OF THE PARTIES TO OFFER WRITTEN COMMENTS ON THE PROPOSED RULE CHANGES, AND ITS VIEWS WERE REPORTED BY AIMS AT THE ORAL HEARINGS HELD IN WASHINGTON D.C. ON 9TH OCTOBER.

ICS IS MOST CONCERNED AT TOTAL REJECTION BY THE PANAMA CANAL COMPANY OF THE INTERNATIONAL SHIPPING INDUSTRY'S VIEWS ON THE PROPOSALS. RESPECTFULLY SUBMIT THAT CERTAIN OF THE PROPOSED CHANGES CONFLICT WITH A BASIC PRINCIPLE OF THE PANAMA CANAL MEASUREMENT SYSTEM I.E. THAT EQUITABLE TREATMENT SHOULD BE GIVEN TO ALL TYPES OF SHIP. FURTHERMORE ALTHOUGH THE PANAMA CANAL COMPANY HAS CLAIMED THAT THE PROPOSALS ARE NOT INTENDED AS AN INCREASE IN TOLLS, THEY WOULD IN PRACTICE INVOLVE AN INCREASE FOR THE GREAT MAJORITY OF VESSELS.

ICS INVESTIGATIONS INDICATE THAT PASSENGER SHIPS AND CONTAINER SHIPS IN PARTICULAR WOULD BE SEVERELY PENALISED UNDER THE PROPOSED NEW REGULATIONS.

AAA) IN THE CASE OF PASSENGER SHIPS THE CANAL COMPANY'S REPORT STATES THAT THE AVERAGE INCREASE IN TOLLS DUE TO THE PROPOSED CHANGE IN TONNAGE MEASUREMENT WOULD BE 22 PERCENT. HOWEVER, FOR A NUMBER OF PASSENGER SHIPS THE INCREASE IN NET TONNAGE WOULD BE ABOUT 40 PERCENT.

BBB) FOR CONTAINER SHIPS ICS HAS CALCULATED THAT THE AVERAGE DECK CARGO SURCHARGE WOULD BE NEARER 20 PERCENT THAT THE 13 PERCENT ESTIMATED BY THE CANAL COMPANY AND INDIVIDUAL CASES WOULD AMOUNT TO AS MUCH AS 40 PERCENT.

THE INTERNATIONAL CHAMBER OF SHIPPING THEREFORE RESPECTFULLY URGES THAT THE PROPOSED CHANGES SHOULD BE RECONSIDERED, AND WOULD WELCOME THE ESTABLISHMENT OF A STUDY COMMISSION TO REVIEW THE MATTER URGENTLY. ICS WOULD BE MOST WILLING TO PARTICIPATE IN SUCH A STUDY.

FINALLY, MAY I EXPRESS THE STRONG HOPE THAT, IN VIEW OF THE WIDESPREAD CONCERN REGISTERED BY THE INTERNATIONAL SHIPPING INDUSTRY, YOU WILL CONSIDER WITHOLDING PRESIDENTIAL APPROVAL.

DENNIS MARTIN-JENKINS

AMERICAN INSTITUTE OF MERCHANT SHIPPING
1625 K Street, N.W., Suite 1000, Washington, D.C. 20006
Phone: 202/783-8400

November 25, 1975

The President
The White House
Washington, D. C. 20500

Dear Mr. President:

I am writing in behalf of the United States-flag steamship industry to urge that you not approve the revised Rules for Measurement of Vessels which are being submitted to you by the Panama Canal Company. Without your approval, these Rules cannot come into effect on January 30, 1976 as is presently being urged by the Company.

On July 31, 1975, the Company, by notice in the Federal Register, announced its intention to substantially alter certain of the Rules which are used for computing the tonnage, i. e. the cargo-carrying/revenue-producing capacity, of vessels. When the tonnage thus computed is multiplied by the existing toll rates, themselves increased by 20% only one year ago, the resultant figure is the fee which must be paid by a vessel which transits the Canal.

The American Institute of Merchant Shipping (AIMS), and 27 other parties, including spokesmen for labor, shippers, and port groups, formally urged the Company not to adopt these Rules. Among the major reasons for this broad-based opposition are:

1. The Company has refused to issue its Fiscal Year 1975 financial report, claiming it will not be available until at least February. Thus, the need for, and impact of, the proposed Rules cannot be determined with accuracy. We do have evidence that since the 1974 toll increase, Company income has risen in excess of $22 million, despite a sharp and continuing decline in vessel transits and cargo tonnage. We suspect that Company costs have risen even more sharply, despite this declining workload.

2. For each proposed change, the Company substantially understated the probable financial impact on vessel operations. In the case of U. S. -flag container vessels for example, the Company estimated a total additional cost of $908,000, yet five of our members alone have calculated they would be confronted with an annual increase of $1,725,000.

3. These Rules are in fact a thinly disguised toll rate increase that is to be inequitably applied to certain types of vessels, particularly combination freighter/passenger vessels and container ships. Transit charges for the latter category would increase over 50%, a very substantial impact since the Company has stated the average toll presently paid by a container vessel is $18,288. Over half of the container vessel transits of the Canal are made by U.S.-flag ships.

4. Tonnage measurement rules by law are related to cargo carrying capacity yet the proposed rules would include areas and spaces aboard ships that cannot be used for cargo or to generate revenues, thus raising a substantial question as to their legality. Even under the present tonnage measurement rules, container ships are unable to use 100% of the spaces on which tolls are levied due to design constraints.

Despite these and other well-documented arguments, on November 17, 1975 the Company's Board of Directors rejected all views, suggestions and recommendations made, and adopted the Rules as proposed without one single change.

If they are allowed to come into effect, by estimates of the Company the cost of using the Panama Canal will rise by over $10 million. About $1.5 million of this burden will be placed upon U.S.-flag carriers, particularly containership and combination freighters/passenger vessel operators. An even greater portion will eventually be borne by American shippers and consumers. And indeed, we suspect portions of these estimates to be considerably understated.

Given the not uncoincidental absence of the Company's 1975 financial data, and their complete and callous disregard of the views expressed by 28 interested parties, it is our contention that the Rules which have been presented to you by the Company's Board of Directors are both unlawful and unnecessary. We would deeply appreciate an opportunity to present our views to you or to a member of your staff before any further action is taken on the Rules.

Respectfully yours,

James J. Reynolds
President

NSC Bob Horowitz Steve Lowe 5004 - NSC

X

Monday 11/24/75

10:05 James Reynolds, President of the American Institute of Merchant Shipping, wanted to talk with you. Said he knows you -- 783-6440

As President of the AIMS, he represents over 70% of the American shipping companies (tankers, cargo ships, etc., many of whom use the Panama Canal).

The Panama Canal Company is intending to increase tolls by an entirely new formula, which is extremely discriminatory against U.S. flag container vessels. Indicates the Director's recommendation by law goes to the President. If approved, it will become effective January 1st. The American ship owners, maritime unions, etc., are deeply concerned about this.

In the past he has dealt with Charles DiBona and Peter Flanigan but he doesn't know who is handling this sort of thing now. His only purpose is find who has the responsibility, among other things, to consider matters that pertain to the Merchant Marine industry, etc.

Or thought it would possibly be in your area.

Would very much appreciate a call from someone.

[Mike Duval 2514]

Mr. Schmults —
Mr. Buchen asked if you'd check on this. Thanks.
Eva

Called Col Collier —
OMB has action here (Collier, Hyland & Ken Schwartz) —
Collier will see to it that Reynolds is called
EJS 11/28/75

THE WHITE HOUSE

WASHINGTON

January 9, 1976

MEMORANDUM FOR: JIM LYNN

FROM: PHIL BUCHEN

SUBJECT: Reforming Federal Benefit Statutes and Procedures

My comments on the memorandum from Cal Collier to you of November 5 which you recently sent me are as follows:

> Rather than trying a blanket approach, I would like to have a review made of certain important specific statutes to see how the procedures and standards might be tightened. Although discretion in grant programs may lead to abuses, it also avoids the application of artificial rules that could frustrate the purposes of the legislation.

I would be glad to attend a general meeting on this subject at your earliest convenience.

cc: Dick Cheney
Jack Marsh

OFFICE OF MANAGEMENT AND BUDGET

TRANSMITTAL FORM

THE DIRECTOR DATE 11/28/75

TO Messrs. Buchen, Marsh, Cheney

FROM: James T. Lynn

I asked Cal Collier to write the attached memo to me dated November 5.

Especially as we move into our election year, I think it is extremely important that these matters be addressed. I also think there are some potential Presidential initiatives here that could be very worthwhile. Let's discuss promptly.

DO NOT USE FOR PERMANENT RECORD INFORMATION

THE WHITE HOUSE

WASHINGTON

December 23, 1975

MEMORANDUM FOR: PHIL BUCHEN

FROM: DUDLEY CHAPMAN DC

SUBJECT: Lynn's Suggestions for Reforming Federal Benefit Statutes and Procedures

While the purpose of this proposal seems desirable, I have the following reservations:

(1) This formalizing of benefit awards risks further proliferation of red tape and possible frustration of the purpose of such grants. Omitting discretion leads officials to hide behind artificial rules that often frustrate the purposes of government programs. While too broad a discretion can be abused, the better answer may be result oriented criteria. Discretion does tend to fix responsibility, and to that extent it is a good thing.

(2) Instituting formal procedures tends to make any grant program more, rather than less, permanent. By creating rules that people can comply with to obtain benefits, they have a firmer expectation of entitlement than in cases where grants are fully discretionary.

(3) The OMB proposal is stated in very abstract terms. The more practical approach might be to take specific statutes and analyze them to see how discretion can be better controlled. It may well be that better administration would accomplish the ends that Jim Lynn is seeking, while preserving desirable flexibility.

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

NOV 05 1975

MEMORANDUM FOR: THE DIRECTOR

FROM: CALVIN J. COLLIER

SUBJECT: Reforming Federal Benefit Statutes and Procedures

This is in response to your request for my thoughts on ways that the Federal Government might go about dumping and scrubbing the pork barrel.

A potential pork barrel exists where:

-- grants, loans, or other benefits (hereinafter, "benefits") are made available pursuant to statutes or regulations vesting broad discretion in public officials;

-- benefit eligibility exceeds available benefits;

-- procedural safeguards do not exist for determining the most worthy beneficiary (contrast, e.g., career civil service entrance examination, competitive bidding procedures for contracts, comparative hearings on the record for award of broadcast and other licenses).

The pork barrel is subject to abuse and the appearance of abuse. The government is regularly confronted with charges of caprice, favoritism, and wrong-doing in the administration of such benefit programs. The constraints that do exist are generalized and ineffective (see Appendix A for a description of statutes that impact in this area).

The following actions could be explored to dump and scrub the pork barrel. Many of these suggestions have disadvantages, including making the grant process more cumbersome or less responsive to unique circumstances.

Substantive options

-- Examine discretionary benefit statutes and seek amendments that would replace discretion with

384-8

formula entitlement criteria. (Would exclude "experimental" programs.)

-- Bring funding levels into line with eligibility, tightening eligibility criteria where necessary.

Procedural options

-- To guard against the exertion of influence on officials to make programmatically unsound decisions:

- Require (by statute or Executive Order) that officials keep records of all "outside contacts" (including Congressional contacts) and make these records public.

- Abandon the Congressional notification and announcement process for benefits.

- Require (by statute or Executive Order) that "major" benefits be awarded only after a notice and public hearing in the applicant's community.

-- Review existing legislation to determine whether a comparative hearing process can be designed along the lines of the process that controls the award of broadcast licenses.

-- Direct agencies to develop objective criteria subject to quantifiable measurement (minimizing value judgments) for choosing the "best" projects from competing applications. This proposal would also require that applications be batched and awards of benefits be made on one or more designated days each year.

-- Establish in each agency a formal review procedure for challenges to benefit awards before they are final.

-- Outlaw coercion (threats or promises of reward) to use official position or authority to affect a benefit decision. (Would exclude judicial actions, actions by law enforcement officials, and actions by persons directly responsible for benefit decisions.) Note: this would expand upon existing prohibitions by eliminating the need to prove malefactory purpose.

* * * * *

These options do not purport to exhaust the available alternatives; and they may not all be worth pursuing.

Many of these changes would require legislation and an omnibus bill could be proposed. Hearings on such legislation might be sensationalized taking the spotlight off of the reformist nature of the proposals. If legislation were proposed, administrative action in the form of an Executive Order could be adopted as an interim step.

Attachment

APPENDIX A

SELECTED STATUTES IMPACTING
BENEFIT DECISIONS

"Whoever, directly or indirectly, corruptly ... promises anything of value to any public official ... with intent ... to influence any official act ... shall be fined ... or imprisoned ... or both ...." 18 U.S.C. § 201 (Bribery)

"It is the intent of this section that employees avoid any action ... which might result in, or create the appearance of - ...

(2) giving preferential treatment to any organization or person; ...
(4) losing complete independence or impartiality of action; ... or
(6) affecting adversely the confidence of the public in the integrity of the Government."

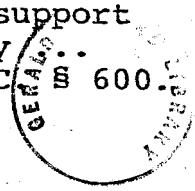
E.O. 11222, § 201 (Code of Conduct for Government Employees)

"Whoever, being a person employed .. by the United States ... or by any State ... or any political subdivision ... in connection with any activity which is financed in whole or in part by loans or grants made by the United States ... uses his official authority for the purpose of interfering with, or affecting the nomination or election of any candidate for ... [Federal elective] office ... shall be fined ... or imprisoned ... or both." 18 U.S.C. § 595

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States ... shall be fined ... or imprisoned ... or both ... ." 18 U.S.C. § 241 (Civil Rights Act)

"Whoever, under color of any law ... willfully subjects any [citizen] ... to the disposition of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States ... shall be fined ... or imprisoned ... or both ... ." 18 U.S.C. § 242 (Civil Rights Act)

"Whoever, directly or indirectly, promises any ... contract ... or other benefit, provided for or made possible in whole or in part by any Act of Congress ... to any person as consideration, favor, or reward for any political activity or for the support of or opposition to any candidate or any political party ... shall be fined ... or imprisoned ... or both." 18 U.S.C. § 600.



"Whoever ... directly or indirectly, deprives, attempts to deprive, or threatens to deprive any person of any ... other benefit provided for or made possible by any Act of Congress appropriating funds for work relief or relief purposes, on account of ... any political activity, support of, or opposition to any candidate or any political party in any election, shall be fined ... or imprisoned ... or both ... ." 18 U.S.C. § 601

THE WHITE HOUSE
WASHINGTON

I sent a copy to Dudley and ask that he deal directly with OMB.

TRANSMITTAL FORM - U.S. DEPARTMENT OF COMMERCE
THE UNDER SECRETARY

FORM CD-82
(5-4-71)
PRESCRIBED BY
DAO 214-2

DATE 2/5/76

TO: Mr. Phil Buchen

FROM: James T. Lynn

DO NOT USE FOR PERMANENT RECORD INFORMATION

USCOMM-DC 416-P71

DRAFT: JTL/gkt
2/5/76

Dear Mr. Chairman:

Recently there have been newspaper articles about one or more OMB memoranda referring to so-called "cut insurance" with respect to the defense budget. This letter is written to set forth the facts as I know them. There is no "cut insurance" in the President's Budget.

In the early stages of the 1977 budget process, there was substantial variance between OMB and practically all agencies as to many important budget issues. Defense was no exception (but I should add, as is also usually the case with any department's budget, these differences became quite small as the time approached for final Presidential decision-making). In some of the analyses of various possible obligational authority and outlay levels for 1977, OMB staff included not only the over-all increases from 1976 that would result but also a breakdown showing the extent to which such levels would, in OMB's judgment, result in increases over the 4% annual real growth in defense purchases targeted in the President's 1976 budget presented last February. These increases over 4% were, in certain papers -- including some among the vast amount of materials we furnished the President -- referred to as "cut insurance." Such concepts were incompatible with the principles which the President applied in reaching his decisions on the Defense budget.

As you probably know, the Presidential review of the budget of major agencies was a two-step process this year. The first step was tentative decision-making by the President based on materials submitted by, and meetings with, OMB. The second step was final decision-making following an opportunity by the agency to appeal directly to the President.

Throughout this review process -- which in the case of Defense covered about a month beginning in late November -- the President made it very clear that he would make his decisions solely on the basis of what was needed to assure the defense of our country. Whatever was essential he would provide no matter what the totals or percentage increases year-to-year might turn out to be. Whatever was not essential he would eliminate. Wherever savings were possible in carrying out essential activities, the steps necessary to eliminate such waste would be taken promptly.

He applied these principles to all aspects of the Defense budget, ranging from major program matters to relatively small possible opportunities for savings. He applied these principles not just to those few remaining issues on which OMB and Defense still disagreed but also to matters on which we agreed.

I can personally assure you that this is precisely how the President made his decisions. And this is why Secretary Rumsfeld and his people at Defense are ready, willing and able to defend, line-by-line, the budget the President has presented to the Congress.

This, of course, does not mean that we expect that as Congress reviews the Defense budget it will necessarily see eye-to-eye with the Administration on every single matter either included or excluded from the proposed budget. But I trust that in carrying out its responsibilities to provide for our national security, Congress will in no way be impressed by a term used in OMB memoranda which was not only the wrong way to characterize what our people then thought were purchase increases beyond 4% but which also played no part in the eventual decision-making.

Very truly yours,

Insert 1

In doing so, I must necessarily refer to certain internal deliberations that would ordinarily be protected as confidential internal communications within the Executive Branch. In view of the misleading impressions that may be drawn from the incomplete disclosure of these documents, the President has authorized me to disclose certain additional confidential matters but only to the extent necessary to set the record straight in this specific instance.

2d DRAFT - JTL/gkt
2/5/76

Dear Mr. Chairman:

Recently there have been newspaper articles about one or more OMB memoranda referring to so-called "cut insurance" in the defense budget. This letter is written to set forth the facts as I know them. There is not cut insurance in the President's budget.

The 1976 budget, presented in February 1975, assumed an increase in defense purchases of 4% per year in real terms over a five-year period.

As was the case with most other departments and agencies, the views of OMB staff and that of the Department of Defense in early stages of the 1977 budget processes as to the right level of resources were substantially different (and I should add, as is also usually the case with any department's budget, these differences ~~narrowed very substantially~~ become quite small as the time approaches for final Presidential decision-making). In preparing analyses of various TOA and outlay levels for 1977, OMB staff included in some ~~analyses of various TOA and outlay options~~ not only the over-all increases from 1976 that would result but also a breakdown showing the extent to which such levels would, in OMB's judgment, result in increases over the 4% annual real purchase growth targeted back in the 1976 budget document. Such ~~amounts~~ increases over 4% were, in certain papers -- including some among the vast amount of materials we furnished the President -- referred to as "cut insurance."

GERALD R. FORD LIBRARY

Defense vigorously contested, both prior to and into the Presidential review process, not only OMB's analysis of what was needed for 1977, but also both (1) the use of 1976 comparisons in view of 1976 Congressional cuts, and (2) ~~the President's and~~ my staff's calculations of the real growth that would be represented at various increase levels.

As you probably know, the Presidential review of the budget of major agencies was a two-step process this year. The first step was tentative decision-making by the President based on materials submitted by, and meetings with, OMB. The second step was final decision-making following an opportunity by the agency to appeal.

Notwithstanding the materials furnished by us ~~to~~ showing ~~demonstrate that the levels we proposed would, in our judgment, result in~~ growth in real purchases ~~beyond the 4% target set the year before~~ and notwithstanding the position of Defense that our levels were inadequate and that our calculations of real growth were unfair year-to-year comparisons and not accurate, the President made it very clear from the beginning and throughout the entire process -- which extended from November 21th through to about December ____, that he would make his decisions solely on the basis of what was needed to secure the defense of our country -- that whatever was essential he would provide no

matter what the percentage increase year-to-year might turn out to be, that whatever was not essential he would eliminate and that wherever there was potential savings in ways of carrying out essential activities, the steps necessary to eliminate such waste must be taken promptly.

I can personally assure you that this is precisely how the President made his decisions. And this is why Secretary Rumsfeld and his people at Defense are ready, willing and able to defend, line-by-line, the budget the President has presented to the Congress.

This, of course, does not mean that we expect that as Congress reviews this defense budget it will necessarily see eye-to-eye with the Administration on every single matter either included or excluded from the proposed budget. But I trust that in carrying out its responsibilities to provide for our national security Congress will in no way be impressed by a term used in OMB memoranda that was not only the wrong way to characterize what our people then thought were purchase increases beyond 4% but also played no part in the eventual decision-making.

Very truly yours,

THE WHITE HOUSE

WASHINGTON

February 10, 1976

Dear Noel:

Many thanks for your letters -- the one explaining the need for making available a third court facility in the Federal Building in Grand Rapids and the other reporting an interesting development in the Florida case which you heard.

I shall pass on the material you have sent to people at OMB who I am sure will give it their full and fair consideration.

Best regards.

Sincerely,

Philip W. Buchen
Counsel to the President

The Honorable Noel P. Fox
Chief Judge
United States District Court
Western District of Michigan
Grand Rapids, Michigan 49502

February 21, 1976

MEMORANDUM FOR: JIM CONNOR

FROM: PHIL BUCHEN

SUBJECT: James Lynn's memo 2/20/76
re National Governors Conference
Interest in the Enrolled Bill Process

I would somewhat modify point 3 on page two by changing the last sentence to read as follows:

> "We will, of course, take into account such contributions in our memoranda to you."

I think it inappropriate for any branch of the Executive office to commit itself to include views expressed by any particular interest group, whether it be Governors, county officials, city officials or private interest groups.

Date: February 21, 1976 Time:

Copy to Buchen Saturday

FOR ACTION:
Phil Buchen
Jim Cannon
Max Friedersdorf

cc (for information):
Rogers Morton

FROM THE STAFF SECRETARY

DUE: Date: IMMEDIATE ATTENTION Time:

SUBJECT:

James Lynn's memo 2/20/76 re
National Governors Conference
Interest in the Enrolled Bill Process

ACTION REQUESTED:

____ For Necessary Action
____ For Your Recommendations
____ Prepare Agenda and Brief
____ Draft Reply
X For Your Comments
____ Draft Remarks

REMARKS:

The attached information piece was forwarded to the President and he requested that your comments be solicited prior to the Governors Conference on Monday, February 23.

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

James E. Connor
For the President

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

FEB 20 1976

INFORMATION

MEMORANDUM FOR: THE PRESIDENT

FROM: James T. Lynn

SUBJECT: National Governors' Conference Interest in the Enrolled Bill Process

BACKGROUND

At the December 18, 1975, meeting between the Governors and the Cabinet, Governor Arch Moore suggested that the staff of the Governors' Conference provide to OMB evaluations of the impact that enrolled bills might have on the States, for your subsequent consideration when acting on the bills. Governor Salmon in a December 29 letter to me reiterated that idea and suggested a meeting between OMB and Conference staff.

STEPS TAKEN

My senior staff for intergovernmental relations and legislative reference met on January 28 with Steve Farber, the Executive Director of the Governors' Conference, and his deputy to discuss a number of ways to strengthen relationships.

The following major points came out of the discussion on enrolled bills:

1. The Governors' Conference staff had for some time given views informally on selected enrolled bills of interest to the Governors to Jim Falk of the Domestic Council to be included in the Council's memorandums to you. (The Governors were probably not fully aware of the extent of this activity.)

2. Farber agreed with our suggestion that he contact Steve McConahey so that that kind of relationship could be continued.

3. In addition, Farber accepted our invitation to give us views or evaluations, either orally or in writing, on any enrolled bill that he wishes. We will, of course, include such contributions in our memorandums to you.

DISTRICT OF COLUMBIA COURT OF APPEALS
WASHINGTON, D. C.

For filing

GERARD D. REILLY
CHIEF JUDGE

March 1, 1976

Hon. Philip W. Buchen
Counsel to the President
The White House
Washington, D.C.

Dear Mr. Buchen:

I am deeply grateful to you for reviewing the problem which I raised in connection with the District of Columbia Council's overriding the Mayor's veto of their Bill No. 1-137. My colleagues and I were greatly relieved by the President's action in sustaining the Mayor's veto.

Had the matter been left to stand, it would have set a dangerous precedent by permitting the encroachment by the Council upon the rule-making powers of the courts.

With best regards,

Faithfully yours,

Gerard D. Reilly

Gerard D. Reilly

THE WHITE HOUSE

WASHINGTON

JMB

February 25, 1976

Dear Judge Reilly:

Many thanks for your letter of February 22nd on the subject of the Mayor's Veto of D. C. Council Bill No. 1-137.

I did find, after you called, that we were aware of the problem which you had raised in your letter, and of course are giving it the serious weight which it deserves.

Your interest and concern are appreciated.

Sincerely,

Philip W. Buchen

Philip W. Buchen
Counsel to the President

The Honorable Gerard D. Reilly
Chief Judge
District of Columbia Court of Appeals
Washington, D. C.

THE WHITE HOUSE
WASHINGTON

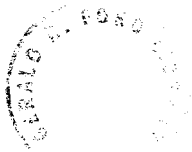
February 24, 1976

Ken,

Mr. Buchen would like to know where this is in the White House?

Says if you can't look into, to please assign to someone else, and have them report back to him before he leaves the city on Thursday morning. Thanks.

shirley



DISTRICT OF COLUMBIA COURT OF APPEALS
WASHINGTON, D. C.

CHAMBERS OF
CHIEF JUDGE GERARD D. REILLY

February 24, 1976

Hon. Philip W. Buchen
Counsel to the President
The White House
Washington, D.C.

Re: Mayor's Veto of D.C. Council Bill No. 1-137, the proposed "D.C. Shop Book Act".

Dear Mr. Buchen:

Inasmuch as the statutory authority of the District of Columbia courts to promulgate their own rules without interference by the City Council would be severely impaired unless the President sustains the Mayor's veto of Council Bill No. 1-137, I am writing to draw your attention to this controversy.

The Council's action in overriding the Mayor's veto was transmitted to the President on January 29, 1976, under Section 404(e) of the Self-Government Act. This provision gives the President 30 calendar days from the date of transmission to sustain the veto. As I understand it, this would mean that the President has only until February 27th to act on the matter.

In this instance, the Mayor vetoed the bill on the advice of the Corporation Counsel, who pointed out to him that enactment of the so-called Shop Book rule by the Council was beyond its powers, as D.C. Code 11-946 (a provision in the D.C. Judicial Reorganization Act of 1970) prescribes that the federal rules of procedure shall be applicable to the Superior Court, unless such court adopts rules which modify them with the approval of the District of Columbia Court of Appeals. A copy of the Mayor's veto message is enclosed as Appendix A.

The proposed local Shop Book rule itself is harmless enough as the Superior Court, with the consent of our court has already adopted it as a local exception to the recently enacted Federal Rules of Evidence Act

of 1975. But the significance of the Council action, if permitted to stand, is vastly more ominous. Backed up behind it are Council bills which would virtually prevent the local courts from effectively trying criminal cases involving rape and other serious sexual offenses, e.g., Bill No. 214, "The Prior Sexual Conduct Evidence Act of 1975", Bill No. 1-172, "The Psychiatric Confidentiality Act", etc. Council action on these bills has been temporarily deferred, presumably because of the transmission of the shop-book controversy to The White House, but their ultimate passage is regarded as almost certain unless the President upholds the Mayor's effort to stop the Council from encroaching upon matters reserved by statute to the courts.

While I recognize that The White House is ordinarily reluctant to get into District matters, I hope that because of the importance of this matter to the future of our courts that you will have time to review both the Mayor's veto and the opinion of the Corporation Counsel, also enclosed as Appendix B, and to advise the President.

Faithfully yours,

Gerard D. Reilly

Gerard D. Reilly
Chief Judge

Enclosures

Appendix A

January 7, 1976

TO THE COUNCIL OF THE DISTRICT OF COLUMBIA:

I am returning without my approval Bill 1-137, a bill "To enact a law of evidence to be applied in the District of Columbia Courts."

I fully support the object of this bill, which is to make the so-called "Federal Shop-Book Rule" applicable once more to proceedings in the Superior Court of the District of Columbia. This was necessary as the provision of the statute making the rule applicable in the Superior Court was repealed by Congress with the enactment of the Federal Rules of Evidence. However, the Corporation Counsel has advised me that the object of this bill has already been accomplished by the District of Columbia Courts themselves, pursuant to their rule-making powers under the District of Columbia Court Reorganization Act of 1970.

More importantly it is the opinion of the Corporation Counsel that the Council does not have the authority to enact this bill for the following reasons. The Court Reorganization Act created the Superior Court and, pursuant to D.C. Code, § 11-946, made the Federal Rules of Civil and Criminal Procedure, including rules relating to the admissibility of evidence, applicable in that

court in the first instance. However, this same section gave the Superior Court, with the approval of the D. C. Court of Appeals, the authority to prescribe rules modifying the Federal Rules. Foreseeing the void that would result from the partial repeal of the "Federal Shop-Book Rule", the Superior Court Board of Judges adopted a rule virtually identical to this rule as a modification of the Federal Rules of Civil and Criminal Procedure relating to the admissibility of evidence, and the D. C. Court of Appeals approved this modification. This rule became effective July 1, 1975 to coincide with the partial repeal of the "Federal Shop-Book Rule". As a result, this rule became a permanent addition to the rules governing proceedings in the Superior Court.

The Council's enactment of a rule identical to the rule prescribed by the District of Columbia Courts would not only be unnecessary, but would exceed the legislative authority of the Council under the Self-Government Act. Under the Court Reorganization Act, the power to prescribe rules of court modifying the Federal Rules was vested exclusively in the District of Columbia Courts, subject only to Acts of Congress. The Self-Government Act did not transfer this authority to the Council, but preserved it in the courts. Section 718(a) of the Act

provides that the District of Columbia Courts shall continue as provided under the Court Reorganization Act. Section 431 vests the judicial power of the District exclusively in these courts. Finally, section 602(a)(4) prohibits the Council from enacting any act with respect to the provisions in title 11 of the District of Columbia Code, including section 946 of that title, which is the source of the courts' rulemaking authority.

In summary, the Corporation Counsel is of the opinion that the enactment of this bill is unnecessary in view of the prior action of the District of Columbia Courts and is beyond the authority of the Council, being an infringement on the powers vested in the District of Columbia Courts under the Court Reorganization Act and the Self-Government Act. Accordingly, I am unable to give my approval to this bill.

WALTER E. WASHINGTON
Mayor

D.C.-44
May 1967

appendix B

Memorandum • Government of the District of Columbia

Department, Corporation Counsel, D.C.
Agency, Office: L&O:JCM:kc

TO: Mayor Walter E. Washington

FROM: Louis P. Robbins LPR
Acting Corporation Counsel, D.C.

Date: February 10, 1976

SUBJECT: Memorandum by General Counsel to the Council of January 13, 1976, concerning Bill No. 1-137, the proposed "District of Columbia Shop-Book Act."

This memorandum is addressed to the arguments set forth by Edward B. Webb, the General Counsel to the D.C. Council, in his memorandum to the Council dated January 13, 1976, concerning Bill No. 1-137, the proposed "District of Columbia Shop-Book Act." The bill was vetoed by the Mayor on January 7, 1976 and was overridden by the Council on January 27, 1976. It was transmitted to the President pursuant to section 404(e) of the Self-Government Act on January 29, 1976. Under this provision, the President has 30 calendar days from the date of transmission to sustain the Mayor's veto.

This memorandum supplements our memorandum of December 19, 1975 to Judith Rogers, special Assistant for Legislation, in which we recommended that this bill be returned without approval. A copy of this memorandum is attached.

The General Counsel contends that the Council alone is empowered to enact a "shop-book" rule of evidence. He argues (1) that "Congress has consistently considered the shop-book rule a substantive law of evidence to be promulgated by legislation"; (2) that the Federal Rules of Civil Procedure recognize statutory enactments as a means to establish rules relating to the admissibility of evidence; and (3) that Congress in enacting title 11 of the D.C. Code, recognized that substantive rules of evidence should be codified separately from provisions relating to the jurisdiction of the courts.

The General Counsel's first argument is a misstatement of a fact. Despite the opinion of the House Judiciary Committee concerning the authority of the Supreme Court to promulgate rules of evidence under the rules enabling acts, 18 U.S.C. §§ 3771, 3772, 3402; 28 U.S.C. §§ 2072, 2075 — an opinion that was not shared by the Senate Judiciary Committee, Sen. Rep. No. 93-1277, 93d Cong., 1st Sess. (1974) — Congress did not divest the Supreme Court of its authority over this area. The rules enabling acts, under which the Court has previously enacted rules governing the admissibility of evidence — Fed. R. Civ. Pro. 43(a), Fed. R. Crim. Pro. 26 — remained intact. Moreover, section 2(a) of P.L. 93-595, by which Congress enacted the Federal Rules of Evidence, gave the Supreme Court "the power to prescribe amendments to the Federal Rules of Evidence", subject, of course, to Congressional oversight. 28 U.S.C. § 2076. The only substantive diminution of the Supreme Court's rulemaking authority was the requirement that rules "creating, abolishing, or modifying a privilege" be ratified by Congress before taking effect.

Under the scheme provided by Congress, subsequent amendments to the successor of the Federal Shop-Book Rule, Fed. R. Evid. 803(6), which do not affect privilege, will be made by the judicial branch of the government, not the legislature.

The wisdom of this approach was articulated by Dean Roscoe Pound during the controversy over the civil rules of procedure:

> "Legislatures today are so busy, the pressure of work is so heavy, the demands of legislation in matters of state finance, of economic and social legislation, and of provision for the needs of a new urban and industrial society are so multifarious, that it is idle to expect legislatures to take a real interest in anything so remote from newspaper interest, so technical, and so recondite as legal procedure. I grant the courts are busy too. But rules of procedure are in the line of their business. When a judicial council or a committee of a bar association comes to a court with a project for rules of procedure, they will not have to call in experts to tell the judges what the project is about; they will not, as has happened more than once when committees of the American Bar Association

have gone before Congressional Committees— they will not have to be taught the existing practice and the mischief as well as the proposed remedy."

R. Pound, The Rule-Making Power of the Courts, Amer. Bar Ass'n J. 602 (1930).

The General Counsel's second argument begs the question. I have no quarrel with the statement that "the Federal Rules of Procedure recognize statutory enactment as a means to establish rules relating to the admissibility of evidence." The power of the Congress, which enacted the rules enabling acts, to promulgate rules of evidence for the Federal judiciary is well settled. Sibbach v. Wilson & Co., Inc., 312 U.S. 1 (1940). Likewise, the power of Congress to enact rules of evidence for the Superior Court of the District of Columbia, which it created under the District of Columbia Court Reorganization Act of 1970, P.L. 91-358, title 1, 84 Stat. 473, is beyond dispute. However, the crucial question, which the General Counsel does not address, is whether Congress delegated its ultimate legislative authority over rule-making in the District of Columbia Courts to the D. C. Council.

An examination of the Court Reorganization Act and the District of Columbia Self-Government and Governmental Reorganization Act, P.L. 93-198, 87 Stat. 774, demonstrate that the power to prescribe rules of court, including rules of evidence, was vested exclusively in the District of Columbia Courts.

The Court Reorganization Act created the D. C. Court of Appeals and the Superior Court of the District of Columbia, and vested them with the judicial power of the District with respect to matters of local law. D.C. Code, § 11-101. For the convenience of the local bar, the Act made the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, promulgated by the Supreme Court, applicable in the Superior Court in the first instance. However, the Superior Court was empowered, subject to the approval of the D.C. Court of Appeals, to prescribe or adopt rules which modify the Federal Rules", and was authorized to "adopt and enforce other rules . . . [which] do not modify the Federal Rules." D.C. Code, § 11-946. No limitation was placed upon the power of the

District of Columbia Courts to modify the Federal Rules.

The "judicial power" of the District, of course, includes the long recognized authority of the District courts to prescribe rules of evidence. As the Supreme Court stated in Griffin v. United States, 336 U.S. 704, 716-717 (1949), "[i]t has become the settled practice for this Court to recognize that the formulation of rules of evidence for the District of Columbia is a matter of purely local law to the determined — in the absence of specific Congressional legislation — by the highest appellate court of the District of Columbia." Accord, Fisher v. United States, 328 U.S. 463, 476-77 (1946).

The enactment of the Self-Government Act did not diminish the rulemaking authority of the District of Columbia Courts, but solidified it. Section 718(a) of this Act provides that these courts "shall continue as provided under the District of Columbia Court Reorganization Act of 1970 . . .". Section 431(a) unqualifiedly vests the "judicial power of the District" in these courts, recognizing the continuation of the full authority of the courts granted under the Court Reorganization Act. Section 602(a)(4) supplements these provisions by expressly precluding Council action with respect to any provision of title 11 of the D.C. Code, which includes D.C. Code § 11-946, the source of the rulemaking authority of the courts.

The General Counsel assumes that the Council, merely because it is a legislature, has the authority to promulgate rules of evidence. However, the power of the Council over the District of Columbia Courts under the Self-Government Act is not analogous to the power of Congress over the Federal judiciary under the Constitution or even to the power of most State legislatures over their respective State courts. The Council's authority over rules of court is more akin to the authority of the legislature of the State of New Jersey defined in Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 406, cert. denied, 340 U.S. 877 (1950), where the court held that the State constitution providing that "the Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure of all such courts" ousted the power of the State legislature over rules of court.

In his third argument, the General Counsel urges a dichotomy between rules of procedure, over which he grants the courts authority, and "substantive" rules of evidence, which he maintains are matters strictly for the legislature. He points to the separate codification of the courts' rulemaking authority — title 11, D.C. Code — and various enactments of Congress relating to evidence — title 14, D.C. Code. He contends that the absence in the Self-Government Act of a specific prohibition of Council action with respect to the provisions in title 14 leads to the conclusion that Congress intended to vest the Council with the authority to promulgate rules of evidence.

In the first place, rules of evidence have been generally considered to be predominantly procedural and not affecting substantive rights. See Sibbach v. Wilson & Co., Inc., 312 U.S. 1 (1940); Prliminary Study of the Advisability and Feasibility of Developing Uniform Rule of Evidence for the Federal Courts, 30 F.R.D. 73, 100 et. seq.

In the second place, the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure contain rules governing the admissibility of evidence. When the Court Reorganization Act was enacted, the principal rules of evidence were Fed. R. Civ. Pro. 43(a) and Fed. R. Crim. Pro. 26. Pursuant to D.C. Code, § 11-946, these rules applied in the Superior Court in the first instance, but were made subject to modification by the District of Columbia Courts.

These two rules of evidence were superseded by the Federal Rules of Evidence, enacted by P.L. 93-595, 88 Stat. 1926. In section 3 of that Act, 88 Stat. 1949, Congress expressly approved the orders of the Supreme Court, issued pursuant to the rules enabling acts, amending these rules and other rules relating to evidence. The attached memorandum of December 19, 1975 to the Special Assistant for Legislation explains in detail the interdependency of the Federal Rules of Evidence and the Federal Rules of Civil and Criminal Procedure. The Rules of Evidence are an outgrowth of these two sets of rules and are incorporated by reference in both. Though codified separately for convenience, the Rules of Evidence remain inextricably bound to the Rules of Civil Procedure

and the Rules of Criminal Procedure.

As a result, the Federal Rules of Evidence, together with the amendments to the Rules of Civil Procedure and the Rules of Criminal Procedure, became applicable in the Superior Court as of July 1, 1975 (the effective date of the Rules and the amendments) under the terms of D.C. Code, § 11-946. Thus, Fed. R. Evid. 803(6), the successor to the Federal Shop-Book Rule , repealed by P. L. 93-595, § 2(b), 88 Stat. 1949, became applicable in the Superior Court in the first instance.

The District of Columbia Courts, exercising their authority under D.C. Code, § 11-946, prescribed modifications to the amendments to the Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure and thereby to the Federal Rules of Evidence, which was incorporated into these rules. Fed. R. Civ. Pro. 43 was modified by the addition of Super. Ct. Civ. R. 43-I, which reinstated the Federal Shop-Book Rule in the District of Columbia. Similar changes were made to analogous rules in the other divisions of the Superior Court.

By order dated December 23, 1975, the Superior Court Board of Judges deleted the amendments to the Federal Rules promulgated by the Supreme Court — Fed. R. Civ. Pro. 30, 32, 43, 44.1; Fed. R. Crim. Pro. 26, 26.1, 28 — which incorporated the Federal Rules of Evidence. The Board replaced them with the former versions of these rules. This action was approved by the D.C. Court of Appeals on December 28, 1975. The deletion of the references to the Federal Rules of Evidence in these rules ended their applicability in the Superior Court.

Thus, the District of Columbia Courts acting pursuant to D.C. Code, § 11-946, modified the successor to the Federal Shop-Book Rule , Fed. R. Evid. 803(6) by reinstating the old rule. Only the Courts were authorized by Congress to modify this Federal Rule. The Council was given no such authority. The power of the District of Columbia Courts in this respect is similar to the power of other courts created by Congress under Article I of the Constitution, such as the United States Military Court of Appeals, 10 U.S.C. § 866(f), and the United States Tax Court, 26 U.S.C.§ 7453. In each case, the rulemaking authority of these courts is shared only with Congress and the Supreme Court.

In the third place, the codification of certain specific rules of evidence in title 14 of the D.C. Code is not inconsistent with the grant to the Courts of general authority over rules of evidence not inconsistent with these laws. The provisions of title 14 — enacted by P.L. 88-241, 77 Stat. 517, and based upon the Act of March 3, 1903, 31 Stat. 1354 — apply to the United States District Court for the District of Columbia as well as to the local courts. This statutory enactment of rules of evidence based on laws that predated the rules enabling acts, clearly cannot be considered to diminish the basic authority of the Supreme Court or of the District of Columbia Courts over the promulgation of rules of evidence.

The absence of a specific prohibition of Council action with respect to the provisions of title 14 can scarcely support a wholesale reallocation to the Council of powers clearly vested in the District of Columbia Courts by the Court Reorganization Act and continued under the Self-Government Act. A specific prohibition is unnecessary, as the enactment of this rule of evidence by the Council would constitute an "act . . . with respect to [section 946] of title 11 of the District of Columbia Code . . ." in violation of section 602(a)(4). Moreover, it would constitute a clear encroachment on the judicial powers of the District of Columbia Courts recognized by section 431(a).

In conclusion, the authority to promulgate rules of evidence was not granted to the D.C. Council or shared with the Council, but vested exclusively in the District of Columbia Courts. Although the subject matter of this bill is not controversial since the Courts have already promulgated every word of it pursuant to their rulemaking authority, the precedent it would set would fundamentally change the balance of power between the judicial and legislative branches of the District government as envisioned by the Self-Government Act.

A number of other bills of the Council enacting rules of evidence in the Superior Court have been introduced, such as Bill No. 1-149, the "Medical Record Act of 1975", 21 D.C. Reg. 4397; Bill No. 1-172, the "District of Columbia Psychiatric Confidentiality Act", 22 D.C. Reg. 771; and Bill No. 1-214, the "Prior Sexual Conduct

Evidence Act of 1975", 22 D.C. Reg. 3011. Action on these bills has been suspended pending the resolution of the question of the allocation of powers between the judicial and legislative branches of the District government under the Self-Government Act.

The instant bill, as well as these others, represents a serious encroachment by the D. C. Council on the powers clearly granted to the District of Columbia Courts, in violation of the Self-Government Act.

THE WHITE HOUSE
WASHINGTON

February 25, 1976

Phil:

In response to your question, attached is the memo and our comments on Council Bill No. 1-137, supporting the position taken by Judge Reilly.

Ken

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: February 23 Time: 700pm

FOR ACTION: Dick Parsons
Max Friedersdorf
Ken Lazarus
Robert Hartmann

cc (for information): Jack Marsh
Jim Cavanaugh

FROM THE STAFF SECRETARY

DUE: Date: February 25 Time: 300pm

SUBJECT:

D.C. Enrolled Act 1-88-District of Columbia Shop-Book Rule Act

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

x____ For Your Comments ____ Draft Remarks

REMARKS:

Please return to Judy JOhnston, Ground Floor West Wing

Recommend disapproval in accordance with the views of the Department of Justice. Would also note that if the assertion of authority by the D.C. Council is allowed to stand in this instance, there are indications that further changes would be made in local rules of evidence which could further erode the process of law enforcement in the District.

Ken Lazarus

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

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

FEB 20 1976

MEMORANDUM FOR THE PRESIDENT

Subject: District of Columbia Enrolled Act 1-88 -- District of Columbia Shop-Book Rule Act

Last Day for Action

February 27, 1976 - Friday

Purpose

To make documentary records of business transactions admissible as evidence in judicial proceedings in the courts of the District of Columbia.

Agency Recommendations

Office of Management and Budget	Disapproval (Memorandum of disapproval attached)
Department of Justice	Disapproval

Discussion

Introduction

The District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act) provides that Acts of the City Council which have been vetoed by the Mayor and overridden by a two-thirds vote of the Council shall be transmitted by the Council Chairman to the President for review. These Acts become law unless the President expresses disapproval within thirty days. We understand that the Home Rule Act has been interpreted to provide that if the President declines to act, thereby approving the legislation, the Congress would then have thirty days for its consideration of the legislation. On the other hand, if the President disapproves the D.C. bill, the Mayor's veto would become final.

This is the second Council override of a mayoral veto since the Home Rule Act was enacted. A separate memorandum is being submitted to you on the other bill.

Summary of Act 1-88

This legislation would amend Title 14 of the D.C. Code, which contains rules of evidence, to exempt business records from the hearsay rule. Act 1-88, cited as the "District of Columbia Shop-Book Rule Act," provides that any documentary record (either the original written version or a photographic copy) of any business transaction, event, or occurrence shall be admissible as evidence in any civil or criminal judicial proceeding in the courts of the District of Columbia. The introduction of a reproduced record does not preclude admission of the original as evidence.

Background

Although, under the Home Rule Act, all legislative power granted to the District is vested in the Council, that power is subject to reservations by the Congress of its own constitutional powers and to specific limitations included in Title VI of the Home Rule Act. Specifically, Section 602 of that Act, headed "Limitations on the Council" prohibits the Council from enacting any act, resolution, or rule relating to the organization and jurisdiction of the District of Columbia courts, as set forth in Title 11 of the D.C. Code.

In addition, Section 602 similarly prohibits the Council from enacting any rule, resolution, or law with respect to the rules of criminal procedure for a period of two years from the date on which the first elected members of the Council take office.

The District of Columbia Court Reorganization Act of 1970, P.L. 91-358, which established the D.C. Superior Court and the D.C. Court of Appeals as local courts, forms Title 11 of the D.C. Code and provides, in part, that the Superior Court must operate under the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. It also provides that, with the approval of the D.C. Court of Appeals, the Superior Court may modify those rules and may adopt and enforce such other rules as it deems necessary. This rulemaking authority was not modified under the Home Rule Act.

Enactment of P.L. 93-595 (approved January 2, 1975), establishing new Federal Rules of Evidence, repealed certain rules of judicial procedure relating to the admissibility of evidence, including a 1936 Federal Shop-Book Rule, which was in force in the D.C. courts. P.L. 93-595, which took effect on July 1, 1975, and which includes a new shop-book rule as a rule of evidence, did not reference the D.C. courts as courts within the purview of the Act. Apparently believing that these new rules of evidence could not be applied in the D.C. Superior Court, and that the absence of a shop-book rule would have had a disruptive effect on litigation, the Board of Judges of that court reenacted a shop-book rule, which is substantially identical to this bill and the repealed 1936 Federal rule. The rule was approved by the D.C. Court of Appeals and became effective on July 1, 1975, thus coinciding with the effective date of the new Federal Rules of Evidence.

On December 16, 1975, the D.C. Council passed this legislation, because it viewed the Board of Judges' action in passing the rule as an emergency measure to be consummated by legislative enactment of substantive law. The Mayor, however, vetoed the bill on the grounds that (1) its passage was unnecessary in view of the legitimacy of the Superior Court's action, and (2) the Council exceeded its legislative authority under the Home Rule Act in passing a law affecting the judicial procedures of the D.C. courts. The Mayor's veto was overridden on January 27, 1976, by a unanimous vote of the eleven Council Members present.

Issue

The Federal interest in this matter is whether the intent of Congress in delegating legislative authority to the D.C. Council under the Home Rule Act has been appropriately carried out in this instance. The specific issue to be decided is whether or not the Council was within its authority under the Home Rule Act in enacting this bill. If not, it has exceeded its powers under the Home Rule Act and encroached upon the powers of the D.C. courts. However, neither the continued effect nor the content of the D.C. court's rule was contested by the Council; only the legitimacy of the Council's action is disputed.

Summary of Arguments

The arguments of the D.C. Corporation Counsel and the General Counsel of the D.C. Council which, respectively, formed the basis of the Mayor's veto and the Council's override are summarized below for your consideration. Briefly, the arguments presented by the Corporation Counsel are:

-- Under the D.C. Court Reorganization Act, which was not modified by the Home Rule Act, the power to prescribe rules of judicial procedure, including rules of evidence, was vested exclusively in the D.C. courts, subject only to acts of Congress.

-- The Home Rule Act prohibits the Council from enacting any act with respect to the provisions of Title 11 of the D.C. Code, which contains the courts' rulemaking authority.

-- Rules of evidence are an integral part of rules of judicial procedure, and, therefore, the D.C. courts' action in this regard was within the scope of their rulemaking authority under the 1970 D.C. Court Reorganization Act, i.e., Title 11 of the D.C. Code. For example, the Superior Court has replaced other Federal rules of procedure, including the new Federal Rules of Evidence, with the former versions of these rules.

Conversely, the General Counsel of the D.C. Council argues:

-- The shop-book-rule is a substantive law of evidence, which is quite distinct from rules of judicial procedure, and which, therefore, must be promulgated by legislation.

-- Codification of the D.C. rules of evidence in Title 14 of the D.C. Code instead of under Title 11 (dealing with the organization, jurisdiction, and authority of the D.C. courts) reflects Congressional intent that rules of evidence are not exclusively a function of the judiciary. P.L. 93-595, which established the new

Federal Rules of Evidence and affirmed the right of Congress to supersede rules of evidence promulgated by the Supreme Court, is referenced as analgous precedent.

-- The Home Rule Act limits the authority of the Council with respect to Title 11, not to Title 14.

View of the Department of Justice

The Department of Justice advises that the Shop-Book Rule, though technically a rule of evidence, is clearly in the nature of a procedural rule which could properly be encompassed within the rules of civil procedure. Therefore, promulgation of the Shop-Book Rule by the D.C. courts was well within the courts' express power to adopt rules of civil procedure, and, as such, is beyond the power of the Council under the Home Rule Act. The Department further advises that it is not necessary in this instance to determine whether Title 11 of the D.C. Code empowers the courts to adopt rules of evidence of a more substantive nature (although the courts did in fact do so on December 22, 1975). Similarly, it is not necessary to determine whether the Council retains authority to enact legislation altering the rules of evidence now codified in Title 14 of the D.C. Code. In this connection, the D.C. Corporation Counsel has noted that the Council has suspended action on a number of bills to enact rules of evidence for the Superior Court, pending your decision.

Conclusion

We concur with the views of the Mayor and the Department of Justice that this bill be disapproved on the ground that the D.C. Council has exceeded its authority in this instance and encroached upon the authority of the courts to enact rules of procedure. Your decision on this matter would, therefore, be based on a technical legal interpretation of the distinctions between rules of procedure and evidence, judgments generally reserved to the courts or the Congress. You may wish to consider the alternative of not taking any action on this bill. As noted earlier in this memorandum, the bill would then go to the Congress which would have 30 days to make its judgment. It might be more appropriate to have the Congress

settle the jurisdictional question of the relative authority of the D.C. courts and the City Council rather than draw the Presidency into narrow legal questions.

A proposed statement of disapproval to the Chairman of the City Council is attached for your consideration.

James M. Frey
Assistant Director for
Legislative Reference

Enclosures

TO THE CHAIRMAN OF THE DISTRICT OF COLUMBIA CITY COUNCIL

In accordance with the District of Columbia Self-Government and Governmental Reorganization Act, I disapprove Act 1-88, the District of Columbia Shop-Book Rule Act.

The Act would make documentary records of business transactions admissible as evidence in any civil or criminal judicial proceeding in the courts of the District of Columbia. This "shop-book rule" is substantially identical to the one adopted by the D.C. Superior Court which took effect on June 30, 1975.

The issue is whether the City Council was acting within its authority under the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act) in passing a law affecting the judicial procedures of the D.C. courts. The Federal interest is whether the intent of Congress in delegating legislative authority to the Council under the Home Rule Act has been appropriately carried out in this instance.

I am advised by the Department of Justice that this "shop-book" rule is clearly within the nature of a procedural rule which could properly be encompassed within the rules of civil procedure and that promulgation of the rule is clearly within the express power of the District of Columbia courts to adopt rules of civil procedure and, as such, is beyond the power of the City Council.

Therefore, since the Council has exceeded its statutory authority in enacting this bill, I am disapproving Act 1-88.

Department of Justice
Washington, D.C. 20530

February 20, 1976

Honorable James T. Lynn
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. Lynn:

This is in response to your request for the views of the Department of Justice on the District of Columbia enrolled bill B-1-137, the District of Columbia Shop-Book Rule Act, which was submitted to the President for approval on January 29, 1976. Under section 404(e) of the District of Columbia Self-Government and Governmental Reorganization Act (P.L. 93-198), a bill passed by a two-thirds majority of the District of Columbia City Council over a mayoral veto becomes law at the end of the thirty-day period beginning on the date of transmission to the President, unless disapproved by the President within that period.

Bill 1-137 is substantially identical with Rule 43-I adopted by the D.C. Superior Court on June 30, 1975, which, in turn, is substantially identical with the relevant provisions of the U.S. Code since repealed. Those provisions essentially allow the introduction into evidence of records regularly made in the normal course of any recurring business, to include accurate photographic copies. They are also consistent with Rule 803 (6) of the Federal Rules of Evidence to the same effect, although different in form. Thus, there is no dispute over the substance of the enrolled bill; Mayor Washington, the D.C. Superior Court, and the D.C. City Council all agree on its desirability.

The issue between the Mayor and Council is a more fundamental one. In the Mayor's view, the Council lacks statutory authority to legislate rules of evidence, and any action by the Council to that effect must be without force. Mayor Washington's veto of the Council enactment was correct in this instance although the reasons stated in his message of January 7, 1976, sweep too broadly. The Justice Department recommends that the President disapprove the enrolled bill, enacted by the Council over the Mayor's veto.

The City Council is the sole legislative body of the District of Columbia government, and all legislative power granted to the District is vested in and may be exercised by the Council, Home Rule Act, Sec. 404(a). However, that power is subject to careful reservations by the Congress of its own constitutional powers and to specific limitations included in title VI of the Home Rule Act. Indeed, the very grant of power in section 404(a) begins with the words, "[s]ubject to the limitations specified in title VI of this Act, . . ." Thus, there are real limits on the Council's authority to act.

The most specific of those title VI limitations are set forth in Section 602 of the Home Rule Act. That section, headed "Limitations on the Council," reads in pertinent part as follows:

> (a) The Council shall have no authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act, or to --
>
> *
> *
> *
>
> (4) enact any act, resolution, or rule with respect to any provision of title 11 of the District of Columbia Code (relating to organization and jurisdiction of the District of Columbia courts); . . .

Therefore any action by the City Council with respect to matters controlled by any provision of title 11 of the District of Columbia Code is beyond the authority of the Council and should properly be disapproved by the Mayor and by the President. The question then becomes one of whether enactment of the Shop-Book Rule is such an action.

The courts of the District of Columbia are created by Act of Congress. The Court Reorganization Act (P.L. 91-358, 84 Stat. 473) forms title 11 of the present D.C. Code, a title over which the D.C. City Council has no legislative authority. Section 718(a) of the Home Rule Act continues the Superior Court and Court of Appeals for the District in existence even after Home Rule, and section 431(a) of the same Act vests the whole judicial power of the District in those two courts. That authority is to be exercised under the terms of title 11 of the D.C. Code.

Pursuant to Section 11-946 of title 11, the Superior Court must operate under the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. With the approval of the District of Columbia Court of Appeals, the Superior Court may modify those rules and may adopt and enforce such other rules as it deems necessary. The Superior Court has adopted, with the approval of the Court of Appeals, its new Rule 43-I, which is identical in substance with the enrolled bill under discussion. Rule 43-I became effective in the Superior Court June 30, 1975.

Rule 43-I is technically a rule of evidence but it is clearly in the nature of a procedural rule which could properly be encompassed within the rules of civil procedure. Prior to enactment of the Federal Rules of Evidence, several provisions of the Federal Rules of Civil Procedure contained evidentiary provisions of a similar nature. See, e.g., Rule 26(b)(2), Rule 32(a)(1), Rule 33(c), Rule 43, Rule 44, Fed. Rules of Civ. Proc. (1970). Title 11 of the District of Columbia Code clearly empowers the District of Columbia Courts to adopt rules of procedure of this nature and the Home Rule Act just as clearly restricts the power of the Council to affect such rules.

It is not necessary in this instance to determine whether title 11 of the D.C. Code empowers the courts to adopt rules of evidence of a more substantive nature (although the courts have, in fact, done so). Nor is it necessary to determine whether the Council retains authority to enact legislation altering the rules of evidence now codified in Title 14 of the D.C. Code. Promulgation of the Shop-Book Rule by the District of Columbia courts is well within the courts' express power to adopt rules of civil procedure and, as such, is beyond the power of the City Council. Because of the ramifications of a veto with respect to the separate issue of the power of the Council to modify statutory rules of evidence, such as those contained in Title 14, the Department of Justice recommends that veto of the Council's action be premised on the narrow ground that the Shop-Book Rule was adopted by the courts as an exercise of its undisputed power to adopt rules of civil and criminal procedure.

Sincerely,

Michael M. Uhlmann
Assistant Attorney General

Attachments

Home Rule Act Pub. L. 93-198, 87 Stat. 774

Sec. 404 Powers of the Council

(a) Subject to the limitations specified in title VI of this Act, the legislative power granted to the District by this Act is vested in and shall be exercised by the Council in accordance with this Act. . . .

Sec. 602 Limitations on the Council

(a) The Council shall have no authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act, or to--

. . .(4) enact any act, resolution, or rule with respect to any provision of title 11 of the District of Columbia Code (relating to organization and jurisdiction of the District of Columbia courts);

D.C. Code

11-946 Rules of Court

The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in title 23) unless it prescribes or adopts rules which modify those Rules. Rules which modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court. The Superior Court may adopt and enforce other rules as it may deem necessary without the approval of the District of Columbia Court of Appeals if such rules do not modify the Federal Rules. The Superior Court may appoint a committee of lawyers to advise it in the performance of its duties under this section.

July 29, 1970, Pub. L. 91-358, §111, title I, 84 Stat. 487. (emphasis added)

General Counsel

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

Copy sent to Counsel 3/9

MAR 2 - 1976

MEMORANDUM FOR: PHIL BUCHEN

FROM: JIM LYNN

This responds to your request for comments on the attached memorandum concerning standards of conduct.

I think the memorandum is fine but agree that it needs some editorial comment. I suggest insertion of the following paragraph on the first page following the material quoted from Executive Order 11222:

> As we enter a Presidential election year, it is especially important to assure that the conduct of government business is beyond reproach. Officials in your departments should be aware of the employee standards of conduct and specific statutory prohibitions that are applicable to such conduct in the awarding of governmental contracts, grants and loans. The purpose of this memorandum is to provide a central listing of the various prohibitions under which each of your Departments has been governed in this area.

General Counsel

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

MEMORANDUM FOR: PHIL BUCHEN

FROM: JIM LYNN

This responds to your request for comments on the attached memorandum concerning standards of conduct.

I think the memorandum is fine but agree that it needs some editorial comment. I suggest insertion of the following paragraph on the first page following the material quoted from Executive Order 11222:

> The standards set forth in the Executive Order take on special significance in a Presidential election year. The history of such periods is replete with allegations that the Administration in office was manipulating the public business for political gain. The President insists that in this Administration there shall be no basis for such allegations. He expects that the affairs of your Departments will continue to be conducted not only in compliance with the statutes below, but in accord with the public's perception of the public interest.

Attachment

cc:
DO Records
Director's chron
Director
Deputy Director
✓General Counsel

DO:GC:WMNichols:sc - 2/13/76

THE WHITE HOUSE

WASHINGTON

February 11, 1976

MEMORANDUM FOR: JIM LYNN

FROM: PHIL BUCHEN P.

Please give your comments on this initial draft of the memorandum we discussed. I had thought of adding to this straightforward compilation of the applicable rules and statutes some editorial comment that might avoid a tendency to policies which are unnecessarily apolitical or as a matter of precaution favor interests of a party not in control of the Executive branch. However, I am at a loss to come up with language that could not be misconstrued.

THE WHITE HOUSE

WASHINGTON

MEMORANDUM FOR

THE CABINET

SUBJECT: Standards of Conduct and Statutory Prohibitions Involved in Governmental Contract, Grant and Loan Decisions

This memorandum summarizes employee standards of conduct and specific statutory prohibitions that are applicable to such conduct in the awarding of governmental contracts, grants and loans. It provides a central listing of the various prohibitions under which each of your Departments has been governed in this area.

Executive Order 11222 prescribes standards of ethical conduct for government officers and employees. Section 201(c) of the E. O. directs Federal employees to avoid any action "which might result in, or create the appearance of:

(1) using public office for private gain;
(2) giving preferential treatment to any organization or person;
(3) impeding government efficiency or economy;
(4) losing complete independence or impartiality of action;
(5) making a government decision outside official channels; or
(6) affecting adversely the confidence of the public in the integrity of the Government."

Below is a description of each of the relevant statutory prohibitions:

18 U.S.C. § 201 prohibits the seeking or acceptance of bribes by public officials. Section 201(c) specifically prohibits any public official or person selected to be a public official from corruptly seeking or accepting anything of value for himself or herself or for any other person or entity, in return for:

"(1) being influenced in his [or her] performance of any official act; or
"(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, on the United States; or
"(3) being induced to do or omit to do any act in violation of his [or her] official duty."

Section 201(g) specifically prohibits any present or former public official or any person selected to be a public official from seeking or accepting anything of value for himself or herself "for or because of any official act performed by him [or her] or to be performed" by him or her.

18 U.S.C. § 595 prohibits any Federal, state or local employee from using his or her official authority derived from Federal loan or grant programs to interfere with any Federal election. It shall be unlawful for the above-mentioned employee

> ". . . in connection with any activity which is financed in whole or in part by loans or grants made by the United States, or any department or agency thereof, . . . [to use his or her] official authority for the purpose of interfering with, or affecting, the nomination or the election of any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner, . . ."

18 U.S.C. § 598 prohibits voting coercion by means of relief appropriations. This provision makes it illegal for a person to use any part of any appropriation made by Congress for "work relief, relief, or for increasing employment by providing loans and grants for public works projects," or to exercise or administer any authority conferred by any appropriation act "for the purpose of interfering with, restraining, or coercing any individual in the exercise of his [or her] rights to vote at any election."

18 U.S.C. § 600 prohibits the promise of a contract, employment, appointment or compensation in exchange for political support. It shall be unlawful for a person to promise

> ". . . any employment, position, compensation, contract, appointment, or other benefit, provided for or made possible in whole or in part by any Act of Congress, or any special consideration in obtaining any such benefit, to any person as consideration, favor, or reward for any political activity or for the support of or opposition to any candidate or any political party in connection with any general or special election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, . . ."

18 U.S.C. § 601 prohibits the deprivation of employment or other benefit under work relief or relief programs because of political activity. It shall be unlawful for a person to deprive, attempt to deprive, or threaten to deprive

> ". . . any person of any employment, position, work, compensation, or other benefit provided for or made possible by any Act of Congress appropriating funds for work relief or relief purposes, on account of race, creed, color or any political activity, support of or opposition to any candidate or any political party in any election, . . ."

18 U.S.C. § 611 prohibits political contributions by Federal government contractors or contractors in the process of negotiating a government contract, and prohibits the solicitation of such contributions by government officials or other persons. It shall be unlawful for any person who is

> ". . . entering into any contract with the United States or any department or agency thereof either for the rendition of personal services or furnishing

> any material, supplies, or equipment to the United States or any department or agency thereof or for selling any land or building to the United States or any department or agency thereof, if payment for the performance of such contract or payment for such material, supplies, equipment, land or building is to be made in whole or in part from funds appropriated by the Congress, at any time between the commencement of negotiations for and the later of (1) the completion of performance under, or (2) the termination of negotiations for, such contract or furnishing of material, supplies, equipment, land or buildings, . . . [to directly or indirectly make] any contribution of money or other thing of value, or . . . [to promise] expressly or impliedly to make any such contribution, to any political party, committee, or candidate for public office or to any person for any political purpose or use; . . ." and

it shall be unlawful for any person to knowingly solicit any such contribution.

THE WHITE HOUSE

WASHINGTON

March 30, 1976

MEMORANDUM FOR: JAMES LYNN

FROM: PHILIP BUCHEN

Quite some time ago, you suggested to the Counsel's Office that a memorandum be sent to the Cabinet delineating the standards of conduct and statutory prohibitions involved in Governmental contract, grant and loan decisions. I have asked Jim Connor whether he wishes to sign the attached memorandum to the Cabinet. He believes it would be more appropriate for the memorandum to be sent by the Office of Management and Budget to the General Counsels of all the Departments and Agencies since the White House is not involved in the area of contract, grants or loans. I agree with this assessment.

It is my recommendation that you sign the attached memorandum and that it be addressed to the Heads or General Counsels of all Departments and Agencies. This would necessitate retyping the first page on OMB stationery as well as making the appropriate changes in reference to the addressees. You might also wish to include your own closing sentence on page four.

Attachment

cc: James Connor