The original documents are located in Box 24, folder "Justice - Opinions Requested (2)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

Department of Justice
Washington, D.C. 20530

MAY 9 1975

MEMORANDUM FOR THE HONORABLE RODERICK M. HILLS
Counsel to the President

This is in response to your oral inquiry as to the manner in which the Executive Director of the Commodity Futures Trading Commission is to be appointed.

Section 101(a)(3) of the Commodity Futures Trading Commission Act of 1974, Pub. L. 93-463, 88 Stat. 1389, establishes a Commodity Futures Trading Commission ("the Commission"). Subsection (a)(5) provides for an Executive Director "who shall be appointed by the Commission, by and with the advice and consent of the Senate." When President Ford approved the bill, he stated that this method of appointment "raises serious constitutional questions by providing for an executive branch appointment in a manner not contemplated by the Constitution," and recommended the enactment of corrective legislation. 10 Weekly Compilation of Presidential Documents 1366, 1367.

The Commission is now being activated and the need for appointment of an Executive Director is at hand. The legislation requested by President Ford has not been enacted, and we have been advised informally by the Office of Management and Budget that its introduction is not now practicable. Accordingly, we must deal with the appointment of the Executive Director under present law. It is my conclusion that he is to be appointed by the President, by and with the advice and consent of the Senate.

1. Invalidity of the Statutorily Prescribed Procedure

The pertinent constitutional text is Article II, section 2, clause 2, which provides that officers of the United States are to be appointed by the President by and with the advice and consent of the Senate, except that "the Congress may by Law vest the Appointment of such inferior Officers as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Thus, the usual appointment

process involves both the President and the Senate. Congress, however, is given the power to provide three alternative methods for the appointment of inferior officers.1/ Those three methods, however, are exclusive; and Congress lacks the constitutional power to provide for any other variation. The Attorneys General in a line of opinions going back to 1843 have consistently held that any attempt to vest the power of appointment in any officer or body2/ other than the President, the courts of law, or a head of department is invalid. 4 Op. A.G. 162, 164 (1843); 10 Op. A.G. 204, 209 (1862); 11 Op. A.G. 209, 210-212 (1865); 13 Op. A.G. 516, 521-522 (1871); 18 Op. A.G. 409, 410 (1886).

Thus, the provision for the appointment of the Executive Director by the Commission, by and with the advice and consent of the Senate, is constitutionally deficient. The only constitutionally prescribed alternatives to the normal manner of appointment do not include one which would exclude the President but not the Senate from the appointment process.

2. Effect of Invalidity

While the Constitution permits Congress to provide "by law" for one of the three alternative procedures, where it has failed to do so--even when that failure results from an attempt to employ an impermissible alternative--the usual method of appointment prevails.

1/ The Executive Director of the Commission is unquestionably an inferior officer within the meaning of the Constitution, and we need not burden this memorandum with elaboration on that point. In any event, the result would be the same if he were not an inferior officer; he would have to be appointed by the President by and with the advice and consent of the Senate, since none of the three alternative methods for appointment would be constitutionally available.

2/ In 1886, Attorney General Garland took the position that a "subordinate commission" such as the Civil Service Commission was not a head of department. 18 Op. A.G. 409, 410 (1886). That opinion, however, was overruled by Acting Attorney General Biggs in 1933. 37 Op. A.G. 227.

The Act of March 3, 1865 sought to vest the power to appoint the Assistant Assessors of Internal Revenue in the several Assessors of Internal Revenue, i.e., officers who were not heads of departments. On that occasion, Attorney General Speed ruled:

> "* * * The Constitution confers on the President the power to nominate, and, by and with the advice of the Senate, to appoint, all officers of the United States whose appointments are not in the instrument otherwise provided for, and whose offices shall be established by law. In the case of 'inferior officers,' Congress may provide for their appointment by the President alone, the heads of departments, or the federal tribunals. When Congress creates such offices and omits to provide for appointments to them, or provides in an unconstitutional way for such appointments, the officers are, within the meaning of the Constitution, 'officers of the United States whose appointments are not' therein 'otherwise provided for.' The power of appointing such officers devolves on the President."3/ 11 Op. A.G. 209, 213 (1865). (Emphasis supplied.)

In connection with the Civil Service Act of 1883, which authorized the Civil Service Commission to employ a Chief Examiner, Attorney General Garland ruled that the power to appoint inferior officers could not be vested in what he considered to constitute a "subordinate commission" and that that power therefore was vested in the President, by and with the advice and consent of the Senate. 18 Op. A.G. 409, 410-411 (1886).4/ On another occasion, Attorney General Garland declared that where a statute establishing an office was silent on the method of appointment "or made no valid and effective provision on the subject," the power of appointment devolves on the President and the Senate. 18 Op. A.G. 298, 300 (1885).

3/ Read in its context, the last sentence should be understood to mean that the power of appointment devolves on the President by and with the advice and consent of the Senate.

4/ On the controversy as to whether a regulatory commission constitutes a head of department in the constitutional sense, see fn. 2, supra.

Congress has agreed with those rulings of Attorneys General Speed and Garland. In the first-mentioned case it promptly enacted legislation vesting the power to appoint the Assistant Assessors of Internal Revenue in the Secretary of the Treasury. Act of January 15, 1866, 14 Stat. 2.[5/] And the Chief Examiner of the Civil Service Commission was appointed by the President by and with the advice and consent of the Senate from 1886 on, until Acting Attorney General Biggs ruled in 1933 that the Civil Service Commission is constitutionally a "head of department" in whom the power to appoint inferior officers could be vested. 37 Op. A.G. 227, 228. See fn. 2, supra.

3. The Issue of Separability

The conclusion that the Executive Director is to be appointed by the President by and with the advice and consent of the Senate raises the question of separability. That is, can the remainder of the statute be applied as enacted, excising only the invalid appointment provision; or must other sections of the statute (e.g., the creation of the office of the Executive Director) be deemed invalidated as well? The above discussed Attorney General opinions do not directly address this point, but it is in any event one which must be resolved in the context of the particular legislation.

5/ Senator Fessenden's explanation of this legislation on the floor of the Senate included the following statement:

> "* * * The act passed at the last session of Congress conferred the appointment of assistant assessors of internal revenue upon the assessor in each district. By the Constitution, all officers are to be appointed by the President with the assent of the Senate; but there is a provision that Congress may confer the appointment of such inferior officers as may be provided for by law upon the President alone, or upon the heads of Departments, or (I believe) on the Judges of the Supreme Court (sic). Consequently, this power thus granted was one that could not be exercised by the assessors, and the President has been obliged to make the appointments." Cong. Globe, 39th Cong., 1st Sess. p. 160.

For Congressman Morrill's explanation of the bill, see id., p. 98.

In the present case, at least, the issue presents no difficulty. While the 1974 enactment, it is true, does not contain a separability provision, it is an amendment to a statute which does. See 7 U.S.C. 17. Moreover, there is nothing to suggest that Congress attached such importance to the appointment provision that it otherwise would not have enacted the statute or established the office. To the contrary, the legislative history indicates that the method of appointment came about almost accidentally, in conference. The House version of the bill provided for appointment of the Executive Director by the Commission alone. H. Rept. 93-975, p. 21. The Senate version provided for appointment by the President, by and with the advice and consent of the Senate. S. Rept. 93-1131, p. 2. The conference committee combined those two approaches (S. Rept. 93-1194, pp. 33-34), presumably without realizing that the scheme thus created was unique (as shown by our computer check of current federal statutes), and unconstitutional. In comparable circumstances, compromise provisions of a constitutionally objectionable nature inserted in legislation in the conference stage have been considered to be separable. See 41 Op. A.G. 230, 235 (1955).

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

THE WHITE HOUSE

WASHINGTON

Justice

May 22, 1975

MEMORANDUM FOR

THE HONORABLE ANTONIN SCALIA
ASSISTANT ATTORNEY GENERAL

After reading your memo to the Attorney General of April 28 on the Inflation Impact Statement, I asked for suggestions in my office as to what might be done to overcome or limit the possibility that the requirement for impact statements would enable private litigants to enjoin executive action.

The proposal I received from Dudley Chapman suggests including a new paragraph in the President's Executive Order to be inserted between the present sections 4 and 5. The language suggested is as follows:

> No legislative proposal, regulation or rule shall be delayed, invalidated, or otherwise impeded by alleged or actual failure to comply with the terms of this order. Enforcement of the requirements herein shall be effected exclusively through the supervisory powers of the President and the Office of Management and Budget. No judicially enforceable duty is imposed by this order, the terms of which shall be automatically suspended as to any official or agency against whom or which a suit is filed on the basis of this order, effective on the filing of such suit.

P.W.B

Philip W. Buchen
Counsel to the President

Justice
(Pre
Economy
&
Inflation)

May 9, 1975

MEMORANDUM FOR: KEN LAZARUS
DUDLEY CHAPMAN

FROM: PHILIP BUCHEN

Attached is a memo from the Attorney General on Inflation Impact Statements.

Kindly let me have your comments.

Attachment

Justice

Department of Justice
Washington, D.C. 20530

APR 28 1975

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Inflation Impact Statements

This is in response to your April 3 request for this Office's views on the legal aspects of the OMB memorandum concerning Inflation Impact Statements required by Executive Order No. 11821. It was the conclusion of the memorandum that the required impact statements would not enable private litigants to enjoin Executive action. Our information from OMB is that this Department had no participation in the preparation of the memorandum. Apparently the legal position was developed by the General Counsel of the Wage and Stability Council.

As you are aware, a preliminary injunction has been granted in Independent Meat Packers Ass'n v. Butz, Civ. No. 75-0-105 (D. Neb. April 14, 1975), at least partially on the basis that the Inflation Impact Statement by the Department of Agriculture was insufficient (see the attached communication to the Civil Division). This preliminary injunction was affirmed by the Eighth Circuit on April 15. The initial indication is, therefore, that the failure to make, or the insufficiency of, an Inflation Impact Statement will provide a basis for enjoining Executive action. The Civil Division tells us that the case will now be heard on the merits and in that connection the Government will again argue that the impact statement is not a proper basis for judicial relief.

The court's willingness to review the impact statement is not surprising when one considers judicial reaction to the requirement of a NEPA statement. It is my estimate that, while objections to standing and jurisdiction may be upheld in particular cases, the courts will not sustain the broad proposition that the Executive order can never support the granting of an injunction. Cf. Service v. Dulles, 354 U.S. 363 (1957); 5 U.S.C. § 702, 706(2)(d).

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

Attachment

THE WHITE HOUSE

WASHINGTON

June 3, 1975

MEMORANDUM FOR: Jerry Jones

FROM: Philip Buchen P.W.B.

I believe that you will find the attached memorandum and opinion regarding GAO's lack of authority to audit certain White House Office accounts to be of particular interest.

My office is available for any continued assistance that you require on this matter.

Enclosures

cc: Bob Linder

THE WHITE HOUSE

WASHINGTON

June 3, 1975

MEMORANDUM FOR: PHIL BUCHEN

FROM: BARRY ROTH

Subject: OLC Opinion On the GAO Request to Audit the Presidential Travel Account

The attached opinion of the Office of Legal Counsel responds to a request from GAO to audit the Presidential Travel Account. Basically, OLC makes the following conclusions:

1. GAO lacks the authority to audit the pre-FY 1975 accounts for Presidential travel, official entertainment, newspapers, periodicals, and teletype news service.

2. Despite a contrary intent by Congress in eliminating the reference to a Presidential certificate in the White House Office appropriation, the appropriation only served to amend 3 U.S.C. 103 to expend $100,000 for Presidential travel, accountable only on the President's certificate.

3. This change in the appropriation language does subject to GAO audit FY 1975 expenditures by the White House Office for official entertainment, newspapers, periodicals, teletype news service and the hire of passenger motor vehicles (unless paid for from the Presidential travel account).

4. The failure of the former President to account by certificate for such expenditures does not allow GAO to audit these accounts.

5. It is proper for a later President to certify expenditures under a former President.

On this last point, I recommend that we prepare a certificate for President Ford's signature only if this formality is insisted upon by GAO after discussions with their auditors and the Staff Secretary's office, in which Bob Linder has asked me to join him. In addition, Jerry Jones should give some consideration to the political reaction that may occur in the Congress as a result of this opinion. My initial reaction is that this will not have a great effect on whether the new White House authorization bill will provide for the continued use of certificate accounts. Congressional focus is more likely to be based on the simpler issue of accountability, wholly apart from what was allowed in the past.

Department of Justice
Washington, D.C. 20530

JUN 3 1975

MEMORANDUM FOR HONORABLE PHILIP W. BUCHEN
Counsel to the President

Re: GAO audit of Presidential travel account

This is in response to your memorandum of May 2, 1975, requesting my views on the above subject.

Expenditures Prior to FY 1975

Prior to FY 1975 both 3 U.S.C. § 103 and the applicable appropriation acts provided that Presidential travel expenses were to be accounted for solely on the certificate of the President. This has been the consistent interpretation of those laws by this Office and the old Bureau of the Budget--presumably accepted by GAO itself--over the course of many administrations. The interpretation by GAO of the 1974 White House appropriation, Pub. L. No. 93-143, 87 Stat. 516 (1973), based merely on the grammatical structure of the sentence in the appropriations act containing the certification authority (and assuming the inapplicability of 3 U.S.C. § 103), concludes that only official entertainment expenses of the President may be accounted for by certificate. Memorandum from General Counsel, Paul G. Dembling to Director, FGMS, dated Mar. 27, 1975, at 2. This conclusion, however, ignores the legislative history of the provision, central to which is the fact that the President's authority to account for certain White House Office funds solely by certificate originated nearly 70 years ago specifically with regard to travel expenses and that the President's travel expenses have been accounted for solely by certificate ever since that time.

The first authorization and appropriation for Presidential travel expenses was made by the Act of June 23, 1906, c. 3523, 34 Stat. 454. That Act provided:

> . . . That hereafter there may be expended for or on account of the traveling expenses of the President of the United States such sum as Congress may from time to time appropriate, not exceeding twenty-five thousand dollars per annum, such sum when appropriated to be expended in the discretion of the President and accounted for on his certificate solely.

There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the purposes authorized by this Act for the fiscal year nineteen hundred and seven, the sum of twenty-five thousand dollars.

(The first paragraph, or authorizing paragraph, virtually unchanged except as to amount, is now found as 3 U.S.C. § 103). Beginning the next fiscal year, the appropriation language took the form:

For traveling expenses of the President of the United States, to be expended in his discretion and accounted for on his certificate solely, twenty-five thousand dollars. Act of March 4, 1907, c. 2918, 34 Stat. 1342.

This language in the annual appropriation acts remained exactly the same until 1922, when the words "and official entertainment" were inserted between "traveling" and "expenses". Act of June 12, 1922, c. 218, 42 Stat. 636. Both travel and entertainment expenses were now to be accounted for solely by certificate. This language was not changed until 1945, although the amount appropriated varied during the depression years. The change in 1945 eliminated the separate appropriation for Presidential travel and entertainment, instead including them as one category of expenses under the appropriation for the White House Office's salaries and expenses. The applicable portion of that appropriation now read:

* * *; and travel and official entertainment expenses of the President, to be accounted for on his certificate solely; . . . . Act of May 3, 1945, c. 106, 59 Stat. 106.

Clearly, travel was still to be accounted for solely by certificate. This language was unchanged until 1954 when it was changed only by the inclusion of three new items to be accounted for by certificate, reading:

* * *; newspapers, periodicals, teletype news service, and travel and official entertainment expenses of the President, to be accounted for on his certificate solely; . . . . Act of June 24, 1954, c. 359, 68 Stat. 273.

This remained the language in the annual appropriation acts until 1959, when a comma was added between "travel" and "and." Act of July 8, 1959, Pub. L. No. 86-79, 73 Stat. 162. Whatever the explanation for this punctuation change, it can hardly be thought to have overturned fifty years of practice with regard to the accounting for Presidential travel without some comment by Congress. Indeed, travel expenses continued to be accounted for solely on the President's certificate. In 1970 the parenthetical limitation on the amount to be expended on Presidential travel was added. Act of Sept. 26, 1970, Pub. L. No. 91-422, 84 Stat. 876. This was done merely to loosen the restriction of 3 U.S.C. § 103, which since 1946, Act of Aug. 2, 1946, c. 744, § 17(c), 60 Stat. 811, had limited the amount expendable on Presidential travel to $40,000. See Hearings on Department of Treasury and Post Office and Executive Office Appropriations for 1971 Before the Subcomm. of the House Comm. on Appropriations, 91st Cong., 2d Sess., pt. 3, at 6 (1970). There is no indication that it was meant to change the accounting for those expenses. This language was continued through the Executive Office Appropriation Act of 1974, Pub. L. No. 93-143, 87 Stat. 516.

As can be seen from this historical summary, the category of expenses accountable solely on the President's certificate began with travel expenses and was enlarged to include the expenses of official entertainment, newspapers, periodicals, and teletype news service. There is not the slightest indication that the original practice of accounting for travel expenses by Presidential certificate was ever intended to be cut back--at least until the Executive Office Appropriation Act of 1975, Pub. L. No. 93-381, 88 Stat. 619 (hereinafter "the 1975 Act"). Finally, as discussed below, the language in the appropriation acts authorizing the accounting for Presidential travel by certificate was actually surplusage, since 3 U.S.C. § 103 explicitly provides for the President to account for his travel expenses solely by certificate.

For these reasons it cannot be seriously doubted that, at least until the 1975 Act, Presidential travel was accountable solely by the President's certificate and was not subject to GAO audit.

FY 1975 Expenditures

In the 1975 Act for the first time Congress did not include the statement that Presidential travel and entertainment expenses could be accounted for solely on the President's certificate. This was not an oversight, but rather the result of a deliberate attempt to subject the handling of these expenses to GAO audits.*/ It is my conclusion, however, that despite the intent of at least those Congressmen who produced and urged this provision to bring Presidential expenses within GAO review, the means chosen--deletion of the certification language which had existed in previous appropriation acts--was not equal to that purpose. That is, even without the certification language in the 1975 Act, the provision in 3 U.S.C. § 103 remains, and this provision authorizes the certification of all $100,000 of the Presidential travel expenses paid for by the 1975 Act, not just the $40,000 mentioned in 3 U.S.C. § 103.

One must agree with GAO that "appropriation acts may vary the terms of authorizing legislation to long as a successful point of order challenging such variance is not interposed. . . ." Memorandum of Paul G. Dembling, supra, at 3. Thus, viewing 3 U.S.C. § 103 as an authorization statute, as GAO apparently does, id. at 2, the language in the 1975 appropriation for Presidential travel, "not to exceed $100,000," varies that phrase in

*/ The actual language in the White House Office appropriation provision of the Act was inserted on the floor of the House and Senate after the Conference Committee had met and reported the bill, H.R. 15544, 93d Cong., 2d Sess., because the Conference language had been keyed to a companion White House Office authorization bill, H.R. 14715 and S. 3647, which it was discovered would not pass. Senator Montoya, chairman of the Senate Appropriations Committee and the Senate manager in the Conference Committee, stated that the new language was "completely in line with the authorizing bill, and is only a technical expedient. . . ." 120 Cong. Rec. S 15022 (daily ed. Aug. 15, 1974). The "authorizing bill" would have, among other things, explicitly subjected travel expenses to GAO audit, amending 3 U.S.C. § 103. See 120 Cong. Rec. H 5657-58 (daily ed. June 25, 1974) (Eckhardt amendment to H.R. 14715) and 120 Cong. Rec. S 12965-66 (daily ed. July 18, 1974) (Hathaway amendment to S. 3647).

3 U.S.C. § 103 that says "not exceeding $40,000 per annum." If the 1975 Act had gone on to say that the expenditure of these funds was to be subject to GAO audit, it would likewise have varied that clause in Section 103 which states: "such sum when appropriated to be . . . accounted for on [the President's] certificate solely." The 1975 Act, however, did not so provide; it made no mention of the means by which the expenditures were to be accounted for. Thus, inasmuch as the provision dealing with accounting in 3 U.S.C. § 103 was not varied, it was not affected and it remains.

The President's travel funds may be accounted for solely on his certificate up to the amount actually appropriated by Congress. The $40,000 limitation in Section 103 applies to the amount Congress may appropriate (which limit was varied by the appropriation itself) and is not a separate limit on the amount the President may account for on his certificate. The "sum" which the President may account for on his certificate is "such sum as Congress may from time to time appropriate." Thus, even for FY 1975, Presidential travel funds may be accounted for on the President's certificate solely; this is not true of official entertainment expenses and the expenses of newspapers, periodicals, teletype news service, and the hire of passenger motor vehicles (unless paid for from the travel account), which no longer may be accounted for by certificate.

Handling of Certificates

Your final inquiry involves the handling of the certificates. Initially, I must disagree with GAO that the failure of the President to account by certificate for his travel expenditures would subject those expenditures to GAO audit. Section 103 of title 3 states that the sum appropriated is "to be . . . accounted for on [the President's] certificate solely." (Emphasis added). The 1974 appropriation act states similarly that the funds are "to be accounted for solely on his certificate." (Emphasis added). The obvious meaning of this language is that the certificate is the sole means by which these funds shall be accounted for. If the President fails to make such a certificate, he may be violating the statute, but the remedy lies in Congressional sanction. There is no basis for creating out of whole cloth a different remedy--a GAO audit power in flat contradiction to the statutory prescription that the President's certificate is the sole means of accounting.

As to the form of the certificate: The minimum legal requirement would seem to be simply a signed statement by the President as to the number of dollars expended from this appropriation and a declaration that they were spent solely for Presidential travel expenses as contemplated by the appropriation act. Clearly, a later President may certify as to expenditures under a former President.

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

Justice
Opinion

June 11, 1975

Dear Senator:

We are examining the procedures by which the President may designate those charities to which he recommends the Inaugural Medal Committee direct royalties from the sale of inaugural items and the possible tax consequences to the President of such designations. In order to determine whether designated royalties would constitute taxable "income" to the President, it is necessary for us to have additional information regarding the establishment and operation of the Committee. Insofar as possible, we would appreciate your providing us answers to the following questions:

First, was the President's approval for the formation of the Inaugural Medal Committee sought because it was legally necessary for, or financially advantageous to the Committee's operation?

Second, were the commemorative items advertised and promoted as having the President's formal endorsement?

Finally, was the Committee's commitment to let the President designate charities accorded to him for any value received?

Again, my sincere thanks for any guidance which you can provide us with respect to the above-cited questions.

With best regards,

Sincerely,

(S)

William E. Casselman II
Counsel to the President

Honorable Mark O. Hatfield
United States Senate
Washington, D.C. 20510

WEC:bw

MAY 8 1975

MEMORANDUM FOR HONORABLE WILLIAM E. CASSELMAN II
Counsel to the President

Re: Inaugural Medal and Inaugural Plate.

You have asked our advice concerning the appropriate procedures by which the President may make charitable designations of the royalty proceeds accruing from the sale of the medals and plates marketed in the name of the Inaugural Medal Committee by the Medallic Art Company and The Franklin Mint respectively, and the tax consequences to the President, if any, of such designations.

As to your first question, there is no established procedure for making such designations. We would think that a letter from the President to the Inaugural Medal Committee expressing his preferences would suffice. In light of the tax discussion below, the letter should avoid any implication that the President is directing a disposition of funds to which he has any claim or over which he possesses any legal right of control.

The question as to tax consequences is difficult to answer without a comprehensive knowledge of the facts involved. It is possible, of course, for payment to a third person, even to a charity, to constitute "income" to the President, if that payment is made at the President's request in order to discharge a legal obligation to him, or as compensation for some service or benefit he had rendered or conferred. On the basis of the facts we know, this does not appear to be the situation in the present case; but the matter can be determined with certainty only by discussions with the principals involved. Pending such further investigation, we must condition our opinion upon the accuracy of the following factual premises:

As we understand the situation, the Inaugural Medal Committee was formed with the "approval" of the President to make arrangements for an "Official Presidential Medal". We take it that Presidential approval was sought only because it seemed courteous and appropriate to advise the President of, and obtain his consent to, an enterprise which was being formed by friends and former colleagues to honor his inaugural--and that there was not involved the obtaining of any consent from the President which was legally necessary for, or financially advantageous to, the Committee's operation. (There was, in our opinion, no legal necessity to obtain the President's consent to reproduction of his image or signature. There might have been some financial advantage to the Committee if his "endorsement" was to be featured in the advertising or promotion of the project, but we do not understand that this was intended or occurred.) We presume that the Committee's commitment to let the President designate charities was prompted by similar sentiments--not accorded to him for any value received, but merely out of a sense of appropriateness that any profits from an enterprise meant to honor his inauguration should be given to a charity which he personally favored.

All of the material you have forwarded to us is consistent with the foregoing analysis. The one item which gives us some pause is Senator Hatfield's description of the President's original consent as "going to the re-formation of the Committee to do an Official Presidential Medal". We are not clear on what makes a medal an "official" medal. If the phrase was meant to imply that the medal would be advertised and promoted as having the President's formal endorsement, the premises of our opinion would be eliminated. If the phrase was meant to imply that the President would publicly object to the striking of a commemorative medal by any other group, the same result would follow. The totality of the material you forwarded, however, does not support that view of the matter, and we take it that the "officialness" of the medal merely referred to its issuance by a committee chaired by a United States Senator, and numbering among its members other senators and representatives and a former chairman of the Inaugural Committee. This point in particular, however, might warrant further investigation.

"Gross income" is defined in section 61 of the Internal Revenue Code, 26 U.S.C. § 61. The only portions of the definition which could conceivably be relevant for present purposes are "(1) Compensation for services including fees, commissions and similar items", and "(3) Gains derived from dealings in property." On the factual premises described above, it is clear that neither of these provisions would apply.

The Tax Division of this Department has informally concurred in the above views concerning the tax aspects of this matter. You might wish, however, to consult the Internal Revenue Service in order to place the matter beyond doubt.

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

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Justice Opinion

Frank, Morton
Lowell, Juliet
Persky, Mort
President's Policy
Justice Dept. Opinion
Press

Exchange of Correspondence concerning
letters published in Family Weekly -- listed as
Humorous Letters to the President.

Material filed in Lowell, Juliet --
and in Justice Dept. Opinions

Justice
(see also
Juliet Lowell)

THE WHITE HOUSE

WASHINGTON

June 4, 1975

Dear Mr. Frank:

Many thanks for your letter of May 29. So far as we are concerned, we shall gladly let the matter rest where it is.

I am glad to learn that we have both had the happy experience of attending the University of Michigan.

Sincerely yours,

Philip W. Buchen

Philip W. Buchen
Counsel to the President

Mr. Morton Frank
President
Family Weekly, Inc.
641 Lexington Avenue
New York, New York 10022

Family Weekly

More than 10,700,000 paid circulation through 309 influential daily newspapers

MORTON FRANK
President and Publisher

May 29, 1975

Dear Mr. Buchen:

Your reference to "confession and avoidance" seems to have hit the nail on the head.

If you and The President are happy, or at least have decided to let matters lay (or is it lie?), we'll do the same.

You have or will be getting a letter from our Editor, Mort Persky.

It may be that the byline in question won't be appearing in FAMILY WEEKLY in the future...

Some time I hope our paths will meet, and not just because I'm a graduate of the University of Michigan.

Cordially,

Mort Frank

Morton Frank

Philip W. Buchen, Esq.
Counsel to The President
The White House
Washington, D.C.

Family Matters

THE WHITE HOUSE

WASHINGTON

May 28, 1975

MEMORANDUM FOR: BOB ORBEN

FROM: PHILIP BUCHEN P.W.B.

In case you missed seeing The Washington Star on Sunday, I attach a copy of the supplement which reflects some of your good work.

Attachment

Family Weekly

MORT PERSKY
VICE PRESIDENT
EDITOR

Persky, Mort
(see
Juliet Lowell)

May 23, 1975

Mr. Philip W. Buchen
Counsel to the President
The White House
Washington, D. C.

Dear Mr. Buchen:

Juliet Lowell sent me a copy of the letter she mailed to you last week.

I'm assuming that you now have the facts that you requested, and don't require further information from us. However, if I'm wrong in this assumption, I hope you will not hesitate to let me know.

If necessary, you may reach me by telephone at area code 212/ 935-3796.

With warm regards.

Sincerely,

Mort Persky

MP:sw

Family Weekly

MORT PERSKY
VICE PRESIDENT
EDITOR

May 21, 1975

Mr. Philip W. Buchen
Counsel to the President
The White House
Washington, D. C.

Dear Mr. Buchen:

Simply for your information, here's our latest effort on behalf of White House humor, coming up in Sunday's Washington Star.

As you may know, we work on extra-long deadlines, so that this story was produced more than two months ago, and went to the printer six weeks ago.

With all good wishes.

Sincerely,

Mort Persky

MP:sw
Enclosure

FAMILY WEEKLY, INC. / 641 LEXINGTON AVENUE, NEW YORK, N.Y. 10022 / AREA CODE 212 935-3796

THE WHITE HOUSE

WASHINGTON

Juliet Lowell

May 21, 1975

Dear Mr. Frank:

Following receipt of your letter of May 12 and a subsequent letter to me from Mr. Persky of your publication dated May 13, we received a letter from Ms. Juliet Lowell, a copy of which is attached.

In legal terms, Ms. Lowell's answer amounts to a "confession and avoidance," although it appears that you, as well as your readers, were victims of Ms. Lowell's humorous hoax. I find it difficult to feel outraged at this circumstance, and I leave it to you as to whether you want to react differently.

Sincerely,

Philip W. Buchen

Philip W. Buchen
Counsel to the President

Mr. Morton Frank
President and Publisher
Family Weekly, Inc.
641 Lexington Avenue
New York, New York 10022

Enclosure

May 17; 1975

Lowell, Juliet

Dear Mr. Buchen,

Family Weekly has turned over to me your letter of May 10, 1975, and I am delighted to have this opportunity to be in touch with you.

In the past 42 years I have published 13 books, 11 of which have been made up of laugh-provoking letters addressed to Heads of State, Famous People, and members of the various professions. Sometimes those addressed have given me the letters, other times I have made them up. Judge Learned Hand explained to me that the rights to publish letters belong to the writer - not to the recipient.

In 1957 I went to London with the American Bar Ass. and was dined by the "Masters of the Bench" at the Middle Temple and attended the Queen's Garden Party at Buckingham Palace. The result of this trip was a book titled "Dear Justice, a Book for the Just, the Unjust and those who just like to laugh." 3 U. S. Supreme Court Justices appeared therein as well as 2 Justices of the Royal Court of England. One of my very happy moments occurred when Justice Harlan, on being introduced to me at a banquet, said "Miss Lowell, I read 'Dear Justice,' my colleagues could never have produced those letters - they are so witty you must have made them up."

My letters have appeared at various times in Readers Digest, Harpers, Good Housekeeping, Cosmopolitan, etc. Parade ran my letters to President Kennedy in 1960 and in October of 1972, Family Weekly ran 2 pages of letters titled "Dear Candidate, zany Letters from the American Voter." These were unintentionally funny letters addressed to President Nixon and Senator McGovern, V. P. Agnew and Sargent Shriver.

You may wonder why I did not answer Mr. Lazarus's letter of March 4th. In early February I had phoned Mr. Robert Orben to ask him for funny letters. He told me that he had read my books and loved them, that he would send me copies of the President's speeches from which I could garner ideas for letters. I then asked Mr. Orben to transfer my call to Mr. Hushen. As he wasn't there, I spoke to Miss O'Neill and when I did not hear from her, I wrote.

On March 6th, I received a letter from Mr. Lazarus. In his 2nd. paragraph, he wrote "Should you wish to undertake this work on the basis that profits and royalties beyond a stated amount representing your

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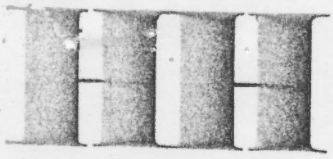

time and other incurred costs, be donated to charity, we would be happy to <u>further consider</u> this matter"

As the letters appeared in Family Weekly on March 9th. the "further consider" seemed to preclude more correspondence at that time.

Family Weekly paid me $300 for the page which of course did not cover the time, thought and effort I put into this project.

However no sooner did I receive their check than I sent half of it to my favorite charity, my daughter, who has two children at college and needs whatever help I can give her.

I feel myself exceedingly fortunate in that while I am working, I can create laughter to counterbalance the great strain of living and so help to preserve the sanity of this atom age.

It is fortunate for us all that the President, Himself, has a sense of humor, recognizes the need for laughter and in his speeches is willing to turn the joke on himself, which of course creates sympathy and fosters his popularity.

Do you come to New York sometimes and if so would you be able to have tea at my place? It would be a pleasure to meet you.

Meantime my
Greetings
Cordial
and
Sincere

Juliet Lowell

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November 14, 1968

Miss Juliet Lowell
Hampton House
28 East 70th Street
New York, N.Y.

Dear Juliet:

I'm so pleased I'll be seeing you again soon and delighted to hear all the good things that are happening to your books.

I think I may have once mentioned that you are named in an important book of the publishing trade: 70 YEARS OF BEST SELLERS by Alice Payne Hackett. Your book DEAR SIR is listed as being one of the best selling humor books of all times, with sales ultimately reaching nearly a million and a half. In the preceding volume, 60 YEARS OF BEST SELLERS, it indicated that in 1945 when the book was published, some 654,381 copies were sold.

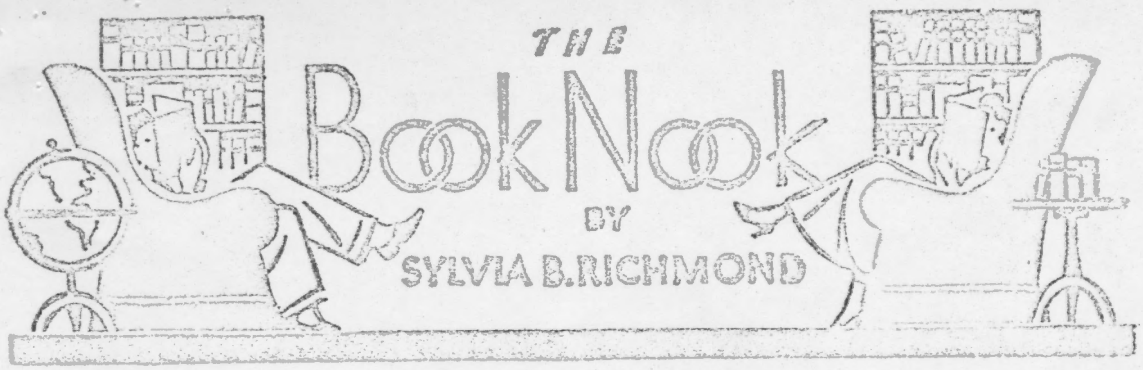
Of course you have so many other books, the sales of the totals run way into the millions.

See you soon and best as always.

Sincerely,

Allan Barnard
Executive Editor

AB/mab



A POPULAR FEATURE IN ...

THE CHELSEA RECORD

CHELSEA, MASSACHUSETTS 02150

June 30, 1968

Sales Promotion Manager
FUNK & WAGNALLS
380 Madison Avenue
New York City 10017

Dear Sir:

May I pay an unsolicited tribute to your newly published author, JULIET LOWELL. For the past thirty years it has been my pleasure and privilege to "present" the great and the near great amongst the American Authors.

I know that you will be pleased to hear that at long last I finally added a FUNK & WAGNALLS' AUTHOR to my "list."

On Wednesday, of this week, a group of over three hundred women sat enchanted and enthralled, listening to the wit and witticisms of your JULIET LOWELL. A natural born charmer, Miss Lowell was the "open sesame" to a rare and delightful day--so much so, that we have already "invited" her to come back to us again after Labor Day.

We had a very brisk sale of "DEAR DOCTOR" and we are all indebted to JULIET LOWELL for giving us "a-day-to-remember."

My every good wish for a pleasant Summer and the overwhelming success of "DEAR DOCTOR."

Cordially yours,

Sylvia B. Richmond

Sylvia B. Richmond, Literary Editor
72 Tudor Street
Chelsea, Massachusetts 02150

FUNK & WAGNALLS
380 Madison Avenue, New York, N.Y. 10017
Telephone (212) 972-3400

JULIET LOWELL -- AUTHOR, HUMORIST, LECTURER, has been dubbed by Walter Winchell "the female Mark Twain." She has been written up in foreign newspapers all over the world with affection and admiration. South Americans titled her "The Literary Ambassador," while others have called her a Cultural Emissary of Laughter. On United Nations Day the New York Department of Public Events specially recognized her, and the Mayor of New York presented her with a gift from the city at a publisher's party celebrating the appearance of another of her books. Bob Hope has said of her: "What Lipton is to tea, Juliet is to humor," and Earl Wilson calls her "the Author of American Wit-erature."

This pixilated charmer has produced 12 best-selling books (DUMBELLES LETTRES, DEAR SIR, DEAR FOLKS, DEAR MR. CONGRESSMAN, DEAR SIR OR MADAM, DEAR HOLLYWOOD, DEAR JUSTICE, DEAR MAN OF AFFAIRS, DEAR VIP, BONERS IN THE NEWS and DEAR CANDIDATE. Our letter-ary author's 12th book is called DEAR DOCTOR. It's illustrated by O. Soglow and looks to be a laugh-hit for a long time to come.

Juliet's buoyant enthusiasm carried her to Hollywood where two of her comedy scripts were made into successful shorts: "Crazy Invention," produced by 20th Century Fox, and "Read 'Em and Laugh" by Warner Bros. RKO filmed thirty shorts from her DUMBELLES LETTRES that broke box office records across the country and at Radio City Music Hall.

Miss Lowell has contributed articles to numerous magazines and newspapers, and topped this off with a treatise for the Encyclopedia Britannica on war humor -- American, English, conquered countries, and Russian. An accomplished lecturer, Miss Lowell spent two and a half years touring from coast to coast. She spoke everywhere -- from a morticians' convention in Los Angeles to the Harvard Club in Boston. She has broad Radio/TV experience, appearing as a guest on numerous programs throughout the United States and Canada.

Juliet Lowell is a graduate of Vassar and the mother of two children. In addition, she is a member of the Author's League of America and the Overseas Press Club, is listed in Who's Who in America, and serves on the board of the Heckscher Foundation for Children.

Lowell
Juliet

Family Weekly

MORT PERSKY
VICE PRESIDENT
EDITOR

May 13, 1975

Mr. Philip W. Buchen
Counsel to the President
The White House
Washington, D. C.

Dear Mr. Buchen:

Thank you for your letter of May 10 about Juliet Lowell's article on letters to President Ford.

I have sent a copy of your letter to Mrs. Lowell in order to get her comments, and I will reply to you after I hear from her.

Many thanks for your letter, and for calling this problem to our attention.

With all good wishes.

Sincerely,

Mort Persky

MP:sw

FAMILY WEEKLY, INC. / 641 LEXINGTON AVENUE, NEW YORK, N.Y. 10022 / AREA CODE 212 935-3796

Family Weekly

More than 10,700,000 paid circulation through 309 influential daily newspapers

MORTON FRANK
President and Publisher

May 12, 1975

Dear Mr. Buchen:

Your letter of May 10 about the Julia Lowell article has just been received. I'm concerned.

Nothing is published in FAMILY WEEKLY, to the best of my knowledge, that is unauthorized or inaccurate.

As soon as our editor returns to the office, I'll be talking with him about your query. Meanwhile, I hasten to reply so that you'll know the matter will be looked into promptly.

Thanks very much for calling our attention to the situation which, understandably, would disturb you and us if the circumstance turns out to be as you suggest.

Sincerely,

Mort Frank

Morton Frank

Philip W. Buchen, Esq.
Counsel to the President
The White House
Washington, D.C.

Justice
(Ltr re
Lowell,
Julia)

May 10, 1975

Gentlemen:

Some time ago your magazine published a series of alleged letters addressed to the President under the by-line of Julia Lowell.

On February 14, 1975, Julia Lowell asked for permission to obtain and publish a sampling of unintentionally humorous letters to the President. A member of my staff, Ken Lazarus, replied to Ms. Lowell on March 4, 1975, that it was the President's policy that no profit should be made from publishing such letters. Further, Ms. Lowell was informed that if she would agree to donate the profit to charity, then she would be permitted to undertake such an effort.

Our records indicate that there was no further response from Ms. Lowell. On March 9, 1975, Ms. Lowell published an article in Family Weekly magazine, a sunday newspaper supplement, which contained humorous letters to the President.

The White House correspondence unit has indicated that no one on that staff gave letters to Ms. Lowell for this article. Indeed, there is some doubt that the letters are real.

We are quite certain that your publication would find it most objectionable if Ms. Lowell had provided you with material for publication which was not what it purported to be. Therefore, we ask that you investigate this situation and report to us your findings.

Sincerely,

Philip W. Buchen
Counsel to the President

The Publisher
Family Weekly
641 Lexington Avenue
New York, New York 10022

bcc: Ken Lazarus

ASSISTANT ATTORNEY GENERAL

Department of Justice
Washington, D.C. 20530

Lowell, Juliet

MAY 8 1975

MEMORANDUM FOR THE HONORABLE PHILIP W. BUCHEN
Counsel to the President

Re: Publication of Letters Allegedly Written to the White House

This is in response to your memorandum referring to the publication of an article in Family Weekly magazine consisting of excerpts from "humorous" letters allegedly written to President Ford. You ask whether any action is appropriate.

If the letters are real, then any right to literary property in them would belong to their authors. See 18 Corpus Juris Secundum, Copyright and Literary Property, §§ 4, 10(c). However, these persons, even if they exist, are probably unidentifiable and would presumably have little interest in enforcing their rights to individual letters.

If the letters are not authentic and Mrs. Lowell, who claims to have compiled them, represented to the publisher that they were, it is conceivable that a legal fraud may have been committed. (You may recall that the author of the fictitious autobiography of Howard Hughes was charged with fraud.) If the mails or telephone were used as part of such a fraud, then the Federal government would have criminal jurisdiction under 18 U.S.C. 1341, 1343. However, the information now available is not sufficient to indicate whether fraud was, in fact, committed or whether prosecution would be appropriate.

At this point, the only concrete action that we might suggest is a letter to the publisher of Family Weekly describing the situation as you know it. If facts develop

suggesting that a violation of Federal law exists, then further action might be considered.

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

THE WHITE HOUSE

WASHINGTON

March 24, 1975

MEMORANDUM FOR: THE ATTORNEY GENERAL

On February 14, 1975, Ms. Juliet Lowell, asked for permission to obtain and publish a sampling of unintentionally humorous letters to the President. A member of my staff, Ken Lazarus, replied to Ms. Lowell on March 4, 1975, that it was the President's policy that no profit should be made from publishing such letters. Further, Ms. Lowell was informed that if she would agree to donate the profit to charity, then she would be permitted to undertake such an effort.

Our records indicate that there was no further response from Ms. Lowell. On March 9, 1975, Ms. Lowell published an article in Family Weekly magazine, a sunday newspaper supplement, which contained humorous letters to the President.

The White House correspondence unit has indicated that no one on that staff gave letters to Ms. Lowell for this article. Indeed there is some doubt that the letters are real.

While I am not aware of any law which Ms. Lowell has violated, it is apparent that she has disregarded the policy with regard to the President's mail.

Would you please review this matter to determine if any action is appropriate. Attached are copies of papers in our files about this matter.

P.W.B.

Philip W. Buchen
Counsel to the President

March 4, 1975

Dear Ms. Lowell:

This is in response to your letter of February 14, 1975, in which you inquired as to the possibility of your obtaining a sampling of unintentionally funny letters to President Ford.

While your interest is most appreciated, the position of this office on behalf of the President is that, as a matter of policy, no profits should be made from such letters to the President. Should you wish to undertake this work on the basis that profits and royalties, beyond a stated amount representing your time and other incurred costs, be donated to charity, we would be happy to further consider this matter.

I can assure you that this is in no way intended to reflect adversely upon the quality of your work, and I trust that you understand the basis of this policy.

Sincerely,

/s/

Kenneth A. Lazarus
Associate Counsel
to the President

Ms. Juliet Lowell
Hampton House
11 East 70th Street
New York, New York 10021

BNR; ns

bcc: Roland Elliott
Judy O'Neil

Dear Ms O'Neill:

So enjoyed speaking with you this afternoon.

I am enclosing a few notes about myself!

What I would like are some unintentionally funny letters addressed to President Ford. Would very much appreciate your sending some to me.

There is a great need for laughter these days to counterbalance the great strain of living. Luckily for us all, the President has a

Hampton House

28 East 70th Street New York, N.Y. 10021
Butterfield 8-2700 Table: Hotelhamp

realizes, the more people
can laugh the easier it is
for them to face their
daily problems.

Looking forward to
hearing from you soon, I
remain with greetings
cordial and sincere

Julie Lowell

"Dear Mr. Pre
The Funny Le
Send to the W

By Juliet Lowell,
Author of "Dear Sir"

President Gerald Ford
The White House

Having the same name, I think you will make the Ford Stock more valuable. I have no contacts on Wall Street so I was wondering if you could arrange to get me 50 shares?

*Anna B*_____

President Ford

Are there Rapids in Grand Rapids and can you go down them in a canoe?

*Joseph H*_____

Mr. Gerald Ford President
Washington

Biden"...
ers Americans
ite House

President Gerald Ford
Washington

Dear President Ford

My name is Gerald and I'm President of our baseball team. Please write and tell me what things a good President shouldn't be caught doing.

*Gerald V*_____

Dearest President

We want my Daddy home for Xmas. Please let him out of jail. I have asked God, Wrote to Santa Claus and now I've got around to you.

*Henry S*_____

ASSISTANT ATTORNEY GENERAL

Department of Justice
Washington, D.C. 20530

cys have been sent to Dudley and Ken

JUN 13 1975

MEMORANDUM FOR HONORABLE PHILIP W. BUCHEN
COUNSEL TO THE PRESIDENT

Re: Inflation Impact Statement

With respect to Dudley Chapman's suggestion for amending the Presidential Order concerning inflation impact statements: I have some reservations concerning the effectiveness of the very last clause, which purports to suspend the Order automatically with respect to any official or agency against which suit is filed.

It seems to me clear that the courts are not going to permit the Executive branch to avoid the legal necessity of acting in conformance with its own regulations by the simple device of suspending those regulations whenever suit is brought. The willingness of the courts to accept such a provision will depend entirely upon whether they deem that the Executive branch requirement in question establishes a judicially enforceable requirement--which will depend in part (though doubtless not entirely) upon whether the Executive branch intended it to do so. In other words, I do not believe that the automatic suspension provision adds anything beyond that provision of the proposed amendment which states that "no judicially enforceable duty is imposed by this order." It seems to me the suspension provision is more likely to get the courts' back up than to contribute any additional effect to the President's intent.

I would suggest one further modification of the Order, which in my view is more important than anything else which could be done: The name "Inflation Impact Statement" should be changed to something else--almost anything else except Adolph Hitler. The current appellation simply begs for parity of treatment with environmental impact statements. Mankind, including judges, tends to operate on the proposition that if something is called a duck it is a duck. Legal labels and categories are such convenient devices to avoid renewed analysis

for each new situation that it is extremely difficult, by whatever explicit means, to induce judges to look behind them.

I have spoken to Dudley about this matter, and I think he is aware of my views.

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel