

AS:DBM:sw:rmd.

cc: Mr. Scalia  
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Oct. 16, 1975

*Mr Pottinger*, CRT  
AS/jh  
10/21/75

Antonin Scalia  
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Arab boycott-draft memorandum for the President

This is in response to your request for comments on the draft memorandum on possible responses to the Arab boycott, sent to you and the other members of the NSC Under Secretaries Committee on September 29, 1975.

Recommendation 1

We support recommendation 1(a), subject to the following qualifications: It should be made clear that the recommendation is not intended to imply that the mere refusal to use an employee for a foreign job is a violation of the civil rights laws when the foreign country will not admit the person or will not permit the person to function because of racial, religious or sex discrimination. Also, we suggest that age be eliminated from the list of grounds; inclusion of a prohibition against age discrimination is neither necessary nor desirable in the present context.

We support recommendation 1(b) if it is modified to conform with our view that Executive Order 11246 (or Title VII) would not be violated by such conduct as the failure of a company to use an employee of the Jewish faith on a project in Saudi Arabia solely because Saudi Arabia would not grant the person a visa. This Office disagrees with the views of the Solicitor of Labor and of the Civil Rights Division regarding this matter, and that disagreement should be resolved in connection with the present Presidential decisions. In our view, there is clearly no act of discrimination involved in the employer's inability to use the employee -- or even to secure his entry -- under the law of the foreign country; and there is small likelihood of the Supreme Court's reaching such a conclusion, unless induced to do so by administrative adoption of such an unreasonable interpretation on the part of the Department of Labor and the Civil Rights Division (or EEOC). The effect of such an interpretation, of course, is to prohibit American companies from doing business in any country with

discriminatory visa or employment policies. We believe that acceptance of such an interpretation by the courts would have potentially disastrous consequences: There is little political prospect that the law or Executive order, once interpreted in this fashion, could be repealed or modified; and if, as is very likely, foreign countries refuse to permit their own domestic policies concerning visas and domestic work customs (e.g., the permissible role of women) to be governed by United States law, we may find that we have quite inadvertently, and quite irreversibly, prohibited American companies from doing any business whatever within a number of financially significant countries. We recommend that this legal issue, as it relates to Executive Order 11246, be presented to the Attorney General for solution, and that appropriate legal guidance or Presidential direction be given to the Department of Labor and the Civil Rights Division.

I may note in this connection that there are several lines of enforcement which may be drawn short of the position that the failure to send an employee to Saudi Arabia because of Saudi Arabia's refusal to admit him constitutes a violation of our civil rights laws. It can be asserted that the refusal to hire a person of the Jewish faith for a job in Saudi Arabia, in precise anticipation of such denial, constitutes a violation. We believe this interpretation is correct, although there is no Federal case law on the point. It might be argued, even beyond this, that to establish possession of a visa as a condition for employment would violate the civil rights laws where the country in question withholds visas for reasons improper under our domestic law. It is by no means clear to me that this would violate the civil rights laws, and I believe the Executive branch should consider the results carefully before it takes even this step. Those results would be, of course, the required hiring of a number of people who cannot be used for the job for which the hiring is conducted -- or, in effect, the exclusion of small companies (who cannot use such surplus employees elsewhere in their organization) from overseas business in many countries of the Middle East. If this position is adopted, however, it should in our view be the absolute limit of the extension which the Executive branch should be prepared to support.

We support recommendation 1(c).

## Recommendation 2

We support recommendation 2. Regarding disclosure, on a prospective basis, of reports filed by exporters, we defer to the Department of Commerce and other organizations more directly involved.

## Recommendation 3

There is no doubt that the mere raising of an eyebrow by the Comptroller of the Currency, the Federal Reserve Board, and the FDIC will suffice to achieve the desired effect upon the banks which are so entirely within their control; and it is unlikely that any bank would choose to bring a lawsuit to establish the ultra vires nature of the anti-discrimination directives from those authorities. On the other hand, it is precisely in this type of a situation that the President's obligation to ensure agency action in accordance with law is the highest. There is considerable question whether discrimination in dealing with customers constitutes an "unsafe or unsound banking practice" within the meaning of the applicable laws, and whether there is any other authority for imposition of the requirement in question. Cf. NAACP v. FPC, No. 72-1959, D.C. Cir. (decided Feb. 5, 1975). \*/ In our view, these issues should be thoroughly researched. If the authority of the banking agencies is doubtful, we would support, instead of recommendation 3, a legislative proposal to confer such authority.

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\*/ In the cited case, the court of appeals rejected the view that the FPC has broad power, under the applicable "public interest" standards, to enforce legal requirements of nondiscrimination in employment. Regarding the present recommendation, which goes beyond the enforcement of existing legal requirements and extends to the creation of entirely new ones (nondiscrimination in selection of customers), the existence of authority may be even more questionable.

#### Recommendation 4

With the qualifications noted below, we support recommendation 4, and have prepared the indicated statutory language. It is our understanding that the prohibition is to apply only to the application of coercion, and not to the discrimination which occurs as a result of the coercion. The present text of the draft does not make this clear, and it should be revised.

Our one reservation from the description of the legislation proposed by recommendation 4 is the statement that "it would have specific application to . . . Arab companies or governments." Under accepted principles of international law, it is possible to reach the activities of foreign governments when they are acting in a commercial, rather than governmental, capacity. Initially, however, it does not seem to me necessary to take the extraordinary and perhaps provocative step of specifically including governments within the prohibition of the law. Most substantial commercial activity which must be conducted in this country will be conducted through business enterprises; or, to look at it another way, any business conducted by a government can be conducted as well abroad (where its assets cannot be reached) as within this country. The Holtzman bill, H.R. 5246, does not apply its prohibition to foreign governments as such, and we would propose the same course (i.e., limiting the prohibition to the conduct of "business enterprises," including government-owned businesses, or their agents).

#### Recommendation 6

We support recommendation 6.

#### Recommendation 7

We support recommendation 7.

However, it is unclear how recommendation 7 relates to the Commerce Department's practice concerning dissemination of information on export opportunities. In our view, that practice raises a serious issue of inconsistency with the policy of the Export Administration Act and, when anti-Jewish (as opposed to anti-Israel) stipulations are involved, a serious issue of violation of the "equal protection" concepts of the Fifth Amendment.