Collection: Roberts, John G.: Files
Folder Title: Chron File (12/12/1983-12/19/1983)
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THE WHITE HOUSE

WASHINGTON

December 12, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Taping: Hillsdale College Dinner Honoring Jeane Kirkpatrick

Richard Darman has asked that comments on the above-referenced draft remarks be sent directly to Ben Elliott by noon today. This draft is essentially identical to a draft we cleared on December 2. Our memorandum on that draft noted no legal objection, although it did provide background concerning Hillsdale College's involvement in the Grove City case before the Supreme Court. The attached draft simply refers Elliott to our prior memorandum.

Attachment

THE WHITE HOUSE

WASHINGTON

December 12, 1983

MEMORANDUM FOR BEN ELLIOTT
DEPUTY ASSISTANT TO THE PRESIDENT
DIRECTOR, PRESIDENTIAL SPEECHWRITING OFFICE

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Taping: Hillsdale College Dinner Honoring Jeane Kirkpatrick

Counsel's Office has reviewed the above-referenced remarks, and finds no objection to them from a legal perspective. We refer you to our memorandum of December 2, 1983 on the previous draft of these remarks for background information concerning Hillsdale College's involvement in Title IX litigation with the Federal Government. As we noted, the remarks appropriately do not touch upon that issue.

cc: Richard G. Darman

FFF:JGR:aea 12/12/83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 12, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Letter to Craig Fuller Requesting Meeting to Discuss the Orion North Atlantic Project

In response to your inquiry, the Executive branch position on the Orion FCC application will be decided at a meeting of the Cabinet Council on Commerce and Trade scheduled for tomorrow. Quaal has asked Karen Hart if the Orion people could meet with Fuller, not to discuss their pending case but the cabinet council process. I advised her to say no.

THE WHITE HOUSE

WASHINGTON

December 8, 1983

John

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Letter to Craig Fuller Requesting Meeting to Discuss the Orion North Atlantic Project

Orion Satellite Corporation has pending before the FCC a very controversial application to provide satellite communications service to the North Atlantic area. If Orion is permitted to proceed with its plan it would be the first breach in the profitable Intelsat monopoly. The FCC is awaiting an Executive branch position before issuing a decision; that position is still in utero. — ? from whom?

Ward L. Quaal, a "friend of the President" and Mr. Deaver, called Craig Fuller's office to arrange a meeting between Orion officials and Fuller. Karen Hart suggested that the officials put their request in letter form, which they have now done. Fuller has asked for a draft response.

Pursuant to our established policy, White House staff members should not meet with private petitioners to discuss a case pending before the FCC, an independent regulatory agency. I have drafted a response for Fuller's signature advising the Orion officials of this policy.

Attachment

THE WHITE HOUSE

WASHINGTON

December 13, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Remarks: Presentation of Congressional Gold Medal to Fred Waring

Richard Darman has asked that comments on the above-referenced draft remarks be sent directly to Ben Elliott by noon tomorrow. The remarks, to be delivered in conjunction with the award of the Congressional gold medal, praise Waring for his patriotism and contributions to the entertainment field. I have reviewed the remarks and have no objection to them.

Attachment

THE WHITE HOUSE

WASHINGTON

December 13, 1983

MEMORANDUM FOR BEN ELLIOTT
DEPUTY ASSISTANT TO THE PRESIDENT
DIRECTOR, PRESIDENTIAL SPEECHWRITING OFFICE

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Remarks: Presentation of Congressional Gold Medal to Fred Waring

Counsel's Office has reviewed the above-referenced remarks, and finds no objection to them from a legal perspective.

cc: Richard G. Darman

FFF:JGR:aea 12/13/83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 13, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Berliner Correspondence Concerning Barbados

After reviewing Mr. Berliner's further correspondence of December 7, I called the State Department to obtain the facts on the apparent special treatment of the Netherlands Antilles. Assistant Legal Adviser for Treaty Affairs Robert E. Dalton advised me that the Netherlands Antilles was treated differently than the 23 terminated countries because it was not a country but an integral component of the Dutch realm, and our tax treaty with the Netherlands Antilles could not be terminated without affecting relations with the Netherlands itself. Subsequent research demonstrated this explanation to be palpably false. On June 30, 1982, we easily terminated our tax treaty with the British Virgin Islands by advising the British that the extension of our treaty with them to the Islands was terminated. On reflection Dalton conceded the same process could be applied to the Netherlands Antilles.

Yielding all hope of obtaining accurate information on this matter from State, I contacted the Treasury officials actually handling the tax treaty negotiations with the Netherlands Antilles and the 23 terminated countries (including Barbados). They advised that they would have terminated the Netherlands Antilles treaty with glee, but for the fact that the treaty provides the only mechanism for American firms to raise capital in the Eurobond market. Access to the Eurobond market through the Netherlands Antilles accounts for some $25 billion in capital raised by American corporations. The tax treaty with the Netherlands Antilles establishes the mechanisms for the functioning of this capital market. Terminating the tax treaty to end tax haven abuse, as done with the 23 countries, would have the deleterious consequence of completely shutting off this vital source of capital. The problem is not present with the 23 terminated countries.

The Treasury officials also noted that they were very close to concluding a new treaty with the Netherlands Antilles, possibly even before the end of the year. (This should not be made public.) There is thus no need for the leverage of a treaty "gap" to encourage serious negotiations, as they feel to be true with respect to the 23 terminated countries.

With respect to our response, the Treasury officials recommended stressing our government's keen desire to conclude a new treaty as soon as possible, and our already expressed willingness to make the provisions of a new treaty retroactive to January 1, 1984, the termination date.

A revised response to Berliner is attached.

Attachment

THE WHITE HOUSE

WASHINGTON

December 13, 1983

Dear Henry:

Thank you for your memoranda on law enforcement assistance in the Eastern Caribbean and the United States - Barbados tax treaty. As you might imagine, recent events have highlighted the importance of this region, and we certainly appreciate having the benefit of your informed views on subjects affecting the area.

It is true that the major hurdle preventing significant foreign aid for police training is section 660 of the Foreign Assistance Act, 22 U.S.C. § 2420, which provides that foreign assistance funds generally may not be used "...to provide training or advice, or provide any financial support, for police, prisons, or other law enforcement forces for any foreign government...." I am advised, however, that there are prospects for increased aid from other foreign sources for the Barbadian police training center, in which we cannot, by law, participate.

Questions concerning the tax treaty are complicated by the fact that the termination and renegotiation of the United States - Barbados treaty is part of a much broader, comprehensive effort governing tax treaties of some 23 countries. These treaties typically date from British colonial days and involve countries not only in the Caribbean but Africa as well. There is understandable reluctance to consider special arrangements with respect to Barbados when any such action could precipitate similar demands from the other affected nations, thereby jeopardizing the entire effort to modernize the tax treaties.

It is true, as you noted in your memorandum of December 7, that our tax treaty with the Netherlands Antilles has not been terminated. This certainly does not reflect greater deference on our part to the interests of the Netherlands Antilles than to those of Barbados or the 22 other terminated countries. The decision not to terminate the Netherlands Antilles tax treaty was based on the unique factual circumstances of the financial markets in the Netherlands Antilles. As you know, the situation in the Netherlands Antilles is quite different from that prevailing in the 23 countries whose treaties have been terminated.

Largely because of the important Eurobond market in the Netherlands Antilles, and the significance of the tax treaty to the functioning of that market, the question of terminting that treaty raises concerns that are not present with respect to the other countries. Our recognition of these concerns should in no sense be construed as favoring one country over another.

In any event, I was pleased to learn that negotiations with Barbados on a new tax treaty are scheduled to commence in Washington before the end of this year. I know that the United States Government is anxious to see the negotiations come to a successful conclusion as soon as possible. I also understand that the Treasury Department has expressed a willingness to make the new treaty retroactive to the termination date, if the new treaty can be concluded next year. This should help alleviate some of the difficulties associated with a gap in treaty coverage.

Once again, thank you for sharing your concerns with us.

Sincerely,

Fred F. Fielding
Counsel to the President

Mr. Henry A. Berliner, Jr.
Berliner & Maloney
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036-4162

FFF:JGR:aea 12/13/83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 13, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Justice Draft Bill, "The Legal Fees Reform Act"

OMB has asked for comments by close of business December 14 on the above-referenced proposed bill. This bill would set a $75/hour ceiling on attorneys fees awarded under fee-shifting statutes to parties prevailing against the United States or state and local governments, and double the rates paid to criminal defense attorneys under the Criminal Justice Act. The bill was first circulated by OMB for comments on September 16. By memorandum dated September 19 we advised OMB that we had no legal objection. By memorandum dated September 21 you recommended to Darman that the Administration "focus very sharply on the issue of whether we should go forward with this at this time." You were concerned that the bill would be portrayed as a means of inhibiting the delivery of legal services to the poor, minorities, etc., and accordingly would not get a fair hearing.

On November 15 Robert McConnell provided us with a copy of the proposed bill as submitted to OMB for clearance. I reviewed the provisions of the bill in a memorandum to you dated November 17. The version of the bill which OMB has now circulated and proposes to clear by the end of the week is essentially identical to the version sent to you by McConnell. There have been no substantive changes.

I have no legal objection to the proposed bill, section-by-section analysis, and Speaker letter. I do not know if you are still interested in pursuing the policy/strategy concerns expressed in your September 21 memorandum to Darman. We should discuss.

Attachment

THE WHITE HOUSE

WASHINGTON

December 14, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Private Citizen Request for Legal Opinion

Faye Karson of Riverside, Connecticut has written Nancy Kennedy, apparently at the suggestion of Senator Weicker, to obtain an opinion concerning the legality of a gambling club she proposes to establish. Members of the club would transmit bets to a computer in Nevada through various wireless means, to avoid triggering 18 U.S.C. § 1084. That criminal provision prohibits use of a wire communication facility in interstate commerce by anyone engaged in the business of betting or wagering. Karson explained in her letter why she did not think her proposal would fall under 18 U.S.C. § 1084, and asked for "a definition of the gray areas" of that statute.

Karson's attorney raised the question with the Justice Department by letter dated December 16, 1982. The Department replied on January 18, 1983, that Department policy prohibited issuing advisory opinions to private parties. There is no specific statutory authority for such a practice, and it would raise serious problems of competition with the private bar. More importantly, the Government's interest in securing compliance with the law is promoted by compelling private parties who would probe the limits of a criminal prohibition to do so at their peril. The Department may not be able to opine that Karson's proposed conduct is definitely illegal, but the policy of the statute is served if the fear of illegality prevents Karson from entering what she describes as the "gray area." I see no reason for the Department to remove that fear by what would amount to a premature exercise of prosecutorial discretion.

For obvious reasons, the White House should not issue an advisory opinion on whether certain conduct violates the criminal laws when the Justice Department has declined to do so. I have prepared a reply to Karson declining to answer her inquiry, and a memorandum to Nancy Kennedy advising her of our disposition.

Attachment

THE WHITE HOUSE

WASHINGTON

December 14, 1983

Dear Ms. Karson:

Your letter of December 3 to Nancy Kennedy, Special Assistant to the President, has been referred to this office for consideration and reply. In that letter and accompanying materials you outlined your proposed "U BET" enterprise, and requested our advice concerning whether the contemplated enterprise would violate 18 U.S.C. § 1084. Through counsel you raised this question with the Department of Justice, and were advised that long-standing policy prevented the Department from issuing advisory opinions upon the request of private parties.

We must abide by that policy as well. The enforcement of federal criminal laws such as 18 U.S.C. § 1084 is the responsibility of the Department of Justice. Any decision concerning the appropriateness of issuing advisory opinions to private parties concerning compliance with the federal criminal laws accordingly rests with that agency. We can only recommend that you obtain the advice of private counsel concerning the legality of your contemplated enterprise, about which we can express no opinion.

I am sorry we cannot be more responsive to your inquiry. Thank you for writing.

Sincerely,

Fred F. Fielding
Counsel to the President

Ms. Faye Karson
14 Surrey Drive
Riverside, CT 06878

FFF:JGR:aea 12/14/83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 14, 1983

MEMORANDUM FOR NANCY KENNEDY
SPECIAL ASSISTANT TO THE PRESIDENT
FOR LEGISLATIVE AFFAIRS

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Private Citizen Request for Legal Opinion

You forwarded to this office a letter you received from Faye Karson, concerning her proposed "U BET" enterprise. Ms. Karson sought an opinion as to whether her contemplated enterprise would violate a specific federal criminal statute. For sound legal and policy reasons, the Department of Justice declines to render advisory opinions upon request of private parties, and in fact declined a previous request of Ms. Karson's for such an advisory opinion. In my reply to Ms. Karson, I advised her that we must abide by the Department's policy. A copy of my reply is attached for your information.

Attachment

FFF:JGR:aea 12/14/83
cc: FFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 15, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Proposed Talking Points on the President's First Three Years

Richard Darman has asked that comments on the above-referenced talking points be sent directly to Mike Baroody by 2:00 p.m. today. The proposed talking points review the Reagan record after three years, with the predominant focus on the economic recovery. Foreign affairs and defense issues appear only briefly at the very end, almost as an afterthought. I recommend raising this imbalance in a general way in our memorandum to Baroody. The attached draft of that memorandum also contains several stylistic comments.

Attachment

THE WHITE HOUSE

WASHINGTON

December 15, 1983

MEMORANDUM FOR MICHAEL E. BAROODY
DEPUTY ASSISTANT TO THE PRESIDENT
DIRECTOR OF PUBLIC AFFAIRS

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Proposed Talking Points on the President's First Three Years

Counsel's Office has reviewed the above-referenced talking points, and finds no objection to them from a legal perspective. We do, however, note that the foreign affairs and defense accomplishments of the past three years receive relatively short shrift in the talking points, and question whether discussion of those issues should not be expanded in a document that purports to be a comprehensive review of the Administration record. More specific stylistic comments follow:

- Page 1, first bullet item: To preserve parallelism, "solvency" should be "insolvency" and "growth" should be "stagnation."

- Page 1, last bullet item: Quotation mark needed at end of quotation.

- Page 2, third bullet item: Delete first "of."

- Page 5, first two sentences: As written the second sentence contradicts the entire first sentence and not simply the "many thought insoluble" clause. The second sentence can be deleted.

- Page 6, first bullet item: Should "New" be added before "[o]pportunities"?

- Page 7: This bullet item is very poorly written. Suggested revision:

  Our alliances have been strengthened. U.S. leadership has been demonstrated to the world - and welcomed - in forums such as the Williamsburg economic summit and the UN after the Korean airline massacre. Our welcomed leadership was clearly evident in the rescue mission we undertook in Grenada to protect innocent lives and to help restore democratic institutions.

cc: Richard G. Darman

FFF:JGR:aea 12/15/83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 15, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Draft Proclamation -- National Care and Share Day -- December 19, 1983

Dodie Livingston has asked for comments by 2:00 p.m. today on the above-referenced draft proclamation, which was received in our office at 1:33 p.m. today. The proclamation would designate December 19 as "National Care and Share Day." The first paragraph stresses voluntarism and the second urges Americans to help provide additional food for the needy.

This proclamation does not fall within our guidelines, as it was neither requested by Congress nor is it traditional. The idea for this proclamation came from Jim Coyne's office, and, according to Livingston's office, was approved by Mr. Deaver. The brainstorm behind this proclamation arose before the brouhaha over Mr. Meese's hunger statements. Both because the proclamation does not fit within our guidelines, and because the controversy over the Meese statements makes the timing of this plea to feed the hungry awful, I recommend trying to block this. A memorandum to Livingston is attached. I have alerted Livingston's office that we might have serious reservations.

Attachment

THE WHITE HOUSE

WASHINGTON

December 15, 1983

MEMORANDUM FOR DODIE LIVINGSTON
SPECIAL ASSISTANT TO THE PRESIDENT
DIRECTOR, SPECIAL PRESIDENTIAL MESSAGES

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Draft Proclamation -- National Care and Share Day -- December 19, 1983

Counsel's Office has reviewed the above-referenced draft proclamation. This proclamation does not fit within the established White House guidelines for proclamations, since it was neither requested by Congress nor is it traditional. Accordingly, we object to its issuance.

While exceptions to the guidelines are occasionally made, we do not think an exception for this proclamation would be appropriate, at least not at this time. The bulk of the proposed proclamation is a plea to provide food for those in need. This area has, of course, recently become the center of considerable controversy, and I do not think our interests are advanced by issuing such a plea at this time. The proclamation will only serve to add fuel to the controversy.

cc: Richard G. Darman

FFF:JGR:aea 12/15/83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 15, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: FOIA Request for Name, Addresses and Telephone Numbers of the Head Offices and Head Executives of Every Government Agency, Department and Cabinet Office

Lauren R. Januz of Lauren R. Januz and Associates, Inc., a consulting firm, has sent an FOIA request to The White House, requesting the name, address, and telephone number of "the head office and head executive of every government agency, department, cabinet office, etc." I have prepared a reply advising Januz that the White House Office is not subject to the Freedom of Information Act. The spirit of the season, however, compelled me to offer the suggestion in the proposed response that Januz obtain a government manual, for sale by the Superintendent of Documents, U.S. Government Printing Office.

Attachment

THE WHITE HOUSE

WASHINGTON

December 15, 1983

Dear Mr. Januz:

I am writing in response to your letter of December 6 to the White House. In that letter you requested, pursuant to the Freedom of Information Act, the name, address, and telephone number of the head office and head executive of every government agency and department.

Please be advised that the White House Office, "whose sole function is to advise and assist the President," is not an agency subject to the Freedom of Information Act. Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 156 (1980). Accordingly, we are not in a position to respond to your Freedom of Information Act request.

I might suggest, however, that the information you seek may be found in The United States Government Manual, which is made available for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Sincerely,

Fred F. Fielding
Counsel to the President

Mr. Lauren R. Januz
Lauren R. Januz and Associates, Inc.
Post Office Box 631
Lake Forest, IL 60045

FFF:JGR:aea 12/15/ 83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 15, 1983

MEMORANDUM FOR IRVING P. MARGULIES
ACTING GENERAL COUNSEL
DEPARTMENT OF COMMERCE

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Textile Proposals

I have considered the opinion expressed in your letter of December 5 concerning the consistency of changes in the textile import program with the Multifiber Arrangement, and have concluded that the contemplated changes are defensible under that Arrangement or related textile bilaterals.

This conclusion is contingent upon it being made explicit that the criteria proposed would merely trigger the "call" mechanisms in our bilateral agreements or, lacking such an agreement, the provisions of Article 3 of the MFA. It must be made clear that the proposed formulae do not trigger import restrictions, and that the level of import restraint that may be agreed as a result of any consultations would continue to be at the discretion of the U.S. Government. It must also be clear that if, after a call is made, consideration of the various factors enumerated in the MFA or bilateral agreement shows the call to have been inappropriate, the call could be discontinued and any import restrictions that might have been imposed would be removed. Implementation of the program in this way could be defended under the MFA. The proposed changes in the textile import program, however, may make the defense of the program in domestic litigation more problematic, and may make the defense before the Textiles Surveillance Body of any limits imposed more difficult. Those confronting the policy decisions should be made aware of these concerns.

It is my further opinion that no action by the President is necessary to implement the proposed changes in the textile import program. If any Presidential action is to be taken, it should not be in the form of an executive order, and should be in a form that minimizes direct Presidential involvement in implementing the proposals.

My opinion does not, of course, address the several outstanding policy issues inherent in the consideration of these proposals.

FFF:JGR:aea 12/15/83

cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 16, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Justice Draft Bill, "The Legal Fees Reform Act"

Attached is a brief memorandum reiterating your concerns about the fee cap bill. Also attached is an editorial from today's Post that I suspect will figure prominently in any effort to counter your arguments and proceed with the bill.

Attachment

The Washington Post, Friday, December 16, 1983, P. A22

Attorney's Fees

PROFESSOR Laurence Tribe of Harvard Law School won a big constitutional case against the Commonwealth of Massachusetts and is therefore, by federal statute, allowed to collect "reasonable" attorney's fees from the loser. But the state is refusing to pay his $332,000 bill, which is based in part on an hourly rate of $275. No wonder. That's a pretty hefty fee for a moonlighting academic who wins a liquor license case. Yes, a liquor license.

Prof. Tribe, with two assistants, represented a restaurant in challenging a state statute that granted churches and schools a veto power over liquor license applications by nearby businesses. After three years he won decisively in the Supreme Court, arguing that this delegation of a governmental licensing decision to a private party, particularly a religious organization, violated due process and the establishment clause of the First Amendment. Under a 1976 federal statute, attorneys who win constitutional and civil rights cases against governments can request the court to make the losing defendant pay "reasonable" attorney's fees. The purpose is to promote vindication of those rights.

Prof. Tribe can command high fees from his paying clients (many are not) because he is an eminent constitutional scholar and a highly creative and successful advocate. Billing $275 per hour, he argues, is consistent with top wages in Boston law firms, is much less than in the priciest New York or Washington firms, and is much less than he himself has charged some affluent clients. Prof. Tribe also argues that the 50 percent "tip" he applied to the itemized bill is both legal and perfectly reasonable given the complexity of the constitutional theories involved, the risk of losing and the time he's waited to receive any compensation at all.

That's beside the point. High-priced lawyers are just charging much too much—to the point of caricature—and the folks expected to pay their fees should put an end to the practice. Just because well-heeled private clients dole out huge sums doesn't mean that the public should be equally generous. The "prevailing wage" approach that government uses when it is buying services—which is the essence of Prof. Tribe's claim—has a superficial appeal. But on closer inspection it reveals elements of a gigantic rip-off.

Public works cost too much in part because the Davis-Bacon Act effectively requires union-scale wages. Medical costs soar in part because doctors have dominated service and price decisions. There's news every week of some windfall for a government consultant or defense contractor. For all these groups, government should refuse to bolster inflated wages and profits. Sorry, Prof. Tribe. Lawyers— even civil rights lawyers—need at least as much wage restraint as others when it comes to billing the government.

THE WHITE HOUSE

WASHINGTON

December 16, 1983

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Justice Draft Bill, "The Legal Fees Reform Act"

OMB is seeking to clear the above-referenced proposed bill, which would set a ceiling on attorneys fees awarded under fee-shifting statutes to parties prevailing against the United States or state and local governments, and raise the level of compensation available to attorneys defending criminal defendants under the Criminal Justice Act. This office has reviewed the proposed bill, and we have no purely legal objections to it. I continue to be of the view, however, first expressed in my September 21, 1983 memorandum for you on this subject, that this may well not be the appropriate time to go forward with this sort of legislation.

There is no doubt that the problems the bill seeks to address are very real. The circumstances in which attorneys fees are awarded to parties prevailing against the government, however, typically involve civil rights litigation, welfare entitlement suits, environmental litigation, and the like. Since the "fee cap bill" would have its greatest impact in these areas, I remain deeply concerned that it will be viewed and portrayed as yet another Administration effort to limit the delivery of legal services to minorities, the poor, and the aged. For this reason I am doubtful that the bill will get a fair airing. In short, I am not convinced that this is the time to open another front in the ongoing battle over our record in these areas.

cc: James C. Murr
Office of Management and Budget

FFF:JGR:aea 12/16/83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 19, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Middletown High School Inquiries

A number of Middletown High School students in a political science course have written seeking the answers to two questions:

1. Who becomes President if the President elect dies immediately prior to taking the oath of office?

2. What would happen if the United States were attacked shortly before the swearing in of the President elect? Would the incumbent handle the crisis or would the President elect?

The first question is answered by the Twentieth Amendment. That amendment provides, in pertinent part:

> If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. U.S. CONST. amend. XX, § 3.

The answer to the second question is also easy, at least as the question is posed. The incumbent acts as President until January 20 at noon, at which point the President elect should take the oath and assume the responsibilities of office. Presumably the two would work closely together in confronting an Inauguration Day attack on the country, but final authority and responsibility for decisions would shift as of noon.

The second question may assume some difficulty in proceeding with the Inauguration ceremony. Article II, Section 1, Clause 8 of the Constitution directs that the President take the prescribed oath "[b]efore he enter on the Execution of his Office." It only takes about ten seconds to take the oath, however, and there is no constitutional significance to the inaugural ceremony beyond the taking of the oath. Our response to the students should point out that there would be no need to proceed with the ceremony in the event of a national emergency.

Draft responses are attached for your review. Some students asked both questions, others just one, and the responses vary accordingly. I have also prepared an unsolicited response for the teacher who posed the questions to the class. I do not know if he told the students to write us or to do research themselves. If the latter is the case the teacher should know that some of the students have taken a shortcut. This may not seem particularly sporting to our correspondents, but I think it important to squelch the "let's ask the Counsel's office" impulse that has afflicted the younger generation before it gets out of hand.

Incidentally, I consider this project to have satisfied my obligations under the "Adopt a School" program. I've simply "adopted" the Middletown High School political science class rather than a class at Congress Heights.

Attachment

THE WHITE HOUSE

WASHINGTON

December 21, 1983

Dear Mr. Freedman:

Thank you for your letters of December 8. Those letters raised two questions concerning Presidential succession:

1. Who becomes President if the President elect dies on Inauguration Day, before taking the oath of office?

2. Who would act as President if the United States were attacked shortly before the inauguration ceremony?

The Twentieth Amendment to the Constitution provides a ready answer to the first question. Section 3 of that amendment provides, in part, that "[i]f, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President." U.S. CONST. amend. XX, § 3. In the hypothetical you posed, the Vice President elect would be sworn in as President, to serve a full term.

With respect to your second question, a crisis on Inauguration Day would not alter the constitutionally mandated transfer of power. The incumbent President would act as President until noon, at which point the President elect should take the oath of office and assume the duties and responsibilities of the Presidency. Presumably the incumbent and the President elect would work closely together in response to any crisis of the sort you hypothesized, but final authority and responsibility for any Presidential decisions would shift at noon.

Certainly an attack on the country or similar crisis on Inauguration Day would disrupt the formal inaugural ceremony, but the ceremony itself is not necessary for the transfer of power to take place. The Constitution requires only that the President take the prescribed oath before entering on the execution of the office; it does not specify any particular ceremony for taking the oath. Thus, the required taking of the oath should not present an obstacle to the prompt transfer of power, even in the event of a national crisis on January 20.

I hope this information is helpful. Best of luck with your studies.

Sincerely,

Fred F. Fielding
Counsel to the President

Mr. Neil Freedman
66 Bellantine Road
Middletown, NJ 07748

FFF:JGR:aea 12/21/83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 21, 1983

Dear Ms. Kuta:

Thank you for your letters of December 7. Those letters raised two questions concerning Presidential succession:

1. Who becomes President if the President elect dies on Inauguration Day, before taking the oath of office?

2. Who would act as President if the United States were attacked shortly before the inauguration ceremony?

The Twentieth Amendment to the Constitution provides a ready answer to the first question. Section 3 of that amendment provides, in part, that "[i]f, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President." U.S. CONST. amend. XX, § 3. In the hypothetical you posed, the Vice President elect would be sworn in as President, to serve a full term.

With respect to your second question, a crisis on Inauguration Day would not alter the constitutionally mandated transfer of power. The incumbent President would act as President until noon, at which point the President elect should take the oath of office and assume the duties and responsibilities of the Presidency. Presumably the incumbent and the President elect would work closely together in response to any crisis of the sort you hypothesized, but final authority and responsibility for any Presidential decisions would shift at noon.

Certainly an attack on the country or similar crisis on Inauguration Day would disrupt the formal inaugural ceremony, but the ceremony itself is not necessary for the transfer of power to take place. The Constitution requires only that the President take the prescribed oath before entering on the execution of the office; it does not specify any particular ceremony for taking the oath. Thus, the required taking of the oath should not present an obstacle to the prompt transfer of power, even in the event of a national crisis on January 20.

I hope this information is helpful. Best of luck with your studies.

Sincerely,

Fred F. Fielding
Counsel to the President

Ms. Diana Lee Kuta
134 Manor Parkway
Lincroft, NJ 07738

FFF:JGR:aea 12/21/83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 21, 1983

Dear Ms. Kouvel:

Thank you for your letter of December 9. That letter raised a question concerning Presidential succession:

Who would act as President if the United States were attacked shortly before the inauguration ceremony?

A crisis on Inauguration Day would not alter the constitutionally mandated transfer of power. The incumbent President would act as President until noon, at which point the President elect should take the oath of office and assume the duties and responsibilities of the Presidency. Presumably the incumbent and the President elect would work closely together in response to any crisis of the sort you hypothesized, but final authority and responsibility for any Presidential decisions would shift at noon.

Certainly an attack on the country or similar crisis on Inauguration Day would disrupt the formal inaugural ceremony, but the ceremony itself is not necessary for the transfer of power to take place. The Constitution requires only that the President take the prescribed oath before entering on the execution of the office; it does not specify any particular ceremony for taking the oath. Thus, the required taking of the oath should not present an obstacle to the prompt transfer of power, even in the event of a national crisis on January 20.

I hope this information is helpful. Best of luck with your studies.

Sincerely,

Fred F. Fielding
Counsel to the President

Ms. Barbara Kouvel
27 Lombardi Court
Red Bank, NJ 07701

FFF:JGR:aea 12/21/83

bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 21, 1983

Dear Ms. Suttell:

Thank you for your letter of December 9. That letter raised a question concerning Presidential succession:

Who would act as President if the United States were attacked shortly before the inauguration ceremony?

A crisis on Inauguration Day would not alter the constitutionally mandated transfer of power. The incumbent President would act as President until noon, at which point the President elect should take the oath of office and assume the duties and responsibilities of the Presidency. Presumably the incumbent and the President elect would work closely together in response to any crisis of the sort you hypothesized, but final authority and responsibility for any Presidential decisions would shift at noon.

Certainly an attack on the country or similar crisis on Inauguration Day would disrupt the formal inaugural ceremony, but the ceremony itself is not necessary for the transfer of power to take place. The Constitution requires only that the President take the prescribed oath before entering on the execution of the office; it does not specify any particular ceremony for taking the oath. Thus, the required taking of the oath should not present an obstacle to the prompt transfer of power, even in the event of a national crisis on January 20.

I hope this information is helpful. Best of luck with your studies.

Sincerely,

Fred F. Fielding
Counsel to the President

Ms. Gail Suttell
211 Yale Drive
Lincroft, NJ 07738

FFF;JGR:aea 12/21/83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 21, 1983

Dear Ms. Tang:

Thank you for your letter of December 8. That letter raised a question concerning Presidential succession:

Who would act as President if the United States were attacked shortly before the inauguration ceremony?

A crisis on Inauguration Day would not alter the constitutionally mandated transfer of power. The incumbent President would act as President until noon, at which point the President elect should take the oath of office and assume the duties and responsibilities of the Presidency. Presumably the incumbent and the President elect would work closely together in response to any crisis of the sort you hypothesized, but final authority and responsibility for any Presidential decisions would shift at noon.

Certainly an attack on the country or similar crisis on Inauguration Day would disrupt the formal inaugural ceremony, but the ceremony itself is not necessary for the transfer of power to take place. The Constitution requires only that the President take the prescribed oath before entering on the execution of the office; it does not specify any particular ceremony for taking the oath. Thus, the required taking of the oath should not present an obstacle to the prompt transfer of power, even in the event of a national crisis on January 20.

I hope this information is helpful. Best of luck with your studies.

Sincerely,

Fred F. Fielding
Counsel to the President

Ms. Josephine Tang
311 Dwight Road
Middletown, NJ 07748

FFF:JGR:aea 12/21/83

bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 21, 1983

Dear Ms. Fauci:

Thank you for your letter of December 7. That letter raised a question concerning Presidential succession:

Who becomes President if the President elect dies on Inauguration Day, before taking the oath of office?

The Twentieth Amendment to the Constitution provides a ready answer to the question. Section 3 of that amendment provides, in part, that "[if], at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President." U.S. CONST. amend. XX, § 3. In the hypothetical you posed, the Vice President elect would be sworn in as President, to serve a full term.

I hope this information is helpful. Best of luck with your studies.

Sincerely,

Fred F. Fielding
Counsel to the President

Ms. Christine Fauci
72 Marcshire Drive
Middletown, NJ 07748

FFF:JGR:aea 12/21/83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 21, 1983

Dear Mr. Steller:

Several students in your Political Science class have asked this office the following questions:

1. Who becomes President if the President elect dies immediately prior to taking the oath of office?

2. What would happen if the United States were attacked shortly before the swearing in of the President elect? Would the incumbent handle the crisis or would the President elect?

For your information, we have responded as follows:

The Twentieth Amendment to the Constitution provides a ready answer to the first question. Section 3 of that amendment provides, in part, that "[i]f, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President." U.S. CONST. amend. XX, § 3. In the hypothetical you posed, the Vice President elect would be sworn in as President, to serve a full term.

A crisis on Inauguration Day would not alter the constitutionally mandated transfer of power. The incumbent President would act as President until noon, at which point the President elect should take the oath of office and assume the duties and responsibilities of the Presidency. Presumably the incumbent and the President elect would work closely together in response to any crisis of the sort you hypothesized, but final authority and responsibility for any Presidential decisions would shift at noon.

Certainly an attack on the country or similar crisis on Inauguration Day would disrupt the formal inaugural ceremony, but the ceremony itself is not necessary for the transfer of power to take place. The Constitution requires only that the President take the prescribed oath before entering on the execution of the office; it does not specify any particular ceremony for taking the oath. Thus, the required taking of the oath should not present an obstacle to the prompt transfer of power, even in the event of a national crisis on January 20.

Sincerely,

Fred F. Fielding
Counsel to the President

Mr. Robert Steller
Middletown High School South
501 Nut Swamp Road
Middletown, NJ 07748

FFF:JGR:aea 12/21/83
bcc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 19, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Draft Proclamation: Alaska Statehood Day

Dodie Livingston has asked for comments by close of business December 21, 1983, on the above-referenced draft proclamation. The proclamation, authorized and requested by S.J. Res. 42, was drafted by Interior and has been approved by OMB. It designates January 3, 1984 -- the twenty-fifth anniversary of Alaska's admission into the Union -- as "Alaska Statehood Day." The text of the proclamation praises the people and resources of Alaska, and is largely unobjectionable.

The first two lines on page 2, however, state that Congress requested this proclamation "in honor of the twenty-fifth anniversary of the passage of the Alaska Statehood Act." The Alaska Statehood Act was passed on July 7, 1958, Pub. L. 85-508, 72 Stat. 339, and it would be more than passing strange even for Congress to designate January 3, 1984 as Alaska Statehood Day in honor of the twenty-fifth anniversary of an event that took place on July 7, 1958. January 3, 1984 is the twenty-fifth anniversary of Alaska's admission into the Union, accomplished not by passage of the Statehood Act but by issuance of Proclamation 3269 by President Eisenhower, pursuant to the terms of the Act. I would revise the language in question to read "in honor of the twenty-fifth anniversary of the admission of Alaska into the Union."

Attachment

THE WHITE HOUSE

WASHINGTON

December 19, 1983

MEMORANDUM FOR DODIE LIVINGSTON
SPECIAL ASSISTANT TO THE PRESIDENT
DIRECTOR, SPECIAL PRESIDENTIAL MESSAGES

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Draft Proclamation: Alaska Statehood Day

Counsel's Office has reviewed the above-referenced proclamation. At the top of page 2, "in honor of the twenty-fifth anniversary of the passage of the Alaska Statehood Act" should be changed to read "in honor of the twenty-fifth anniversary of the admission of Alaska into the Union." The Alaska Statehood Act was passed on July 7, 1958, so Congress could hardly have designated January 3, 1984 as Alaska Statehood Day in honor of the twenty-fifth anniversary of that event. Alaska was admitted into the Union on January 3, 1959, when President Eisenhower issued the proclamation called for by the Act, and it is in honor of the anniversary of that event that Congress designated January 3, 1984 Alaska Statehood Day.

FFF:JGR:aea 12/19/83
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 19, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Draft Proclamation: National Consumers Week, 1984

Dodie Livingston has asked for comments by close of business December 21 on the above-referenced draft proclamation. Michael Horowitz's memorandum to the President advises that the White House Office requested the proclamation, which was prepared by the Office of Consumer Affairs and has been approved by OMB. The proclamation has not been requested by Congress, nor is it traditional in the sense of a proclamation such as that for Thanksgiving Day. A similar proclamation has, however, been issued for two years running, so not issuing one this year would probably be more newsworthy than issuing one.

The substance of the proclamation discusses the role of the consumer in a free market economy. I have no objections. I consider the effort to restrict proclamations to those that are traditional or requested by Congress to have been lost in this instance.

Attachment

THE WHITE HOUSE

WASHINGTON

December 19, 1983

MEMORANDUM FOR DODIE LIVINGSTON
SPECIAL ASSISTANT TO THE PRESIDENT
DIRECTOR, SPECIAL PRESIDENTIAL MESSAGES

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Draft Proclamation: National Consumers Week, 1984

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

FFF:JGR:aea 12/19/83
cc: FFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 19, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Proposed Executive Order Entitled Continuation of Export Control Regulations

Richard Darman has asked for comments by 4:00 p.m. today on the above-referenced proposed executive order. You will recall that the failure of Congress to extend the Export Administration Act of 1979, 50 U.S.C. App. 2401 et seq., before its expiration date of October 14, 1983, compelled the President to issue an executive order on that date declaring a national economic emergency and continuing in effect the system of controls promulgated pursuant to that Act. Executive Order 12444, 48 Fed. Reg. 48215 (1983). Richard Hauser, Peter Rusthoven and I have all worked on this.

On November 18, 1983, Congress passed a law changing the expiration date of the Act from October 14 to February 29, 1984, with the intent of reviving the Act nunc pro tunc. The enrolled bill was reviewed for our office by Peter, and, while we had no objection to signature, we expressly noted that the earlier executive order declaring the national emergency would need to be revoked. The proposed executive order implements the President's expressed intention "to terminate [Executive Order 12444] upon the enactment into law of a bill reauthorizing the authorities contained in the Export Administration Act," by revoking Executive Order 12444 and rescinding the declaration of emergency. The proposed order contains language ensuring the continued validity and effectiveness of actions taken pursuant to Executive Order 12444 when it was in effect.

The proposed order, submitted by the Department of Commerce, has been approved by OMB and, as to form and legality, by the Office of Legal Counsel. The Department of Defense submitted a letter opposing this executive order, arguing that Executive Order 12444 should remain in effect until Congress reestablishes the Export Administration Act on a more permanent basis. Richard, Peter and I appreciate the argument that we should not be forced to go through the drill of rescinding the emergency declaration and then quite possibly reinstating it if Congress should once again fail to act before the latest expiration date, little more than two months hence. On balance, however, we agree with OMB's recommendation that this order be signed.

First, the President did express an intention to revoke Executive Order 12444 when Congress revived the Export Administration Act, and Congress has done just that. OLC has also advised Peter that continuing the emergency when statutory authority has been restored could theoretically create confusion in the enforcement of export restrictions. In addition, OLC reports that all previous invocations of emergency authority to avoid gaps in Export Administration Act coverage have been revoked as soon as the Act was extended by the Congress, even when the extensions were very short.

The last point highlights the most significant issue -- namely, that it is important from a legal perspective not to invoke emergency powers unless necessary to do so. No emergency now exists justifying continuance of Executive Order 12444, since the Export Administration Act has been revived -- the gap in coverage no longer looms. The extraordinary executive powers claimed under emergency authority are often justified and upheld precisely because they are only invoked in an emergency. Invocation of the powers in the absence of such an emergency inevitably dilutes the legal defense of the powers not only in that particular case but in all others as well. In short, the wolf is gone, and the fact that he might return on February 29 does not justify us in continuing to call "wolf" now.

Peter has discussed the foregoing with Will Taft at Defense, who has, in essence, withdrawn any serious objection to termination of the emergency. It should be added that we will also be required, under the relevant statutes involving national emergencies, to report the termination to the Congress, an obligation that raises the additional question of how this should be done during an intersession recess in which we are, inter alia, pocket vetoing legislation. Richard and Peter have been working on this and will follow-up this week; they agree, however, that this need not delay revoking the executive order.

A memorandum for Darman is attached.

Attachment

cc: Richard A. Hauser
Peter J. Rusthoven

THE WHITE HOUSE

WASHINGTON

December 19, 1983

MEMORANDUM FOR RICHARD G. DARMAN
ASSISTANT TO THE PRESIDENT AND
DEPUTY TO THE CHIEF OF STAFF

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Proposed Executive Order Entitled
Continuation of Export Control Regulations

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

It should also be noted, however, that we will, under the relevant statutes involving national emergencies, be required to report to the Congress the termination of the emergency declared by the executive order being revoked. Our office will be following-up on the proper way to accomplish this during an intersession Congressional recess.

FFF:JGR:PJR:aea 12/19/83
cc: FFFielding/JGRoberts/PJRusthoven/RAHauser/Subj/Chron

THE WHITE HOUSE

WASHINGTON

December 20, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Draft Presidential Remarks: News Conference Opening Statement

Richard Darman has asked for comments on the attached draft remarks by 10:00 a.m. today. The remarks review the progress of the economic recovery and cite statistics to support the proposition that the country is enjoying the strongest economic recovery with the lowest rate of inflation since the 60's. I have reviewed the remarks and have no objections.

Attachment

THE WHITE HOUSE

WASHINGTON

December 20, 1983

MEMORANDUM FOR BEN ELLIOTT
DEPUTY ASSISTANT TO THE PRESIDENT
DIRECTOR, PRESIDENTIAL SPEECHWRITING OFFICE

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Draft Presidential Remarks: News Conference Opening Statement

Counsel's Office has reviewed the above-referenced draft remarks, and finds no objection to them from a legal perspective.

cc: Richard G. Darman

FFF:JGR:aea 12/20/83
bcc: FFFielding/JGRoberts/Subj/Chron