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1	MEMO	ROBERTS TO DIANA HOLLAND RE HOLIDAY PLANS (OPEN IN WHOLE)	1	11/20/1984	B6	1263

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C. Closed in accordance with restrictions contained in donor's deed of gift.

THE WHITE HOUSE

WASHINGTON

November 2, 1984

MEMORANDUM FOR DIANNA G. HOLLAND

FROM: JOHN G. ROBERTS

SUBJECT: Appointment of Deputy Assistant Attorney General Richard B. Abell to the Board of Directors of the Federal Prison Industries

I have reviewed the Personal Data Statement submitted by Deputy Assistant Attorney General Richard Abell in connection with his prospective appointment to the Board of Directors of the Federal Prison Industries. By virtue of 18 U.S.C. § 4121, the President is authorized to appoint six individuals to this Board, including a representative of the Attorney General. Mr. Abell will serve on the Board as the Attorney General's representative.

Federal Prison Industries is a government corporation of the District of Columbia charged with administering the prison industries program of the Federal prison system. Nothing in Mr. Abell's PDS presents any difficulties with his prospective appointment; as a Department of Justice employee he is appropriately situated to represent the Attorney General on the Board.

I have not yet received a PDS from Joanna C. Maitland, and advised Presidential Personnel of her delinquency some time ago.

THE WHITE HOUSE

WASHINGTON

November 5, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: H.R. 5479 -- Equal Access to Justice Act Amendments

Richard Darman has asked for comments on the above-referenced enrolled bill by close of business today. This bill would permanently reauthorize the Equal Access to Justice Act, which expired pursuant to a sunset provision on September 30, 1984, and also make several significant changes in the Act. The Act authorizes the award of attorneys fees and other expenses to parties prevailing in civil cases against the United States when the United States cannot prove that its position was "substantially justified."

Although the Administration supports permanent retroactive reauthorization of the Act, Justice, OMB, and most other agencies oppose this bill, primarily because of the change it would make in defining what the "position of the United States" is that must be "substantially justified." Under the former Act, "position of the United States" was the litigating position of the Government. This bill would provide that "position of the United States" refers to the justification for underlying agency action. Thus, a court considering a fee application under the Act would not simply consider whether the Government position articulated in court passed some "red-faced" test, but would have to conduct a collateral inquiry into why the agency took the action in the first place. It is inevitable that such an inquiry would precipitate discovery of the most sensitive sort into the agency deliberative process, with a likely chilling effect on the free exchange of ideas by agency personnel. Justice and other agencies also object to provisions in H.R. 5479 that would expand the availability of awards, liberally allow interest on awards, and prohibit agency review of fee determinations by agency administrative law judges. These other objections are clearly of less significance than the change in the definition of "position of the United States."

The Small Business Administration recommends approval of the bill, noting its importance to the small business community and stressing that the Act has proven far less expensive than critics predicted.

I agree with Justice, OMB, and the other agencies that disapproval of H.R. 5479 is warranted because of the change in the definition of "position of the United States." That change would dramatically expand the scope of attorneys fees litigation and compel intrusive inquiries into the agency decision-making process. It would require agency bureaucrats at every level to be as smart as the Justice Department lawyers who defend their decisions in court, since an improper justification for agency action at any level could be the basis for a fee award, even if the justification is corrected before trial.

To lessen the potential fall-out from disapproval, Justice recommends that the President issue a memorandum to department and agency heads, calling upon them to ensure that their positions are "substantially justified," and to accept and retain fee applications in the hope that the Equal Access to Justice Act will eventually be retroactively reauthorized. Justice refers to this memorandum in its proposed memorandum of disapproval, which appropriately focuses on objections to the change in the definition of "position of the United States." I have reviewed both proposed memoranda, and have no objections.

Attachments

THE WHITE HOUSE

WASHINGTON

November 5, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: H.R. 5479 -- Equal Access to Justice Act Amendments

Counsel's Office has reviewed the above-referenced enrolled bill, and has no objection to the recommendation that the President withhold his approval of this bill. I also have no objection to the proposed memorandum of disapproval or to the proposed memorandum for department and agency heads.

FFF:JGR:aea 11/5/84
cc: FFFielding/JGRoberts/SUbj/Chron

THE WHITE HOUSE

WASHINGTON

November 7, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Representative Edwards and the FBI

You have asked for more information on the attached story from the November 1 New York Times. (Tab A). The FBI's National Crime Information Center (NCIC) is a clearinghouse for crime information provided by law enforcement entities at the Federal, state, and local level. The NCIC is perhaps best known as the source for the Bureau's annual crime statistics, but it also provides information of active investigative significance to law enforcement agencies. For some time the FBI has been considering adding a "white collar crime" component to its NCIC files; at present information about such crimes is generally not compiled and thus not available to law enforcement agencies pursuing investigations in this area. Congressman Don Edwards (D-CA) has expressed concern that compiling and making available information on individuals suspected of involvement in white collar crime would violate the civil liberties of those individuals.

On October 12 the Bureau advised the staff of the House Subcommittee on Civil and Constitutional Rights, chaired by Edwards, that staff counsel would not be permitted to attend meetings of the Planning and Evaluation Subcommittee of the NCIC Advisory Policy Board. The meetings, which took place October 15-16, were called to consider adding white collar crime to NCIC coverage. Edwards protested this decision in an October 12 letter to Judge Webster, citing the provisions of the Federal Advisory Committee Act making the open meeting requirements of that Act applicable to subcommittees, and the separate provision directing each committee of the House to "make a continuing review of the activities of each advisory committee under its jurisdiction." (Tab B). Edwards later wrote to the Attorney General to object in general to plans to expand coverage of the NCIC. (Tab C).

Justice has not yet responded to either of Edwards's letters. Judge Webster signed a reply dated October 31, contending that the subcommittee was not an advisory committee itself but simply functioning as staff for the advisory committee, an argument recently accepted in National Anti-Hunger Coalition v. Executive Committee of the President's

Private Sector Survey on Cost Control, 557 F. Supp. 524 (D.C. 1983), aff'd, 711 F.2d 1071 (D.C. Cir. 1983). (Tab D). This reply has not been sent, because of internal Justice Department objections to the validity of its legal reasoning. I tend to agree with those within Justice who think the argument in Webster's October 31 proposed reply is not supported by the facts. The Planning and Evaluation Subcommittee, as its very name suggests, was not simply gathering data for the Advisory Policy Board but carrying out advisory committee functions in its own right. As noted, Justice is still working on a reply to Edwards, who probably is correct on the Federal Advisory Committee Act points.

THE WHITE HOUSE

WASHINGTON

November 8, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Legislative Agenda

You have asked for our views on a legislative agenda for the second term. The following list of suggestions is limited to problems that have arisen in the course of the past years within the scope of my official duties.

1. Portal-to-Portal. As you know, the 1983 GAO opinion construed the existing portal-to-portal statute very narrowly, in a manner that prohibited much of what has been accepted portal-to-portal practice. The Comptroller General recommended corrective legislation and granted a "grace period" during which he would refrain from enforcing his restrictive view of the statute. You have discussed this matter with Joe Wright; action will need to be taken very soon to avoid embarrassing application of the existing statute against Administration officials, including members of the White House staff. If possible the legislation should also address another problem that arose in the first term, the use of official transportation by Cabinet spouses.

2. Judges' Pay. We have also discussed the upcoming report of the Quadrennial Commission and the anticipated recommendation that the mechanism for determining judicial compensation be altered. Possibilities include an automatic cost-of-living increase and/or an annual increment for each year of continued service, up to a set number of years. In any event, there is strong sentiment that the current linkage of judicial salaries with Congressional and executive salaries is ill-advised.

3. Federal Advisory Committee Act. This Act is perhaps the single piece of legislation most frequently criticized in judicial opinions. It not only imposes considerable costs on executive branch decision-making but also provides easy opportunities for vexatious litigation (as in the case of the President's Private Sector Survey on Cost Control). The problems with FACA have been so extensively documented in court opinions that there may be an opportunity to amend the Act without being accused of favoring "government in the shadows."

4. Enhanced Impoundment Authority. The President continues to call for line-item veto authority. I do not think sufficient attention was given last term to the possibility of gaining the substance of a line-item veto through enhanced impoundment authority. Justice recommended this approach, which OMB declined to push for what I believe were unpersuasive reasons. I think it deserves a second look, particularly since the chances for a constitutional amendment are remote.

* * *

There are three items that do not, strictly speaking, fall within the "legislative agenda" category but nonetheless merit the attention of this office at this time. I raise them now simply because they occurred to me in the course of reflection in response to your request.

1. Civil Aeronautics Board Matters. The imminent demise of the CAB will necessitate some changes, perhaps only formal, in the manner in which we review what were formerly CAB decisions. Executive Order 11920 will have to be amended, and new procedures instituted consistent with the transfer of the CAB's authority.

2. Presidential Records Act. Sooner rather than later we should address the fate of the Reagan Administration records under this Act. In the course of the Nixon Archives matter Mr. Hauser and I identified possible constitutional infirmities in the Act of significance to the doctrine of executive privilege. How we intend to comply with the Act should be made clear to all concerned some time before November of 1988 (when our ability to implement our intentions will be far more limited).

3. Constitutional Convention. The President's continued call for a balanced budget amendment, and the likely prominence of deficit and revenue issues, can be expected to highlight the issues surrounding an Article V constitutional convention. By one count, 32 of the needed 34 states have called for a constitutional convention to propose a balanced budget amendment. Some have suggested that the President should join in calling for such a convention to increase his leverage with Congress on deficit reduction negotiations. This office, working with the Department of Justice, should be prepared to give advice concerning the unprecedented legal questions surrounding an Article V convention.

THE WHITE HOUSE

WASHINGTON

November 13, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Laker Antitrust Investigation

The Deputy Attorney General will call your office today to set up a meeting with Justice, State, and you on the Justice Department's plans concerning the Laker antitrust investigation. Roger Clegg telephoned me at Mrs. Dinkins's request to let you know why such a meeting must be held. The Department of State would like to hold up Justice's planned indictments to see if the United States and Great Britain can negotiate an agreement on future air fares. Justice considers such a plan an ill-advised intrusion of economic policy planning on the prosecutorial function. Dinkins, Paul McGrath, Ken Dam, Allen Wallis (Under Secretary of State for Economic Affairs), and you would be invited to the meeting. Dam also wants to invite McFarlane but Dinkins would rather not -- you will have to make that call.

THE WHITE HOUSE

WASHINGTON

November 13, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Request to Swear In the President For His Second Term

Emily Brown, a Justice of the Peace from Pembroke, Massachusetts, has volunteered to administer the oath of office to the President at his second inauguration. Ms. Brown suggests letting an average citizen administer the oath would be a "grand gesture." No doubt, but I suspect the President would just as soon have the oath administered by the Chief Justice, pursuant to established custom. There is no legal requirement that the Chief Justice administer the oath. Indeed, there is no need for anyone to administer the oath at all. The Constitution merely requires that the President-elect take the prescribed oath before entering on the execution of his office. Art. II, § 1, cl. 7. Theoretically the President could take the oath by himself.

In any event, it does not appear that a Massachusetts justice of the peace would be authorized to administer the oath outside of Massachusetts. Under 5 U.S.C. § 2903(c), an oath required under the laws of the United States may be administered by the Vice President or "an individual authorized by local law to administer oaths in the State, District, or territory or possession of the United States where the oath is administered." I think it sufficient in the reply to Ms. Brown, however, to note that the President will adhere to tradition and have the Chief Justice administer the oath.

Attachment

November 13, 1984

Dear Ms. Brown:

Thank you for your telegram of November 5, 1984 to the President. In that telegram you volunteered to administer the oath of office to the President at his second inaugural.

Please be advised that the President plans to adhere to the tradition of having the oath of office administered by the Chief Justice of the Supreme Court of the United States. I trust you will appreciate the reasons for this.

Sincerely,

Fred F. Fielding
Counsel to the President

Ms. Emily Brown
Justice of the Peace
218 Pleasant Street
Pembroke, MA 02358

FFF:JGR:aea 11/13/84
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 14, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: ABA Support for Equal Access to Justice Act Renewal

On October 16, 1984, the director of the Governmental Affairs Group of the American Bar Association, Robert D. Evans, wrote the President to urge him to sign H.R. 5479, the bill to reauthorize the Equal Access to Justice Act (EAJA). As you know, the President pocket vetoed this bill, the ten-day period expiring on November 9. In the memorandum of disapproval, however, the President objected not to reauthorization of the EAJA but to revisions made by H.R. 5479. Indeed, the President reiterated Administration support for the EAJA itself. It therefore seems appropriate to reply to Mr. Evans, noting that we support the EAJA and enclosing a copy of the memorandum of disapproval.

Attachment

THE WHITE HOUSE

WASHINGTON

November 14, 1984

Dear Mr. Evans:

Thank you for your letter of October 16, 1984 to the President. In that letter you urged the President to sign H.R. 5479, a bill to reauthorize and revise the Equal Access to Justice Act.

As you doubtless know, the President withheld his approval of H.R. 5479. As the President made clear in his memorandum of disapproval, however, his decision to do so was not based on opposition to the Equal Access to Justice Act itself. Indeed, the President reiterated his support for the Act, and expressed his hope that Congress would act promptly to reauthorize it retroactively. He also directed the heads of Federal departments and agencies to continue to accept applications for fee awards under the Act, so that such applications may be processed pursuant to the reauthorized Act. The President was compelled to withhold his approval from H.R. 5479 because that bill did not simply reauthorize the Equal Access to Justice Act but also made numerous ill-advised changes in its provisions.

I have enclosed for your information a copy of the memorandum of disapproval and the memorandum to the heads of Federal departments and agencies. Thank you for sharing your views on this matter with us.

Sincerely,

Fred F. Fielding
Counsel to the President

Robert D. Evans, Esquire
Director, Governmental Affairs Group
American Bar Association
1800 M Street, N.W.
Washington, D.C. 20036-5886

FFF:JGR:aea 11/14/84

bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 14, 1984

MEMORANDUM FOR THE FILES

FROM: JOHN G. ROBERTS

SUBJECT: Florida Kidnapping Case/Extradition

On November 13, 1984 Dianna G. Holland asked me to handle a call from Sheriff Tom Smith of Collier County, Florida. Smith had located a fugitive in a parental kidnapping case in Canada, and was having difficulty reaching anyone at State to begin extradition. Smith feared the fugitive would flee. On November 14 I reached Assistant Legal Adviser Andre Surano at State and advised him of Smith's problem. Surano called me back to advise that the case was in the proper channels, and that Smith needed to provide State with more information. I told Surano that the White House had no continuing interest in the matter, but simply wanted to make certain that Sheriff Smith had reached the proper authorities. Surano stated that he had.

cc: Dianna G. Holland

THE WHITE HOUSE

WASHINGTON

November 14, 1984

MEMORANDUM FOR DIANNA G. HOLLAND

FROM: JOHN G. ROBERTS JGR

SUBJECT: Judge Wilkey Letter to the President

Judge Wilkey has written the President, advising him of his plan to assume senior status on December 6, 1984. Wilkey gave the letter to the Attorney General, and the Attorney General's office has forwarded it to me for transmittal to the President. (Apparently they expect me to give it to the President at our daily meeting.) Mr. Fielding is aware of Judge Wilkey's plans. In light of the Judge's unusually distinguished service I think a reply from the President would be appropriate. If you would log this in and return it I would be happy to prepare one.

Attachment

THE WHITE HOUSE

WASHINGTON

November 19, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Justice Department News

Associate Deputy Attorney General Roger Clegg advised me of two developments at the Department of Justice of which you should be made aware. Brad Reynolds has written a letter (copy attached) to Secretary Pierce, advising him that the Civil Rights Division intends to review HUD policies under Title VI. Reynolds is reportedly concerned that HUD has adopted a racial quota system for public housing projects. You may recall the controversy that developed in Texas over Judge Justice's order that families be moved between two neighboring housing projects to achieve racial balance. HUD has reportedly adopted Judge Justice's approach, to which Reynolds objects. Reynolds's letter was sent out without review or clearance by the Attorney General or Deputy Attorney General; it seems obvious that the matter could have been better handled without producing a written document that will probably be leaked. There is now the potential for a news story on a rift between Reynolds and HUD on housing discrimination policy.

In a more curious if less substantive development, the Department has been having problems with Loretta Tofani, the Pulitzer Prize-winning reporter recently assigned to take over Mary Thornton's job of covering Justice for the Post. Ms. Tofani has allegedly been guilty of several violations of Department policy with respect to the press, including wandering the halls after hours to drop in on people in their offices and even eavesdropping outside the offices. Tom DeCair's office has warned Tofani that her pass may be revoked; it is unclear if she will take the warnings to heart. I doubt you will get any calls on this matter at this stage, but it may develop into something interesting.

Attachment

THE WHITE HOUSE

WASHINGTON

November 19, 1984

MEMORANDUM FOR CHARLES KOLB
ASSISTANT GENERAL COUNSEL
OFFICE OF MANAGEMENT AND BUDGET

FROM: RICHARD A. HAUSER
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: Executive Order: White House Conference on Small Business

Counsel's Office has reviewed a preliminary draft of the above-referenced proposed executive order, and would like to note an objection to one provision in the draft. Section 1(b) of the draft generally tracks the language of Section 5(e)(1) of the statute, Public Law 98-276, 98 Stat. 170, with the significant exception that the executive order provides that the Administrator of the Small Business Administration shall appoint the Executive Director and other directors and personnel for the Small Business Conference Office, while the statute vests this authority in the President. While the President may legally delegate such appointment authority, we have been provided with no justification for such a delegation beyond a desire to avoid the clearance processes for a Presidential appointment. Such a desire is a patently insufficient justification: the clearance processes serve a valuable function and should not be circumvented for perceived convenience. Since the statute vests the appointment power in the President the White House will remain responsible for the appointment, even if the authority to make it were delegated, further demonstrating the need to abide by the normal clearance processes.

We recommend that "Administrator of the Small Business Administration" be changed to "President" in Section 1(b) of the draft order.

cc: Craig Fuller

RAH:JGR:aea 11/19/84
bcc: FFFielding/RAHauser/JGRoberts/SUbj/Chron

THE WHITE HOUSE

WASHINGTON

November 21, 1984

MEMORANDUM FOR DIANNA G. HOLLAND

FROM: JOHN G. ROBERTS JGR

SUBJECT: High Frontier Solicitation

Mr. Fielding was sent a High Frontier fundraising packet by an anonymous correspondent, who asked if it were legitimate. Our office previously objected to General Graham's including a letter from the President in his fundraising solicitation. The present packet does not contain the letter, or any other suggestion that the President has endorsed the fundraising. The material does state that funds are being raised to promote the anti-missile defense plan backed by the President, but that is wholly accurate. No action is necessary.

Attachment

THE WHITE HOUSE

WASHINGTON

November 21, 1984

MEMORANDUM FOR CAROL GREENAWALT
WHITE HOUSE PHOTO OFFICE

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Inquiry From William Graef

By letter dated November 13 William Graef requested a photograph of the President for use on a book cover. He enclosed a facsimile of the planned cover, in which the photograph of the President would appear along with photographs of his eight predecessors. There is no danger that the contemplated use of the photograph of the President would create the impression that the President has endorsed or is otherwise associated with this book, and accordingly this office has no objection to your providing Mr. Graef with the requested photograph.

Thank you for raising this matter with us.

THE WHITE HOUSE

WASHINGTON

November 20, 1984

MEMORANDUM FOR DIANNA G. HOLLAND

FROM: JOHN G. ROBERTS

SUBJECT: Holiday Plans

I plan to be out of the office Thanksgiving Day and the next day, November 22 and 23. I will be traveling to Indiana to serve as godfather at the christening of my niece. I will be in the office tomorrow, November 21.

I have not yet finalized any plans for the Christmas season.

THE WHITE HOUSE

WASHINGTON

November 26, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: OPIC Request for Letter from the President

You may recall that in late September William A. Delphos of the Overseas Private Investment Corporation (OPIC) requested that the President sign a letter to OPIC, requesting a report on OPIC activities and accomplishments. By memorandum to Delphos dated October 1, you declined to approve such a letter, on the ground that OPIC had already prepared the report and should not seek to justify it retroactively on the basis of a Presidential request. You noted, however, that you would not object to a letter from the President being included in the report, so long as the letter did not actually request the report.

Bruce Hatton of OPIC has now asked you to approve such a letter, submitting a draft as well as a draft of a reply from Craig Nalen, both of which would appear at the beginning of the OPIC report. I have no legal objection to the draft Presidential letter, which is similar to Presidential letters that have opened past OPIC annual reports. Since our office is in no position to approve the letter from a policy standpoint, however, I recommend that we submit it to Darman for whatever staffing he considers appropriate.

I also recommend a slight change in Nalen's proposed letter. The opening clause -- "In reply to your letter of November , 1984," -- should be deleted. As we told OPIC before, the report is not in reply to anything the President has done. Attached are draft memoranda to Darman and Hatton, respectively.

Attachments

THE WHITE HOUSE

WASHINGTON

November 26, 1984

MEMORANDUM FOR BRUCE N. HATTON
ACTING VICE PRESIDENT, MARKETING
OVERSEAS PRIVATE INVESTMENT CORPORATION

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: OPIC Request for Letter from the President

I have reviewed the proposed letter from the President and have no objection to it from a legal perspective. I have submitted the letter for other appropriate clearances within the White House; you should have a response shortly.

Consistent with my memorandum of October 1, 1984 to William A. Delphos, however, the opening clause of the proposed letter from OPIC President Craig A. Nalen must be deleted. The report in question was not prepared in response to anything the President has done. Stating that the report is submitted "in reply" to the President's letter suggests otherwise.

Attachment

FFF:JGR:aea 11/26/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 26, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: OPIC Request for Letter from the President

Bruce Hatton, Vice President of the Overseas Private Investment Corporation (OPIC), has requested a letter from the President to appear at the beginning of a report on OPIC activities. He has submitted the attached draft. I have reviewed the draft and have no objection to it from a legal perspective; I forward it to you for whatever policy clearance you consider appropriate. Also attached is a draft letter from OPIC President Craig Nalen that would appear with the President's letter. I have advised Hatton that the opening clause of this letter must be deleted, since the report was not in fact prepared in response to any request from the President.

Attachment

FFF:JGR:aea 11/26/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 28, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Commission on Executive, Legislative, and Judicial Salaries

Susan Borchard has asked if Justice Potter Stewart would be confronted with an apparent or actual conflict of interest were he to serve on the Commission on Executive, Legislative, and Judicial Salaries. As you know, that Commission was established pursuant to 2 U.S.C. § 352 to review and make recommendations concerning the rates of pay for members of Congress, high-ranking Executive branch officials, and justices and judges. Justice Stewart assumed senior status, "retain[ing] his office but retir[ing] from regular active service." 28 U.S.C. § 371(b). Pursuant to 28 U.S.C. § 371(b), "[h]e shall, during the remainder of his lifetime, continue to receive the salary of the office." Throughout his retirement Justice Stewart will be paid the same as a sitting associate justice. Since the Commission is tasked with making recommendations on, inter alia, what an associate justice should be paid, Justice Stewart would be presented with a direct actual conflict of interest were he to serve on the Commission. Simply put, he would be reviewing and making recommendations with respect to his own salary.

There is another, even more basic problem with appointing Justice Stewart to this Commission. Under 2 U.S.C. § 352(1), the members of the Commission "shall be appointed from private life." The legislative history sheds little light on the purpose of this restriction, but it seems intended to prevent those in government from deciding how much those in government should be paid. The question is not entirely free from doubt, but I do not think a senior judge should be considered to have returned to "private life." As noted a senior judge draws a full government salary, typically is assigned to sit by designation on various courts (as Justice Stewart has), and retains full rights (as Justice Stewart has) to chambers, law clerks, secretarial assistance, and so on. The fact that senior judges have not returned to private life is confirmed by the fact that were they to pursue private employment -- by joining a law firm, for example -- they would forfeit their senior judge status. Judges that resign -- like former Judge Mulligan of the Second Circuit -- return to private

life; judges that assume senior status -- like Judges Lumbard and Friendly of the same court -- do not.

The attached memorandum for Borchard notes that Justice Stewart would be confronted with a conflict of interest problem, and is probably not eligible for this Commission in any event.

Attachment

THE WHITE HOUSE

WASHINGTON

November 28, 1984

MEMORANDUM FOR SUSAN BORCHARD
ASSOCIATE DIRECTOR
OFFICE OF PRESIDENTIAL PERSONNEL

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Commission on Executive, Legislative, and Judicial Salaries

By memorandum dated November 21 you inquired if Justice Potter Stewart would be presented with a conflict of interest were he to be appointed to the Commission on Executive, Legislative, and Judicial Salaries. That Commission is charged, inter alia, with reviewing and making recommendations concerning the rate of pay for associate justices. 2 U.S.C. § 356(c). Justice Stewart did not resign his office; he retained his office but retired from regular active service. He is, accordingly, entitled to receive the salary of an associate justice during the remainder of his lifetime. 28 U.S.C. § 371(b). Thus, if Justice Stewart were to serve on the Commission, he would be reviewing and making recommendations concerning his own salary. Although the Commission is only advisory, it would be difficult to imagine a clearer conflict of interest.

Quite apart from any conflict of interest problem, it appears that Justice Stewart is ineligible for service on the Commission. Pursuant to 2 U.S.C. § 352(1), Commission members "shall be appointed from private life." As noted, a senior judge "retain[s] his office," 28 U.S.C. § 371(b), and, unlike a judge who resigns, cannot be considered to have returned to "private life." For the foregoing reasons, I must advise against considering Justice Stewart for appointment to the Commission on Executive, Legislative, and Judicial Salaries.

FFF:JGR:aea 11/28/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 28, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Competition in Contracting Act of 1984

By memorandum dated November 7, 1984 I responded to your request for more information on the controversy surrounding the Competition in Contracting Act of 1984. You will recall that the Justice Department concluded that certain provisions in the Act were unconstitutional on separation of powers grounds, and should be ignored by Executive Branch agencies. I advised you that the Department was preparing the formal report required to be submitted to Congress by Public Laws 98-411 and 96-132 whenever the Attorney General determines an Act of Congress to be unconstitutional. You asked to see that report. A copy is attached at Tab A; though dated November 21 it was sent to the Hill on Friday, November 23. Also attached at Tab B is a letter to Senator Cohen, who complained about the Justice determination. There is nothing new in either letter. Both simply reiterate the reasoning of the October 17 Office of Legal Counsel opinion, reviewed in my memorandum of November 7.

THE WHITE HOUSE

WASHINGTON

November 29, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Meeting Between the President and Delegation From the Zhong Hua International Technology Development Corporation

Lyn Nofziger has written Mr. Deaver, requesting a meeting December 4 between the President and three children of high-ranking officials from occupied China (hereinafter referred to as the People's Republic of China). The three will be traveling with a delegation from an entity called the Zhong Hua International Development Corporation, and will be bringing letters from their prominent fathers to the President. Nofziger made his request on behalf of his company, U.S. Trading Company, which does business in China. Deaver has noted that he would like to comply with the request, assuming you and NSC have no objections.

It is my understanding that it is not unusual for entities like Zhong Hua to be formed by the Chinese to facilitate what we occidentals might call "junkets" for the fortunately situated. Zhong Hua was in fact only created on October 9, 1984. There is no problem with the President meeting with the children because of their connection with Zhong Hua: As a Chinese company Zhong Hua of course has no competitors in the capitalistic sense that might object to it receiving an apparent endorsement or preferential treatment from the President. The President meeting with representatives of Zhong Hua would be no different than meeting with representatives of the Ministry of Trade.

The question is whether the involvement of an American entity -- Nofziger's U.S. Trading Company -- sours the deal. U.S. Trading will gain commercial goodwill and perhaps more tangible compensation for setting up the meeting, but the fact that the children chose to ask Nofziger rather than our embassy to set up the meeting should not prevent it from taking place. There is of course something of an appearance problem, but the problem exists in every case of former government officials capitalizing on their contacts after they have returned to the private sector.

The attached draft memorandum to Deaver notes that the meeting can legally take place.

THE WHITE HOUSE

WASHINGTON

November 29, 1984

MEMORANDUM FOR MICHAEL K. DEAVER
ASSISTANT TO THE PRESIDENT
DEPUTY CHIEF OF STAFF

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Meeting Between the President and Delegation From the Zhong Hua International Technology Development Corporation

You have asked for my views on a proposed meeting between the President and three children of prominent officials of the People's Republic of China. The children will be visiting Washington as part of a delegation from Zhong Hua International Development Corporation, and would like to present letters from their fathers to the President. The request for the meeting was made through Lyn Nofziger and his U.S. Trading Company, which does business in China.

I have no legal objection to such a meeting taking place. The difficulties that would arise with such a meeting with representatives of a typical commercial entity are not present in this case, since a Chinese commercial entity such as Zhong Hua is actually tantamount to a government agency rather than a private commercial enterprise. It would of course have been preferable from an appearance standpoint if the prominent offspring had sought the meeting through normal diplomatic channels rather than an American representative, but that was their decision.

FFF:JGR:aea 11/29/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 30, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Proposed Executive Order Entitled "Amending Executive Order No. 11157 as it Relates to Pay for Hazardous Duty"

Richard Darman has asked for comments by close of business December 4 on the above-referenced proposed executive order. The order, proposed by the Department of Defense, has been approved by OMB and, as to form and legality, by the Justice Department Office of Legal Counsel. Pursuant to 37 U.S.C. § 301(a) the President may issue regulations specifying when incentive pay may be awarded for hazardous military duty. Those regulations are embodied in Executive Order 11157. That order provides that incentive pay may be awarded for demolition of "underwater objects, obstacles or explosives." Established practice had been to award incentive pay for any demolition work, whether underwater or not. A recent audit, however, suggested that only underwater demolition work qualified under Executive Order 11157. The proposed order would simply delete the word "underwater," to codify the existing practice. I have no objections.

Attachment

THE WHITE HOUSE

WASHINGTON

November 30, 1984

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Proposed Executive Order Entitled "Amending Executive Order No. 11157 as it Relates to Pay for Hazardous Duty"

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

FFF:JGR:aea 11/30/84
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

November 30, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Meeting Between the President and Delegation From the Zhong Hua International Technology Development Corporation

In response to your inquiry, NSC and State recommend that the meeting take place, according to Gaston Sigur of NSC. Indeed, Bob Kimmitt has submitted a scheduling request to Fred Ryan.