

# WITHDRAWAL SHEET

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DOC NO	Doc Type	Document Description	No of Pages	Doc Date	Restrictions	
1	MEMO	ROBERTS TO FIELDING RE NATIONAL CANCER ADVISORY BOARD (PARTIAL)	3	4/17/1984	B6	760
2	MEMO	ROBERTS TO JOHN HERRINGTON RE NATIONAL CANCER ADVISORY BOARD (OPEN IN WHOLE)	2	4/17/1984	B6	761

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- B-3 Release would violate a Federal statute [(b)(3) of the FOIA]
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THE WHITE HOUSE

WASHINGTON

April 17, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: Appointments of David Korn, Louise C. Strong, Gertrude Elion, Helene Brown, and Reappointment of Roswell K. Boutwell as Members of the National Cancer Advisory Board

I have reviewed the Personal Data Statements submitted by the above-referenced prospective appointees to the National Cancer Advisory Board. The functions of the Board include reviewing the programs of the National Cancer Institute, collecting and disseminating information on cancer studies, and reviewing applications for grants for cancer research projects. 42 U.S.C. § 286b(b). The President is authorized to appoint 18 members to the Board, no more than 12 of whom may be scientists or physicians, no more than eight of whom may be representatives of the general public, and not less than five of whom shall be knowledgeable in environmental carcinogenesis. The scientists and physicians must be "among the leading scientific or medical authorities outstanding in the study, diagnosis, or treatment of cancer or in fields related thereto," and at least two of the physicians must be physicians primarily involved in treating cancer patients. Each Board member must be "especially qualified" to appraise the work of the National Cancer Institute. 42 U.S.C. § 286b(a) (1). Reappointments are specifically authorized by 42 U.S.C. § 286b(a) (2) (B).

In order to verify compliance with the arcane numerical requirements outlined above, I reviewed the PDS's of the six members appointed on June 12, 1982, in addition to those of the above-referenced prospective appointees, and obtained information concerning the six members appointed on May 14, 1980, from Katherine Reardon of HHS. Reardon handles advisory committees for the Secretary. Based on this review and information, it appears that we are presented with a legal "Catch-22" concerning compliance with the requirements of 42 U.S.C. § 286b(a) (1). Of the 12 members whose terms have not expired, there are eight scientists or physicians but no carcinogenesisists. We must, therefore, appoint five carcinogenesisists this time. To comply with the requirement that no more than 12 of the members be scientists or physicians, however, we can appoint no more than four scientists

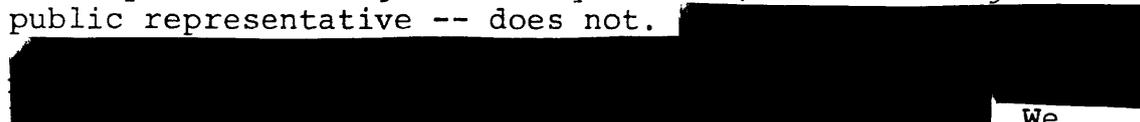
- 2 -

or physicians. Since there is no such thing as a carcinogenesisist who is not a scientist, we are in a quandary. If we satisfy the carcinogenesis requirement, we will violate the scientist or physician cap. If we comply with the cap, we will violate the carcinogenesis requirement. This difficulty is the result of using up the scientist or physician slots in prior appointments on non-carcinogenesisists.

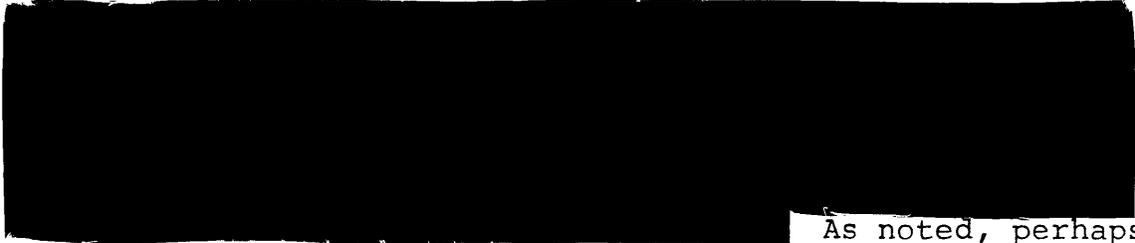
At Reardon's suggestion I contacted Dr. Vincent DeVita, the Director of the National Cancer Institute, who had reviewed the prospective appointees. DeVita recognized the apparent problem, but argued that the scientist or physician cap was not violated because Tim Lee Carter, M.D., appointed in 1982, should not be considered a physician but rather a lay member. Carter served in Congress from 1964-1980, and while he is a licensed physician he did not practice for 16 years and even now only sees an occasional patient. DeVita argued that there was precedent for such a functional rather than literal reading of the "scientist or physician" cap. According to DeVita, a physicist was carried on the Board in the past as a non-scientist, despite his doctorate, since his scientific expertise was entirely unrelated to the activities of the Board.

I am not particularly comfortable arguing that Tim Lee Carter, M.D., should not be considered a "physician," as that term is used in the statute. The argument is a colorable way out of a dilemma, however, and is no more troublesome than simply violating the carcinogenesis requirement by not appointing five carcinogenesisists or the physician cap by doing so. Accordingly, I recommend that we insist on the appointment of five carcinogenesisists, and argue that Carter is not a "scientist or physician" as those terms are used in the statute if anyone asserts we have violated the scientist or physician cap.

DeVita advises that Strong, Elion, Korn, and Boutwell satisfy the carcinogenesis requirement; Brown -- a general public representative -- does not.

 We should advise Presidential Personnel that whomever is appointed to this open seat must satisfy the carcinogenesis requirement. That will result in the required five carcinogenesisists serving on the Board.

A memorandum to Herrington is attached for your review and signature. The memorandum clears the above-referenced five individuals, 



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As noted, perhaps sending this memorandum will help force the issue.

Attachment

THE WHITE HOUSE

WASHINGTON

April 17, 1984

MEMORANDUM FOR JOHN S. HERRINGTON  
ASSISTANT TO THE PRESIDENT  
FOR PRESIDENTIAL PERSONNEL

FROM: FRED F. FIELDING  
COUNSEL TO THE PRESIDENT

SUBJECT: Appointments of David Korn, Louise C. Strong, Gertrude Elion, Helene Brown, and Reappointment of Roswell K. Boutwell as Members of the National Cancer Advisory Board

Counsel's Office has reviewed the Personal Data Statements submitted by the above-referenced prospective appointees to the National Cancer Advisory Board. Of the 18 members appointed by the President to the Board, no more than 12 may be scientists or physicians, no more than eight may be representatives of the general public, not less than five must be knowledgeable in environmental carcinogenesis, and at least two must be physicians primarily involved in treating cancer patients. 42 U.S.C. § 286b(a)(1). The background and qualifications of this latest group of prospective appointees cannot be assessed in a vacuum but must be considered together with the background and qualifications of the sitting Board members, to ensure that the composition of the total Board satisfies the statutory requirements.

Our office is of course not qualified to determine who is or is not "knowledgeable in environmental carcinogenesis," but we have been advised by Dr. Vincent DeVita, Director of the National Cancer Institute, that none of the members appointed in 1980 and 1982 satisfy this requirement. In filling the six vacancies created by expiration of terms on March 9, 1984, therefore, five of our appointees must be knowledgeable in environmental carcinogenesis. DeVita advises that Strong, Elion, Korn, and Boutwell meet this requirement; Brown does not. Whomever is chosen to replace Irving J. Selikoff and fill the sixth vacancy thus must meet the carcinogenesis requirement.

Appointing five carcinogenesisists, however, presents a problem with the requirement that no more than 12 Board members be scientists or physicians. Of the sitting Board members whose terms do not expire until 1986 or 1988, eight are scientists or physicians. Appointing five carcinogenesisists

would result in exceeding the cap of 12 scientists or physicians. Not appointing five carcinogenesisists, however, would result in violating the carcinogenesis requirement. This highly unsatisfactory quandary is the result of using up scientist and physician slots in prior appointments on scientists or physicians who were not carcinogenesisists.

Dr. DeVita advised us that one of the sitting members, Tim Lee Carter, M.D., is considered a lay member and not a "scientist or physician." Carter served in Congress for 16 years and has a largely inactive medical practice. While we are not entirely content with finessing the problem by viewing Dr. Carter as not being a physician, and note that the composition of the Board may be open to challenge, adopting this argument is no more troubling than failing to appoint five carcinogenesisists, as required by statute.

Not surprisingly, the prospective appointees have associations of different types with various institutions or individuals that could at some point apply for grants reviewable by the Board. Obviously, those associations will have to be reviewed on a case-by-case basis should the institutions or individuals apply for grants or otherwise come under the jurisdiction of the Board. If necessary, affected members will have to recuse themselves from the review and certification process with respect to those particular applications.

Assuming that your office confirms what we have been told -- that Strong, Elion, Korn, and Boutwell satisfy the carcinogenesis requirement -- and assuming that whomever is appointed to replace Irving Selikoff also satisfies the carcinogenesis requirement, we have no objection to proceeding with the appointments of Strong, Elion, Korn, Brown and the reappointment of Boutwell.

FFF:JGR:aea 4/17/84  
cc: FFFielding/JGRoberts/Subj/Chron