THE WHITE HOUSE

WASHINGTON

September 13, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS
DEBORAH K. OWEN (JGR for both judges)

SUBJECT: Domestic Briefing Materials for Press Conference

David Chew has asked that comments on the above-referenced briefing materials be sent directly to Tom Gibson by 2:00 p.m. today. The materials discuss tax reform, the budget, trade, agriculture, AIDS, judicial selection, revisions to E.O. 11246 (affirmative action), comparable worth, Hispanic poverty, the supposed lack of women appointees, immigration reform, congressional relations, and bank failures.

The AIDS briefing points consider the dispute over admitting AIDS-afflicted children into the public schools. The third bullet item contains the statement that "as far as our best scientists have been able to determine, AIDS virus is not transmitted through casual or routine contact." I do not think we should have the President taking a position on a disputed scientific issue of this sort. He has no way of knowing the underlying validity of the scientific "conclusion," which has been attacked by numerous commentators. I would not like to see the President reassuring the public on this point, only to find out he was wrong later. There is much to commend the view that we should assume AIDS can be transmitted through casual or routine contact, as is true with many viruses, until it is demonstrated that it cannot be, and no scientist has said AIDS definitely cannot be so transmitted. I would simply delete the third bullet item.

I would also drop the last bullet item, stating that the President does not view this issue as "a strictly civil rights issue." The previous points state how the President sees the issue, and it should be left at that, without introducing possibly confusing references to civil rights. Certainly civil rights concerns are implicated, and this is in that sense a "civil rights issue," but that does not mean countervailing concerns do not outweigh any civil rights claims.

Federal Judge Selection/Too Political?:

The briefing materials in this area make five points: (1) charges of abuses are "moot"; (2) the President's nominees have received "extremely high" ABA ratings; (3) judicial appointment is a "Constitutional right and responsibility of the Chief Executive"; (4) it has been the practice of this President and his predecessors to appoint judges "who share similar attitudes concerning the role of the judiciary"; and (5) it "sounds like some folks are finally getting around to harvesting sour grapes from last November." (Emphasis in original.)

Point 1 is unclear and should be deleted, in my view. The description of abuse charges as "moot" suggests that there possibly may be substance to them. As an alternative, the first point would more appropriately be the one you made in the National Public Radio interview: "This Administration looks for nominees who are intelligent and very well-qualified." Point 2, relating to the ABA ratings, supports this.

I have no objection to Point 3 or Point 4. However, the latter would be strengthened if it were followed by a Point similar to one you made in the NPR interview: "There is no 'litmus test.' This Administration is attempting to restore a balance on the Federal judiciary that does not exist now with the judicial activism we see. Judges should interpret the law, not make it or execute it."

Point 5 should also be deleted, even though it is probably true to a certain degree. It implies that politics may be involved, a position we are trying to disclaim in the earlier Points.

Finally, since questions about the Administration's appointment of women and minorities to the bench are frequently raised in the press, and might be the focus of an initial, or follow-up, question, it might be advisable for Mr. Gibson to provide the President with back-up materials describing the Administration's achievements in this area.

The E.O. 11246 points are noncommital, simply noting that the President hopes for a color-blind society and would support changes to the extent they would further this goal.

The comparable worth points are incomplete in that they contain no reference to the recent Ninth Circuit decision. I would add the following between the current third and fourth bullets: "The U.S. Court of Appeals for the Ninth Circuit recently rejected a comparable worth suit brought by

state and local government workers against the State of Washington. That court decision reaffirms what we have been saying."

The attached draft response to Tom Gibson makes the foregoing recommendations.

Attachment

THE WHITE HOUSE

WASHINGTON

September 13, 1985

MEMORANDUM FOR TOM GIBSON
DIRECTOR, PUBLIC AFFAIRS

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Domestic Briefing Materials
for Press Conference

Counsel's Office has reviewed the above-referenced briefing points. I suggest deleting the third and sixth bullet items under the AIDS/Public Schools category. I do not think the President should be in the position of reassuring people that the AIDS virus cannot be transmitted through casual or routine contact, when that may prove to be untrue with catastrophic results. There is much merit to the view that we should assume AIDS may be so transmitted, as many viruses can, until it is definitely proven that it cannot be. The last bullet item should be deleted as confusing. The previous items convey the President's view, and I do not think it helpful to say this is or is not a "civil rights" issue.

With respect to the talking points under the title "Federal Judge Selection/Too Political?", I have several concerns. Point 1 is unclear and should be deleted. The description of abuse charges as "moot" suggests that there possibly may be substance to them. As an alternative, the following Point 1 would be more appropriate: "This Administration looks for nominees who are intelligent and very well-qualified." Point 2, relating to the ABA ratings, supports this.

I have no objection to Point 3 or Point 4. However, the latter would be strengthened if it were followed by: "There is no 'litmus test.' This Administration is attempting to restore a balance on the Federal judiciary that does not exist now with the judicial activism we see. Judges should interpret the law, not make it or execute it."

Point 5 should also be deleted. It implies that politics may be involved, a position we are trying to disclaim in the earlier Points.

Finally, since questions about the Administration's appointment of women and minorities to the bench are frequently raised in the press, and might be the focus of an initial, or follow-up, question, you should provide the President with back-up materials describing the Administration's achievements in this area.

With respect to comparable worth, it seems that some mention should be made of the recent Ninth Circuit decision. I would add the following item as a new bullet between the third and fourth bullet: "The U.S. Court of Appeals for the Ninth Circuit recently rejected a comparable worth suit brought by state and local government workers against the State of Washington. That court decision reaffirms what we have been saying."

FFF:JGR:DKO:aea 9/13/85
cc: FFFielding
JGRoberts
DKOwen
Subj
Chron

THE WHITE HOUSE

WASHINGTON

September 13, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Violation of 18 U.S.C. § 713(a)

The attached was received in the mail by a friend of a friend. It is the clearest example of a violation of 18 U.S.C. § 713(a) I have run across in my three years here. The Great Seal is clearly being used "for the purpose of conveying, or in a manner reasonably calculated to convey, a false impression of sponsorship or approval by the Government of the United States..." Even without the Seal, the solicitation -- "A Reminder from the President," return address "Office of the President," with donor categories of "Cabinet," "Ambassador," "Senate," "Congressional," "Commission," and "Constituent" -- clearly constitutes a fraudulent effort to create the impression of official Presidential sanction.

I am sending this over for staffing. I sincerely think that we should consider referring this to the Department of Justice for prosecution.

Attachment

THE WHITE HOUSE

WASHINGTON

September 16, 1985

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS

SUBJECT: Letter from Senator Byrd on Recess Appointments

Attached is a draft reply to the letter from Senator Byrd on Recess Appointments. His view has been rejected by the courts, and I think we should let the court opinions do most of the talking.

Attachment

THE WHITE HOUSE

WASHINGTON

September 16, 1985

Dear Senator Byrd:

This is written in response to your letter to the President dated July 30, 1985, concerning recess appointments. A response was not prepared when your letter arrived because it did not seem to call for a response. I understand, however, that you expect a response, and so the following is offered.

Your letter stated that the recent August recess "should not...be considered the kind of extended recess contemplated by Article III [sic], Section 2, Clause 3, of the Constitution," and that "recess appointments should be limited to circumstances when the Senate, by reason of a protracted recess, is incapable of confirming a vitally needed public officer." Such limitations on the President's power, however, do not appear in the Constitution itself. Article II, Section 2, Clause 3 of the Constitution simply provides: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

The courts have rejected your suggestion that the recess appointment power was intended to be used only in rare and exceptional cases. Perhaps the clearest statement may be found in an opinion rejecting a challenge to one of former President Carter's recess appointments:

> There is nothing to suggest that the Recess Appointments Clause was designed as some sort of extraordinary and lesser method of appointment, to be used only in cases of extreme necessity. ...There is no justification for implying additional restrictions not supported by the constitutional language. Recess appointments have traditionally not been made only in exceptional circumstances, but whenever Congress was not in session. Staebler v. Carter, 464 F. Supp. 585, 597 (D.D.C. 1979).

Your letter also suggests that use of the recess appointment power is somehow an illegitimate circumvention of the advice and consent role of the Senate. We do not share this view. The power to make recess appointments is found in the same Constitution that accords the Senate its advice and consent

role. As the Supreme Court has stated, "The Constitution... must be regarded as one instrument, all of whose provisions are to be deemed of equal validity." Prout v. Starr, 188 U.S. 537, 543 (1903). In no way is the provision for Senate confirmation constitutionally superior to the provision for recess appointments.

The decision to make a recess appointment is not made lightly. At the same time, however, the power to make such appointments is an important part of the system of checks and balances crafted by the Framers. The President would do a disservice to that system and the institution of the Presidency were he to acquiesce in your reading of the Recess Appointments Clause.

Sincerely,

M.B. Oglesby
Assistant to the President
for Legislative Affairs

The Honorable Robert C. Byrd
United States Senate
Washington, D.C. 20510

MBO:JGR:aea 9/16/85
bcc: FFFielding
JGRoberts
Subj
Chron

THE WHITE HOUSE

WASHINGTON

September 16, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Request for the President and First Lady to be Honorary Chairmen of Crescent Gala Benefit, April 4-5, 1985, Dallas, TX

Fred Ryan has asked if you have any legal problems with the President and Mrs. Reagan serving as Honorary Chairmen of the Crescent Gala Benefit, to be held April 4-5, 1986, in Dallas. Proceeds of the Gala will benefit the Dallas Chapter of the Friends of the Kennedy Center. The Gala will celebrate the opening of The Crescent, a lavish hotel-shopping-restaurant-office complex. The Crescent is a development of the Caroline Hunt Trust Estate, and the request for the Reagans to serve as Honorary Chairmen came from Caroline Hunt Schoellkopf, a Kennedy Center Trustee. Ryan indicates that he is inclined to accept in light of the Reagans' personal friendship with Mrs. Schoellkopf.

I contacted Bill Becker, attorney for the Friends of the Kennedy Center, to clarify the legal status of the entities involved. The Friends is a committee of the Board of Trustees, the governing entity of the Center, which itself qualifies for 501(c)(3) status. The Dallas Chapter of the Friends is not a separate legal entity, but funds raised by the Dallas Chapter will be administered by the Board to cover expenses of Texas groups performing at the Kennedy Center. In short, a gift to the Dallas Chapter is a gift to the Friends is a gift to the Kennedy Center itself.

Since the Gala will benefit the Kennedy Center, the Reagans are free to lend their names to it if they so desire. I am a bit concerned by the fact that the Gala will also celebrate the opening of the Crescent -- a commercial venture in which Mrs. Schoellkopf has a direct financial interest -- and wonder if the Reagans will be lending their name to the Crescent as much as to the Kennedy Center. The attached memorandum for Ryan notes this concern.

Attachment

THE WHITE HOUSE

WASHINGTON

September 16, 1985

MEMORANDUM FOR FREDERICK J. RYAN, JR.
DEPUTY ASSISTANT TO THE PRESIDENT
DIRECTOR, PRESIDENTIAL SCHEDULING

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Request for the President and First Lady to be Honorary Chairmen of Crescent Gala Benefit, April 4-5, 1985, Dallas, TX

You have asked if I have any legal objections to the President and Mrs. Reagan lending their names as Honorary Chairmen of the Crescent Gala to be held in Dallas, April 4-5, 1986. The Gala will celebrate the opening of The Crescent, a shopping-hotel-restaurant-office complex. Proceeds will benefit the Dallas Chapter of the Friends of the Kennedy Center.

Donations to the Dallas Chapter of the Friends of the Kennedy Center are, for legal purposes, contributions to the Kennedy Center. The Kennedy Center is of course a worthy activity, and the Reagans are legally free to lend their names to events to benefit the Kennedy Center.

I am concerned, however, by the mixture of commercial promotion and charitable benefit in this event. The Gala is, after all, described as a celebration of the opening of The Crescent, not simply a benefit for the Kennedy Center. If the Reagans do decide to participate in this event, care must be taken to ensure that they are listed as Honorary Chairmen only of particular events to benefit the Kennedy Center, not of all the festivities celebrating the opening of The Crescent.

FFF:JGR:aea 9/16/85
cc: FFFielding
JGRoberts
Subj
Chron

SUGGESTED TALKING POINTS FOR MEETING WITH

THE CHIEF JUSTICE, CHAIRMAN

COMMISSION ON THE BICENTENNIAL OF THE CONSTITUTION

--- Thank you very much for this first report of the Commission on the Bicentennial of the U.S. Constitution. By law this is not due until September 29. I'm surprised enough when anything is on time in Government, let alone early. The Commission chairman must crack a sharp whip. Seriously, I am pleased that the group of distinguished Americans serving on the Commission has gotten off to such a fast start.

-- It is of course fitting to do this today, for two reasons. Today is not only the 198th anniversary of the signing of the Constitution in Philadelphia's Independence Hall, it is also the Chief Justice's 78th birthday.

-- Greater statesmen than I have, over the generations, sung the praises of the Constitution, and nothing I can say can add much to the luster it has acquired over the past 198 years. The Constitution has, quite simply, done what the Framers intended it to do: it has permitted us to govern ourselves. That was rare in 1787; it is still rare today.

-- One thing that has struck me is how frequently we see revolutions betrayed. People rise up and cast off oppressive rulers only to have them replaced soon thereafter by new oppressors. Our revolution was different, because it was shortly followed by the Constitution, which has served as a blueprint for freedom ever since.

-- I know from personal experience that the Constitution works. The system of "checks and balances" we learn about in high school civics turns out to be very real. I know, I've been "checked" by the other branches a few times myself! If only the Framers had remembered to include a line-item veto...

-- I know, Mr. Chief Justice, that you and all the members of the Commission share my view that this upcoming bicentennial is a very important occasion. It is an opportunity for all Americans to re-educate themselves about the Constitution and rededicate themselves to the principles it embodies.

-- Your great predecessor John Marshall said "the people make the Constitution, and the people can unmake it." One way they can "unmake it" is by being ignorant of what it means and how it works. Too many have sacrificed too much for us to let that happen.

-- Thank you again for this first report. I wish the Commission well in its work, which I know will steadily increase in intensity as the bicentennial approaches.

THE WHITE HOUSE

WASHINGTON

September 17, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Portal-to-Portal Letter

Attached is a draft along the lines we discussed. I am a bit concerned about the Carter OLC opinion, since it relies on an old Comptroller General opinion explicitly renounced in the 1983 Comptroller General opinion. We can, of course, contend that the reasoning is still correct, even if the Comptroller General has rejected his old opinion, but I wanted you to know that the Comptroller General opinion cited in the OLC opinion has been overruled.

I recognize that this draft may be a bit much, particularly in the last two paragraphs, but I think the best approach is to try to shame those carping about the very limited portal-to-portal being provided.

THE WHITE HOUSE

WASHINGTON

September 17, 1985

Dear Mr. Bowsher:

I have received a copy of your letter dated August 19, 1985, to Senator William Proxmire, concerning the provision of home-to-work transportation to Government employees. As you know, we do not agree with the reading of the law on this subject contained in the Comptroller General decision of June 3, 1983, 62 Comp. Gen. 438 (1983). That decision itself recognized that it was inconsistent with prior Comptroller General decisions, as well as common practice over many Administrations known to and acquiesced in by Congress. The decision was also contrary to prior Department of Justice legal opinions and legal opinions issued by various agency general counsel.

In light of the confused state of the law on the provision of home-to-work transportation to Government employees, the Comptroller General decision pointed out the need for Congress to consider adopting clarifying legislation on the subject. As you know, Administration officials have been working closely with you and other General Accounting Office officials for some time to develop appropriate legislation to resolve the confusion in this area. After a lengthy and detailed drafting process, with the full participation of your office, former Office of Management and Budget Director David Stockman was able to submit to Congress, on July 31, a comprehensive legislative proposal. Your office was, of course, fully aware of that submission.

Despite the foregoing, your letter to Senator Proxmire, which you propose to make public on September 18, concludes that "the officers and employees on the White House staff who might be involved should immediately cease such use of Government vehicles unless adequate justification is provided."

The only members of the White House staff receiving regular home-to-work transportation are the Chief of Staff and the National Security Adviser. Both officials would be covered by the proposed legislation. The National Security Adviser is provided such transportation under an opinion from the Department of Justice Office of Legal Counsel furnished during the Carter Administration, with respect to former National Security Adviser Dr. Zbigniew Brzezinski. That opinion noted the need for the National Security Adviser to be able to communicate with the President at all times. The opinion also stressed that the position of the National

Security Adviser makes him an important potential target for terrorists or disturbed persons. The provision of home-to-work transportation in a Government vehicle with secure communication facilities and a trained driver ensures constant communications capability and increased protection, both not in the interest of personal convenience but rather of national security.

The same reasoning applies with equal force to the Chief of Staff. In addition, the Secret Service has determined that a security threat exists with respect to the Chief of Staff, and has directed that the Chief of Staff be provided home-to-work transportation in response to that threat.

I view the foregoing as "adequate justification" for the provision of home-to-work transportation to these two officials. I could not, in good conscience, advise them to cease accepting such transportation when doing so could result in the President being unable to communicate with his Chief of Staff or his National Security Adviser in the event of a critical national emergency in which the necessary response time, in this nuclear age, is measured in minutes. Nor could I so advise them when doing so could subject them to unreasonable threats to their personal safety and thereby to our national security.

If you have other views, I would appreciate the opportunity to discuss this matter with you at your earliest convenience. The foregoing reasons for providing home-to-work transportation to these individuals will not suddenly abate when you make your letter to Senator Proxmire public, yet the individuals need to know if they are at risk after that date. A decision that the Chief of Staff and the National Security Adviser may not continue to be provided home-to-work transportation must be accompanied by a willingness to accept responsibility for the consequences in terms of our Nation's ability to respond to a crisis and in terms of the security not only of the individuals involved but the Nation as well.

Sincerely,

Fred F. Fielding
Counsel to the President

The Honorable Charles A. Bowsher
Comptroller General of
the United States
Washington, D.C. 20548

FFF:JGR:aea 9/17/85
cc: FFFielding
JGRoberts
SUbj
Chron

THE WHITE HOUSE

WASHINGTON

September 17, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Presentation of Prince of Peace Prize to Pope John Paul II

Fred Ryan has asked for your views on an unusual request for Presidential participation by William French Smith III, the former Attorney General's son. Smith, a California attorney, is President of an entity known as the Prince of Peace Institute. In 1980, a small group of individuals (including the Chief Justice) presented Anwar Sadat with a "Prince of Peace Prize." There were at the time apparently no plans to institutionalize the award, but Smith now proposes a three-day "Prince of Peace Festival" in Rome, beginning January 1, 1987, at which Mrs. Anwar Sadat would present the second Prince of Peace Award to Pope John Paul II. The Festival and the Award are intended to "celebrate the Divine Source of Peace." Smith wants the President to send him a letter endorsing the scheme.

It is difficult for me to figure out what is behind all this. In any event, the idea is far too preliminary for the President to consider supporting it. I do not know if the President will ever be in a position to support the Festival or Award. The Prince of Peace Institute plans to use the facilities of the International Service Committee in Rome, an entity described by Smith as "the Vatican liaison for fifty million Charismatic Catholics around the world." If the award is a sectarian endeavor the President should not become involved. The attached reply to Ryan simply notes that the plans are too preliminary for the President to consider participating.

Attachment

THE WHITE HOUSE

WASHINGTON

September 17, 1985

MEMORANDUM FOR FREDERICK J. RYAN, JR.
DEPUTY ASSISTANT TO THE PRESIDENT
DIRECTOR, PRESIDENTIAL SCHEDULING

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Presentation of Prince of Peace Prize to Pope John Paul II

You have asked for my views on a proposal from William French Smith III that the President participate in and endorse a planned "Prince of Peace Festival" at which a "Prince of Peace Award" would be presented to Pope John Paul II. I think you will agree that the proposal is far too preliminary to warrant any definite response or action by the President. As a general matter the President should avoid participating in festivals or awards associated with particular religions. It is unclear whether the proposed "Prince of Peace Award" falls within this category, although it is described as a "Christian award" and those planning the event will be using offices of a Catholic organization in Rome.

Mr. Smith may be motivated by the best of intentions, but his "Prince of Peace Award" proposal has far to go before becoming a reality. I think we need to wait and see if and how it develops before having the President lend his name to it.

FFF:JGR:aea 9/17/85
cc: FFFielding
JGRoberts
Subj
Chron

THE WHITE HOUSE

WASHINGTON

September 19, 1985

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

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Address: President's Export Council

I have reviewed the above-referenced draft Presidential address. The first sentence in the first full paragraph on page six should be changed to read as follows: "Under a recent amendment of the Trade Act of 1974, we have initiated investigations to help counter unfair trade practices in so-called 301 cases." As written, the sentence is misleading in suggesting that other Administrations could but chose not to self-initiate § 301 investigations, and that previous Administrations took no action to counter unfair trade through § 301 cases. Previous Administrations did take such action, in response to petitions initiating investigations, which was the only way to do so until October 30, 1984.

The first sentence in the last paragraph on page six should be changed by adding "to seek legislation" between "Treasury" and "to."

cc: David L. Chew

THE WHITE HOUSE

WASHINGTON

September 19, 1985

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS

SUBJECT: Proposed Presidential Message to ABA Young Lawyers' Section

Presidential Messages has asked if we have any objection to the President sending a message to the Young Lawyers Section of the Bar Association of the District of Columbia on the occasion of its fiftieth anniversary. Appropriate language has also been requested. I do not know why this was staffed for a response for your signature, since it concerns the Young Lawyers Section, but an appropriate reply, with suggested language, is attached. Printing deadline is September 21.

Attachment

THE WHITE HOUSE

WASHINGTON

September 19, 1985

MEMORANDUM FOR ANITA BEVACQUA
PRESIDENTIAL MESSAGES

FROM: RICHARD A. HAUSER
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: Proposed Presidential Message
to ABA Young Lawyers' Section

You have asked for our views on a proposed message from the President to the Young Lawyers Section of the Bar Association of the District of Columbia, on the occasion of its fiftieth anniversary. We believe a message would be appropriate, and attach suggested language.

Thank you for raising this matter with us.

Attachment

cc: Luis Acle
Office of Public Liaison

RAH:JGR:aea 9/19/85
bcc: FFFielding
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Chron

I am happy to send congratulations to the Young Lawyers Section of the Bar Association of the District of Columbia on the occasion of its Fiftieth Anniversary. Although I am not eligible for membership in the Section for at least two reasons, I do recognize the valuable contribution the Section has been making to the legal profession in the District and to the community as a whole.

The efforts of the Section to provide pro bono services are in the finest tradition of the Bar and of the uniquely American spirit of voluntarism. The services provided by the Section to its members help shape the skills that will enable young lawyers in the District to assume positions of trust and responsibility in Government and the private sector.

The Young Lawyers Section may look back on its fifty years of service with pride. You have my best wishes for many more years to come.

THE WHITE HOUSE

WASHINGTON

September 19, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Address: President's Export Council

Attached is the President's proposed address to the Export Council that we discussed at this morning's staff meeting. The speech is a pitch for free trade, criticizing the wide range of protectionist legislation pending in Congress. It minimizes the significance of the trade deficit, and explains that deficit on the basis of the relative strength of the American economy.

There are two minor legal problems with the draft, both on page six. The first full paragraph on page six states "Under authority granted by the Trade Act of 1974, we are the first Administration in history to initiate investigations and take action to counter unfair practices in so-called 301 cases." It is true that an amendment to the Trade Act enacted October 30, 1984, first authorized the Trade Representative to self-initiate § 301 investigations. The sentence in the draft, however, conveys the false impression that other Administrations refused to do this (rather than were not authorized by Congress to do so) and that other Administrations did not take action under § 301. Other Administrations did take such action, in response to petitions calling for an investigation. I would change the sentence to "Under a recent amendment of the Trade Act of 1974, we have initiated investigations to help counter unfair trade practices in so-called 301 cases."

In the last paragraph on page six, the draft states that the President has asked the Secretary of the Treasury to establish a $300 million war chest for trade purposes. This should be changed to the President has requested the Secretary to seek legislation to establish such a war chest.

Attachment

THE WHITE HOUSE

WASHINGTON

September 19, 1985

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

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Address: President's Export Council

I have reviewed the above-referenced draft Presidential address. The first sentence in the first full paragraph on page six should be changed to read as follows: "Under a recent amendment of the Trade Act of 1974, we have initiated investigations to help counter unfair trade practices in so-called 301 cases." As written, the sentence is misleading in suggesting that other Administrations could but chose not to self-initiate § 301 investigations, and that previous Administrations took no action to counter unfair trade through § 301 cases. Previous Administrations did take such action, in response to petitions initiating investigations, which was the only way to do so until October 30, 1984.

The first sentence in the last paragraph on page six should be changed by adding "to seek legislation" between "Treasury" and "to."

cc: David L. Chew

FFF:JGR:aea 9/19/85
cc: FFFielding
JGRoberts
Subj
Chron

THE WHITE HOUSE

WASHINGTON

September 19, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Presidential Power to Convene Congress

Dianna conveyed your request for a memorandum for the President outlining his authority to keep Congress in session or call Congress back from a recess or adjournment. So far as I can determine, the President has no authority to prevent Congress from adjourning. He has complete and unfettered authority, however, to convene either or both Houses at any time.

Pursuant to Article II, Section 3, the President "may, on extraordinary occasions, convene both Houses, or either of them." I have found no cases construing this authority of the President. Hamilton in The Federalist No. 77 simply noted the existence of this power in a laundry list of miscellaneous Executive powers, stating that "no objection has been made to this class of authorities; nor could they possibly admit of any." He went on to state that a President may desire to convene simply the Senate, to obtain its consent to a treaty.

The Constitutional language refers to "extraordinary occasions," but it is accepted that the President may convene Congress for whatever reasons are deemed sufficient by him. B. Schwartz, A Commentary on the Constitution of the United States, Vol. II, p. 23 (1977). Past practice bears this out. Presidents have convened Congress for such purposes as tariff revision, consideration of a ship subsidy bill, and to deal with a housing shortage. A list of the occasions on which the authority has been exercised is contained at Tab A.

The last instance on which a President convened Congress was President Truman's action in 1948. The proclamation accomplishing this is at Tab B.

I am aware of no Presidential authority to keep Congress in session. Article I, Section 7, Clause 3 specifically provides that adjournment resolutions need not be presented

to the President. The President may threaten to convene Congress if it adjourns, to prevent it from doing so. Congress may, of course, convene and then promptly adjourn, but the President would seem to be just as free to reconvene Congress again and again.

Attachment

THE WHITE HOUSE

WASHINGTON

September 19, 1985

INFORMATION

MEMORANDUM FOR THE PRESIDENT

FROM: FRED F. FIELDING

SUBJECT: Presidential Power to Convene Congress

I. SUMMARY

As President you have constitutional authority to call Congress back into session or back from recess at any time for any purpose. You have no authority to prevent Congress from adjourning, but the threat of calling Congress back may suffice, as a practical matter, to prevent adjournment.

II. DISCUSSION

The Constitution provides that the President "may, on extraordinary occasions, convene both Houses, or either of them." Article II, Section 3. This authority has been exercised on numerous occasions throughout history. Presidents have convened Congress to deal with a broad range of matters, ranging from the Civil War and the Marshall Plan to ship subsidy legislation and an American-Canadian tariff.

President Truman was the last President to convene Congress, in 1948, as part of his attack on the so-called "do nothing" Congress. The Constitution refers to "extraordinary occasions," but it is accepted that the President himself may judge what constitutes such an occasion to justify convening Congress. There are thus no restrictions on your authority to call Congress back into session or back from recess at whatever time you determine.

You do not, however, have any legal authority to prevent Congress from adjourning. You may, of course, threaten to convene Congress if it adjourns without taking up matters you wish it to consider, and this threat may suffice to prevent Congress from adjourning. There is nothing to prevent Congress from adjourning promptly after reconvening in response to your call, but, by the same token, there is nothing to prevent you from calling Congress back again and again.

FFF:JGR:aea 9/19/85
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

September 23, 1985

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS

SUBJECT: Invitation for Linas Kojelis to Serve as Chairman of Lithuanian-American Republican Federation

The attached reply for your signature advises Linas Kojelis not to accept an invitation to serve as an officer of an ethnic political organization. Kojelis is the Office of Public Liaison official responsible for liaison with the ethnic community.

Attachment

THE WHITE HOUSE

WASHINGTON

September 23, o985

MEMORANDUM FOR LINAS KOJELIS
ASSOCIATE DIRECTOR
OFFICE OF PUBLIC LIAISON

FROM: RICHARD A. HAUSER
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: Request to Serve as Chairman of
Lithuanian-American Republican Federation

You have asked for our views on an invitation extended to you by the Lithuanian-American Republican Federation to serve as Chairman of the Education Committee of the Federation. I must advise you to decline the invitation, on grounds of potential conflict with your official responsibilities.

As a member of the Office of Public Liaison with responsibility for liaison with ethnic groups, your areas of responsibility obviously overlap with the areas of interest to the Lithuanian-American Republican Federation. There is the possibility that the Administration and the Federation may adopt inconsistent positions, or that service as an officer of the Federation may cause some to question your objectivity in the discharge of your official duties.

Thank you for raising this matter with us.

RAH:JGR:aea 9/23/85
cc: FFFielding
JGRoberts
Subj
Chron

THE WHITE HOUSE

WASHINGTON

September 23, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Request for White House Support for the Fourth National Colon-Rectal Cancer Screening

Attorney Philip F. Zeidman, on behalf of "The Medicine Shoppe," a national chain of pharmacies, has asked that the President endorse The Medicine Shoppe's free colorectal cancer screening program, scheduled for December 6-8. Home testing kits will be distributed free at Medicine Shoppes on those days, and the AMC Cancer Research Center will analyze the results. This is the fourth year for the program.

It is my understanding that the memorandum we prepared on Presidential endorsement of fundraising for colorectal cancer programs is being held in abeyance, pending a meeting with the President on the subject. This request should be addressed at that meeting. This request is a bit different, since it involves a for-profit company, and The Medicine Shoppe will obviously benefit from any publicity surrounding the program. On the other hand, this seems like the sort of private sector initiative often praised by the President, and if he decides to become personally involved in this area he may want to endorse the completely free testing program. I recommend that this be held until it can be raised by you at the anticipated meeting.

THE WHITE HOUSE

WASHINGTON

September 23, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: OGE Inquiry on Portal-to-Portal

David Martin has written you, attaching a copy of the Comptroller General's letter of August 19 to Senator Proxmire, and the 1983 GAO opinion on portal-to-portal. Martin states that he does not entirely agree with the opinion but is "considering a memorandum addressing this problem and providing clear instructions on appropriate vehicle use."

The last thing anyone needs is another memorandum "providing clear instructions" on portal-to-portal. I do not know where Martin would draw his "clear instructions" from -- the GAO opinion is not binding on the Executive branch, and Justice and agency general counsel opinions directly contradict the GAO opinion. The attached reply provides Martin a little background on our efforts, and sends along a copy of the Administration bill and testimony by Horowitz and Socolar.

Attachment

THE WHITE HOUSE

WASHINGTON

September 23, 1985

MEMORANDUM FOR DAVID H. MARTIN
DIRECTOR
OFFICE OF GOVERNMENT ETHICS

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Portal-to-Portal

Thank you for your memorandum of September 23, transmitting a copy of the Comptroller General's letter of August 19, 1985, to Senator Proxmire and a copy of the 1983 Comptroller General opinion on portal-to-portal. There is, as you know, considerable confusion concerning the state of the law on portal-to-portal. The 1983 GAO opinion itself recognized that it was inconsistent with prior GAO opinions. It is also inconsistent with Department of Justice opinions and opinions issued by various agency general counsel. I do not necessarily agree with the GAO opinion, and, as a matter of constitutional law, the opinion is not binding on the Executive branch.

The 1983 GAO opinion contained a call for Congress to consider legislation to clarify the confused state of the law on portal-to-portal. My office and OMB have been working closely with GAO for some time to develop a suitable legislative proposal. On July 31, former Director of OMB David Stockman submitted an Administration bill on this subject to the Hill. A hearing on the bill was held on September 19, at which OMB General Counsel Michael Horowitz testified for the Administration. Testimony by Milton Socolar, Special Assistant to the Comptroller General, was generally supportive of the bill. I attach for your information copies of the bill and the statements by Horowitz and Socolar.

Given this background, I do not know where you would look to find "clear instructions on appropriate vehicle use." The GAO opinion may seem clear, but it may well be an incorrect reading of the law and, as noted, it is not binding on the Executive branch. It also may not be as clear as it seems -- as noted in Horowitz's testimony, GAO itself recognized an exception to its categorical statement only weeks after it issued the 1983 opinion.

FFF:JGR:aea 9/23/85
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

September 24, 1985

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS

SUBJECT: Appointment of Kay Orr to the John F. Kennedy Center for the Performing Arts Advisory Committee

A draft to Tuttle for your signature is attached.

Attachment

THE WHITE HOUSE

WASHINGTON

September 24, 1985

MEMORANDUM FOR ROBERT H. TUTTLE
DEPUTY ASSISTANT TO THE PRESIDENT
DIRECTOR, PRESIDENTIAL PERSONNEL

FROM: RICHARD A. HAUSER
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: Appointment of Kay Orr to the John F. Kennedy Center for the Performing Arts Advisory Committee

Thank you for advising that Kay Orr is "a museum follower and is supportive of the arts," and that she is a trustee of a college engaged in expanding its arts facilities. Based on your representations that Mrs. Orr is "supportive of the arts" and involved in the Hastings College arts expansion, this office will not object to proceeding with her appointment. The fact that she is a "museum follower" is irrelevant, since museum arts are not one of the arts covered by the Kennedy Center. And the fact that the Committee's function is fundraising is also irrelevant, since the statute sets out specific criteria for appointees. 20 U.S.C. § 76h(c).

RAH:JGR:aea 9/24/85
cc: FFFielding
RAHauser
JGRoberts
Subj
Chron

THE WHITE HOUSE

WASHINGTON

September 24, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Barnes v. Kline

The Solicitor General is deciding whether (and how) to seek certiorari in the recent pocket veto case, Barnes v. Kline. You will recall that the Court of Appeals decision in that case was as decisive a defeat on pocket veto issues as possible, with the end result that the pocket veto is now available only between Congresses (which has never been disputed). Since the decision is as binding on us as a Supreme Court decision, and since we lost everything below, we obviously want the Supreme Court to review the pocket veto issue on the merits.

The catch is that the case also raises serious mootness and Congressional standing issues, which go to jurisdiction. Justice's arguments that the case is moot and that the Congressional plaintiffs have no standing (Judge Bork's view in dissent) will, if successful, preclude a decision on the merits of the pocket veto issue. The case would then be "Munsingwear'd," but, as a practical matter, we would of course know how the votes stack up on the pocket veto issue (particularly since en banc was sought and denied). As a practical matter, you would, I think, be compelled to advise the President to return veto any bills other than those that fall between Congresses. You could include a disclaimer with the return, as we now do with intrasession vetoes under Kennedy v. Simpson, but the practical effect will be that the pocket veto issue will probably never arise again. Result: unless we obtain Supreme Court review of the pocket veto issue on the merits this time, we will have to concede the issue in the future. Justice cannot simply avoid raising mootness and standing, since they go to jurisdiction.

The situation strikes me as a true Catch-22. No action is necessary now, but I wanted you to be aware of the issues confronting the Solicitor General, in the event we are asked our views by him.