

From: [Rachel K. Dowell](#)
To: [Seth Jaffe](#)
Subject: LDF LA - Electronic File Designation
Date: Wednesday, May 24, 2017 3:59:56 PM

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Thanks!



United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

July 22, 1994

Michael H. Cardozo
Executive Director
Presidential Legal Expense Trust
1215 19th Street, NW.
Washington, DC 20036

Dear Mr. Cardozo:

I have reviewed your letter of July 20, 1994 setting forth the structure and proposed operation of the Presidential Legal Expense Trust. Based upon the trust agreement and your description, I believe that the existence and proposed operation of this trust does not or will not violate any of the conflict of interest or gift statutes or the administrative standards of conduct provisions that are applicable to the President.

There is no statute that provides for the manner in which a legal defense fund must be created nor is there a statute that prohibits the creation of a legal defense fund. There are, however, statutes that apply to the operation of the fund and some of those apply to the President.

In particular, I believe that the manner in which this trust is to be operated will be consistent with the provisions of 5 U.S.C. § 7353 and the implementing regulations found in subpart B, of part 2635 of title 5 C.F.R. As you know, that statute prohibits officers and employees of the executive and legislative branches, including Members of Congress and the President and Vice President, from soliciting or accepting gifts from certain individuals or groups. The statute does provide, however, that the appropriate supervising ethics office may, by rule or regulation, provide for reasonable exceptions as may be appropriate. The supervising ethics office for the executive branch is the Office of Government Ethics. This Office issued exceptions to this statute as a part of subpart B noted above. Specifically with regard to the President, 5 C.F.R. § 2635.104(j) provides that the President, because of considerations relating to the conduct of his office, may accept any gift on his own behalf or on behalf of any family member so long as it does not violate certain specified statutes or provisions of the standards or the Constitution.

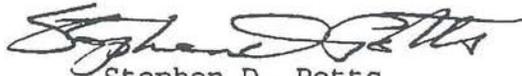
One of those specified standards prohibits the solicitation of gifts. We do not view the mere establishment of the trust as a solicitation, nor do we view the provision of an information sheet as a solicitation. Solicitation must involve some request. We do

Mr. Michael H. Cardozo
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not see the manner in which you have outlined the trust's proposed activities as involving requests. Further, your desire to see that individuals who may voluntarily wish to solicit funds from the trust do not, through their actions or written materials, imply that the trust or the President is the solicitor or has authorized the solicitation is understandable. A review of those materials or a discussion with those individuals for that purpose is not an authorization of their solicitation. for

If you have any further questions, please do not hesitate to ask.

Sincerely,



Stephen D. Potts
Director

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United States
Office of Government Ethics

1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

August 8, 1994

The Honorable Jon Kyl
House of Representatives
Washington, DC 20515-0304

Dear Mr. Kyl:

This is in response to your letter of July 8, 1994, which was forwarded to the Office of Government Ethics (OGE) by facsimile on July 12, 1994. You asked a series of questions about the establishment by President and Mrs. Clinton of a legal defense trust. More specifically, you asked me to address the propriety of the creation of the trust and of solicitations for that trust under existing laws and regulations. I will respond to your questions in the order in which you posed them.

1. A Presidential Legal Expense Trust was established on June 28, 1994, between the President and Hillary Rodham Clinton as grantors and Jon Brademas, Michael Cardozo, Theodore Hesburgh, Barbara Jordan, Nicholas Katzenbach, Ronald Olson, Elliot Richardson, Michael Sovern and John Whitehead as trustees. The trust issued a press release on that same date, making public the trust indenture and related materials.

Prior to the establishment of the trust, OGE had discussions with the White House concerning whether the creation of a legal defense fund would violate any conflict of interest law or regulation. While the propriety of legal defense funds for Members of Congress had been recognized in the legislative branch, there was no precedent for such a fund to be established for a President. We found no statute prohibiting the creation of such a legal defense fund, nor one providing for the manner in which a legal defense fund must be established. As I remarked to Congressman Ramstad on May 12 in a hearing before the Committee on the Judiciary's Subcommittee on Administrative Law and Governmental Relations, there appears to be no magic formula for how a legal defense fund should be set up, so common sense and an appreciation for appearances should be controlling guides.

OGE did not participate in the creation of the trust and was not asked to review the trust document prior to the establishment of the trust. There was no requirement that we do so. After the trust was created, however, we were asked by the Executive Director of the Presidential Legal Expense Trust, Michael Cardozo, to review the trust's proposed operation in light of the conflict of interest laws and regulations, including those relating to the acceptance of gifts. Copies of Mr. Cardozo's letter and our response are enclosed.

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2. Under 5 U.S.C. § 7353, Federal employees are prohibited from soliciting or accepting anything of value from a person who seeks official action from, does business with, or conducts activities regulated by the employee's employing entity, or whose interests may be substantially affected by the performance or nonperformance of the employee's official duties. The statute applies to employees of the executive, legislative, and judicial branches, including the President, Vice President, and Members of Congress. The statute provides that each supervising ethics office may issue implementing regulations, including such reasonable exceptions as may be appropriate. No exception, however, may authorize an employee to accept a gift in return for being influenced in the performance of any official act. OGE has published regulations implementing 5 U.S.C. § 7353 in subpart B of 5 C.F.R. part 2635.

In view of "considerations relating to the conduct of their offices," the exception at 5 C.F.R. § 2635.204(j) authorizes the President or Vice President to accept any gift on his or her own behalf or on behalf of any family member. A gift accepted under this exception must be reported on a public financial disclosure statement (SF 278) if its value exceeds the applicable reporting threshold. While it was expected that this exception would generally be used to satisfy the requirements of protocol and etiquette, its use was not limited to those circumstances. While OGE may not have originally contemplated that a President or Vice President might establish a legal defense fund, we believe the exception is sufficiently broad to permit either to accept voluntary donations to such a fund.

Although the President may accept gifts in accordance with 5 C.F.R. § 2635.204(j) from "prohibited sources" or that are given because of his official position, he is prohibited by 5 C.F.R. § 2635.202(c)(2) from soliciting gifts. The enclosed documents indicate that the Presidential Legal Expense Trust does not intend to solicit contributions within the meaning of the gifts rules set forth in subpart B of 5 C.F.R. part 2635. While the term "solicit" is not defined in subpart B, the term is defined in subpart C (relating to gifts between employees) as involving some request. As we stated in our response to Mr. Cardozo, we do not view the mere existence of the trust as tantamount to a solicitation, nor do we believe that the trust would engage in a solicitation if it were to furnish a fact sheet to potential contributors. Further, we advised Mr. Cardozo that the trust would not engage in a solicitation if it reviewed materials prepared by a third party to ensure that there would be no appearance that either the President or the trust had authorized that third party's solicitation.

As a member of the House Committee on Standards of Official Conduct, you will be interested in comparing certain of the terms of the Presidential Legal Expense Trust with the rules relating to

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legal defense funds applicable in the House and Senate. A Member of Congress as well as his or her legal defense fund is permitted to solicit and accept contributions to the fund. Contributions from any one source are limited to \$5,000 in the House and \$10,000 in the Senate. Donations to the Presidential Legal Expense Trust are limited to \$1,000 per individual and, in contrast to the rules applicable to Congressional legal defense funds, cannot be accepted from corporations or other organizations or from Federal employees.

I trust this information is helpful to you.

Sincerely,



Stephen D. Potts
Director

Enclosures



United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

September 9, 1994

The Honorable Deborah Pryce
U.S. House of Representatives
Washington, DC 20515-0304

The Honorable Christopher Cox
U.S. House of Representatives
Washington, DC 20515-0304

Dear Ms. Pryce and Mr. Cox:

This is in reply to your letter of August 3, 1994, which was received by the Office of Government Ethics (OGE) on August 5. Your letter poses a number of questions relating to the creation and operation of the Presidential Legal Expense Trust established by the President and Hillary Rodham Clinton on June 28, 1994. Accordingly, our discussion below addresses the nature of OGE's participation in the establishment of the trust, the scope of the exception permitting acceptance of gifts by the President, the scope of the provision prohibiting the solicitation of gifts, and the extent of OGE's oversight responsibilities in relation to the operation of the trust.

ESTABLISHMENT OF TRUST

On May 10, 1994, members of my legal staff met at the White House with attorneys from the Office of the Counsel to the President to discuss the proposed creation of a legal defense fund to benefit the President and Mrs. Clinton.¹ My staff addressed the propriety of legal defense funds in the executive branch in view of the conflict of interest and financial disclosure laws and regulations within OGE's purview.² However, the specific structure

¹In telephone conversations during the months that preceded the May 10 meeting, OGE and White House attorneys discussed issues relating to legal defense funds generally. My staff was not asked in those conversations, however, to address legal defense fund issues in the context of a specific proposal to create a fund to benefit the President.

²There are many laws and regulations governing employee conduct which do not fall within the purview of OGE. Notwithstanding OGE's broad mandate with respect to the interpretation of Federal ethics provisions as described in 5 U.S.C. app. and 5 C.F.R. part 2638, inter alia, our jurisdiction does not, for example, extend to interpreting campaign finance laws or numerous other provisions which some would characterize as "ethics" provisions.

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The Honorable Christopher Cox
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of the fund was not discussed at that meeting, and no documents purporting to establish such a fund were either discussed or reviewed by my staff until after June 28 when the trust indenture and related materials were made public.

My staff advised White House attorneys that we knew of no statute prohibiting the creation of a legal defense fund to benefit the President and his wife, nor of any statute providing for a specific manner in which a legal defense fund must be established in the executive branch. Reflecting views that I would express two days later during a May 12 hearing before the Committee on the Judiciary's Subcommittee on Administrative Law and Governmental Relations, my staff observed that there appeared to be no magic formula for how a legal defense fund should be set up. Rather, common sense and an appreciation for appearances should be controlling guides.

The participants at the meeting also discussed the two informal advisory letters concerning legal defense funds that OGE had previously provided to the Office of the White House Counsel. As you correctly noted, we were unable to say in the circumstances involved in OGE informal advisory letter 85 x 19 that payment of an employee's legal fees by way of contributions to a legal defense fund would not be barred by a criminal statute.³ However, that criminal statute, 18 U.S.C. § 209, is not applicable to the President (or to Members of Congress).⁴

ACCEPTANCE OF GIFTS

While 18 U.S.C. § 209 does not apply to the President, 5 U.S.C. § 7353 applies to all employees of the executive, legislative, and judicial branches, including the President, Vice President, and Members of Congress.⁵ This fact was discussed with attorneys from the Office of the Counsel to the President during

³The Informal Advisory Letters and Memoranda and Formal Opinions of the United States Office of Government Ethics, at 601.

⁴18 U.S.C. § 202(c). Moreover, even if 18 U.S.C. § 209 were applicable to the President, the analysis set forth in the 1985 advisory letter would have to be read in light of OGE informal advisory letter 93 x 21. The 1993 letter revisited the issue of § 209 and legal defense funds in view of the U.S. Supreme Court decision in Crandon v. U.S., 494 U.S. 152 (1990).

⁵Section 7353 applies to any "officer or employee of the executive . . . branch." The term "officer or employee" is defined in § 7353(d)(2) to mean "an individual holding an appointive or elective position in the executive . . . branch."

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the May meeting. Under section 7353, Federal employees are prohibited from soliciting or accepting anything of value from a person who seeks official action from, does business with, or conducts activities regulated by the employee's employing entity, or whose interests may be substantially affected by the performance or nonperformance of the employee's official duties. The statute provides that each supervising ethics office may issue implementing regulations, including "such reasonable exceptions as may be appropriate."

As the supervising ethics office for the executive branch, OGE issued a final rule implementing 5 U.S.C. § 7353 on August 7, 1992.⁶ Now codified at 5 C.F.R. part 2635, this executive branch-wide regulation also implements Executive Order 12674.⁷ When the new regulation became effective on February 3, 1993, it superseded all pre-existing agency standards of conduct regulations.⁸ As was true under former Executive Order 11222, the President is not an "employee" subject to Executive Order 12674. The President is, however, subject to the gift regulations in subpart B of 5 C.F.R. part 2635 insofar as those regulations implement 5 U.S.C. § 7353.⁹

The gifts prohibition set forth in Executive Order 12674 is nearly identical to the language of 5 U.S.C. § 7353.¹⁰

⁶57 Fed. Reg. 35006 (Aug. 7, 1992).

⁷Executive Order 12674 of April 12, 1989 "Principles of Ethical Conduct for Government Officers and Employees," as modified by Executive Order 12731 of October 17, 1990, 3 C.F.R., 1990 Comp., p. 306. Both Executive Order 12674 and 5 C.F.R. part 2635 address a number of subjects in addition to gifts from non-Federal sources.

⁸From the mid-1960s until 1993 executive branch employees were subject to individual agency regulations setting forth standards of conduct. Certain provisions of some of these pre-existing agency standards of conduct regulations may continue to remain in effect until as late as February 3, 1995. See 59 Fed. Reg. 4779 (Feb. 2, 1994). Although 3 C.F.R. § 100.735 continues to be published, the gifts rules at § 100.735-14 to which you referred in your letter were superseded on February 3, 1993, by the gifts rules now set forth in subpart B of 5 C.F.R. part 2635.

⁹See, e.g., 56 Fed. Reg. 33778, 33782 (July 23, 1991).

¹⁰Section 101(d) of Executive Order 12674 provides that "[a]n employee shall not, except pursuant to such reasonable exceptions as are provided by regulation, solicit or accept any gift or other item of monetary value from any person or entity seeking official
(continued...)

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The Honorable Christopher Cox
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Accordingly, § 2635.202(a)(1) of the OGE implementing regulation states that an employee shall not accept anything of monetary value, directly or indirectly, from the "prohibited sources" enumerated in both the Executive order and the statute. Further, in light of the general principle in section 101(g) of the Executive order stating that an employee "shall not use public office for private gain," the regulation not only prohibits the acceptance of gifts from prohibited sources," but also forbids the direct or indirect acceptance of gifts given "because of the employee's official position."¹¹

OGE is authorized by both 5 U.S.C. § 7353 and Executive Order 12674 to draft regulatory exceptions to these general prohibitions.¹² Accordingly, an employee may accept a gift pursuant to one of the exceptions in §§ 2635.204(a) through (l) notwithstanding that the gift is from a prohibited source or is given because of the employee's official position.¹³ Exceptions to section 7353 adopted by the legislative branch similarly permit acceptance of certain gifts from prohibited sources seeking official action from legislators or their staffers.

¹⁰(...continued)

action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties."

¹¹ 5 C.F.R. § 2635.202(a)(2). Section 2635.203(e) states that a gift is given because of the employee's official position if it is from a person other than the employee and "would not have been . . . given had the employee not held his position as a Federal employee." To illustrate this concept, the regulation includes the example of free season tickets that are given by the opera guild to all members of the Cabinet. The legislative branch has no corollary prohibition and, because the prohibition derives from the Executive order, it is not applicable to the President.

¹²As noted earlier, OGE is the "supervising ethics office" for the executive branch within the meaning of 5 U.S.C. § 7353. In § 201(a) of Executive Order 12674, OGE was assigned the responsibility of promulgating an executive branch standards of conduct regulation implementing the general principles set forth in section 101 of the order, including section 101(d) concerning the acceptance of gifts.

¹³No exception, however, may authorize an employee to accept a gift in return for being influenced in the performance of an official act. 5 C.F.R. § 2635.202(c)(1).

Several of the exceptions in § 2635.204 resemble exceptions that had in the past been included in agency standards of conduct regulations.¹⁴ For example, § 2635.204(b) of the OGE regulation provides that "[a]n employee may accept a gift given under circumstances which make it clear that the gift is motivated by a family relationship or personal friendship rather than the position of the employee." Other exceptions are new, such as the \$20 de minimis exception at § 2635.204(a). As we explained in the preamble to the final rule, OGE carefully weighed "appearance" considerations in crafting each of the exceptions. Accordingly, if an exception is applicable in a particular case, it is not necessary for an employee in that case to also test acceptance against the appearance standard or other general principles in the Executive order.¹⁵

In view of "considerations relating to the conduct of their offices," the exception at 5 C.F.R. § 2635.204(j) authorizes the President or Vice President to accept any gift on his or her own behalf or on behalf of any family member notwithstanding the gift prohibition at § 2635.202(a)(2). As we explained when we published the rule first proposing this exception --

¹⁴From the mid-1960s until 1993 when it was superseded, the White House regulation at 3 C.F.R. § 100.735-14 provided for some exceptions permitting an employee to accept gifts from persons seeking official action from the employee or the Executive Office of the President.

¹⁵As pointed out above and consistent with the OLC opinion cited in your letter (4B Opinions of Office of Legal Counsel 749 (1980)), § 2635.202(a)(2) of the OGE regulation prohibits the acceptance of gifts given because of an employee's Federal position. However, under the new regulation, an employee need not measure acceptance against the "appearance of impropriety" standard when an exception applies. As originally proposed, § 2635.202(c)(3) of the OGE regulation would have required that an employee also consider the timing and the nature of the gift even if the circumstances fell within an exception (56 Fed. Reg. 33778, 33794 (July 23, 1991)). We omitted this requirement from the final rule, however, fearing that "it would place an employee in the position of having his or her judgment reviewed against the more perfect standard of hindsight." 57 Fed. Reg. 35006, 35012 (Aug. 7, 1992). In any case, the President and Vice President are not executive branch "employees" subject to the appearance standard of Executive Order 12674. As is true in the case of Members of Congress, the personal conduct of these elected officials is, instead, primarily judged in the arena of public opinion.

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In the case of an elected official of the stature of the President or Vice President whose personal conduct is closely scrutinized by the public and the press, [the] requirement for public disclosure provides sufficient restraint on their acceptance of gifts. To the extent that it does not permit scrutiny of gifts worth less than the amount that triggers the reporting requirement, it is tantamount to an extension to the President and Vice President of an exception not unlike the \$75 de minimis exception applicable to Members of Congress. OGE anticipates that, as their predecessors have done in the past, the President and Vice President and their successors will establish their own discretionary standards for acceptance of gifts.¹⁶

While it was expected that the exception at § 2635.204(j) would be used to satisfy the requirements of protocol and etiquette, its use is not limited to those circumstances. Accordingly, the wording of § 2635.204(j) clearly indicates that it was created for reasons "including those of protocol and etiquette." (Emphasis added). To the extent that your letter suggests that this provision "creates a narrow exception for those limited and traditional circumstances in which the President and Vice President are offered honorary or commemorative gifts by foreign governments, citizens associations, and the like," we do not agree.¹⁷ While OGE may not have originally contemplated that the exception would be used to accept gifts to a legal defense fund, we believe the exception is very broad and permits the

¹⁶56 Fed. Reg. 33778, 33783 (July 23, 1991). The amount of the de minimis exception in the House has since been adjusted upward. Currently, Members of the House may accept gifts valued up to \$250 from any one source in a calendar year. Gifts worth \$100 or less may be disregarded for purposes of determining whether the \$250 limit has been exceeded. Ethics Manual for Members, Officers, and Employees of the U.S. House of Representatives, 102d Cong., 2d Sess., 26 (1992).

¹⁷In drafting the exceptions to the gifts prohibitions set forth in 5 U.S.C. § 7353 and Executive Order 12674, OGE's objective was to create "reasonable" exceptions. The legislative history cited on page 2 of your letter relates to 5 U.S.C. § 7351 -- not 5 U.S.C. § 7353. Section 7351 prohibits an executive branch employee from giving a gift to an official superior or accepting a gift from an employee who receives less pay.

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President to accept voluntary donations to a legal defense fund.¹⁸

SOLICITATION OF GIFTS

Individuals subject to 5 U.S.C. § 7353 may not "solicit" anything of value from certain sources. Although the term "solicit" is not defined in subpart B of part 2635, it is defined in subpart C (relating to gifts between employees) as involving some "request." The dictionary defines "solicit" to mean "to make petition to" or "to approach with a request or plea."¹⁹

The term "solicit" in section 7353 is not modified by the word "indirectly."²⁰ However, § 2635.202(a) of the OGE regulation implementing 5 U.S.C. § 7353 prohibits the direct or indirect solicitation of gifts. Your letter correctly points out that § 2635.203(f)(2) provides that a gift which is solicited indirectly includes a gift "[g]iven to any other person, including any charitable organization, on the basis of designation, recommendation or other specification by the employee" The definition in § 2635.203(f), however, was drafted in connection with both indirect acceptance and indirect solicitation. While an employee will be considered to accept a gift indirectly when he responds to an unsolicited offer of a gift by designating an organization to receive it, we do not believe an employee indirectly solicits a gift when he designates a recipient organization unless the designation is accompanied by some sort of request.

The solicitation prohibition is repeated in § 2635.202(c)(2) to emphasize our view that 5 U.S.C. § 7353 does not authorize an employee to solicit a gift even when an exception permitting acceptance applies.²¹ Section 7353(b)(2)(A) provides that "a

¹⁸Contrary to your suggestion, in construing the scope of this exception, we do not believe that we must apply Department of Justice guidelines for providing counsel to represent the President.

¹⁹Webster's Third International Dictionary 2169 (1986).

²⁰Similarly, the term "solicit" in section 101(d) of Executive Order 12674 is not modified by the word "indirectly." In any event, however, the President is not an "employee" subject to Executive Order 12674.

²¹With respect to the President and Vice President, § 2635.202(c)(2) must be read in conjunction with § 2635.204(j). When read together, it is clear that the President and Vice President may not "solicit or coerce the offering of a gift."

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The Honorable Christopher Cox
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Member, officer, or employee may accept a gift pursuant to rules or regulations established by such individual's supervising ethics office" (Emphasis added). Accordingly, OGE has adopted exceptions that permit executive branch employees to accept gifts notwithstanding section 7353, but has indicated in § 2635.202(c)(2) that employees must nevertheless comply with the statute's prohibition against soliciting them. Apparently, the legislative branch has read the same statute to allow exceptions to the solicitation ban inasmuch as both the House and Senate permit a Member of Congress to personally solicit contributions to a legal defense fund. As you may know, contributions up to \$5,000 in the House and \$10,000 in the Senate can be solicited and accepted from any one source and can be solicited and accepted from corporations or other organizations and from Federal employees.²²

Following the June 28 announcement of the creation of the Presidential Legal Expense Trust, OGE began to receive telephone inquiries from executive branch agencies regarding the propriety of donations to the trust from Federal employees. In order to answer these inquiries, my staff contacted Mr. Cardozo, the Executive Director of the trust, and obtained a copy of the trust indenture and the other documents released by the trust to the press. After reviewing the trust indenture, my staff contacted the Office of the Counsel to the President to discuss the applicability of the solicitation provisions to the trust.²³ On July 11, 1994, members of my staff and I met with Mr. Cutler, members of the White House Counsel's staff, and representatives of the Presidential Legal Expense Trust. That meeting was followed by telephone conversations and by the exchange of correspondence between Mr. Cardozo and OGE that is referred to in your letter.²⁴

²²Frankly, we are concerned about the anomalous consequences of these differing interpretations of 5 U.S.C. § 7353. Thus, while the legislative branch has interpreted the statute to permit Members of Congress to personally solicit sizable donations to legal defense funds, under our interpretation an executive branch employee may not solicit a dinner invitation from a personal friend who happens to be employed by a prohibited source. In light of the legislative branch's more liberal interpretation of the statute, it may be appropriate for us to revisit our own interpretation.

²³We neither had then, nor do we have now, any indication that the President has at any time personally solicited contributions to the trust.

²⁴The letter from Mr. Cardozo was dated July 20, 1994. OGE responded to his letter on July 22. It is not unusual for OGE to respond to inquiries from private citizens or organizations
(continued...)

Mr. Cardozo's July 20 letter outlined certain details relating to the proposed operation of the trust and requested our comments concerning those proposed activities.²⁵ Since we interpret a solicitation to require some sort of request, our response to Mr. Cardozo advised that we did not view the mere existence of the trust as tantamount to a solicitation, either direct or indirect. More specifically, however, Mr. Cardozo's letter had indicated that the trustees would "provide relevant information about the Trust to anyone who requests such information." Enclosed with the letter was a "fact sheet" said to be prepared by the trust and "used by it to respond to such inquiries." As you know, we advised Mr. Cardozo that we did not view the "provision of an information sheet" as a solicitation since a solicitation "must involve some request." In reaching this conclusion, we viewed as significant not only the fact that the wording of the information sheet did not include an appeal for funds, but also the fact that the requests for information were initiated by potential contributors.²⁶

²⁴(...continued)
regarding the interpretation of Federal ethics provisions within OGE's purview.

²⁵Our July 22 response to Mr. Cardozo was limited to the specific activities as outlined in his letter. Accordingly, we advised Mr. Cardozo that our response was "based upon the trust agreement and [his] description." You observe in your letter that the trust agreement itself authorizes the trustees to "raise funds and solicit donations to the trust" As you suggest, however, it is important to focus on the actual operation of the trust. It does not follow that the trust must solicit donations merely because it is authorized to do so in the trust agreement. Given pending efforts to postpone a lawsuit filed against the President until his term of office has ended, the trust may have sound reasons for preserving its ability to solicit contributions once the President is no longer in office.

²⁶This analysis is consistent with the rule relating to solicitation adopted by the General Services Administration (GSA) in implementing 31 U.S.C. § 1353, a statute which permits the Government to accept travel or travel expenses from non-Federal sources for the official travel of employees to certain meetings or similar events. Provided an employee is first invited to attend the event, he is authorized by the GSA regulation to then inform the non-Federal source of the existence of the statutory gift acceptance authority. 41 C.F.R. § 304-1.2(b). OGE was consulted by GSA prior to publication of the regulation implementing section 1353.

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As you indicate, our letter also advised Mr. Cardozo that the trust would not engage in a solicitation if it reviewed materials prepared by a third party to ensure that there would be no appearance that either the President or the trust had authorized that third party's solicitation. You are concerned that such a review by the President or by one or more trustees would be undertaken in violation of the fundraising rules set forth in subpart H of 5 C.F.R. part 2635. These rules provide that an employee may not personally solicit funds from subordinates or "prohibited sources" or use or permit the use of his official title, position, or authority to further a fundraising effort.²⁷ However, these rules apply only to fundraising undertaken on behalf of nonprofit organizations. Moreover, even if the trust were a nonprofit organization, the trustees are not subject to the fundraising rules since they are not Federal employees. Similarly, and as discussed earlier, the President is not an "employee" subject to rules regarding fundraising that are derived from Executive Order 12674.

You believe that the review by the trustees of materials generated by third parties "would unavoidably create an extraordinarily serious appearance of impropriety." I believe, to the contrary, that the public would support efforts on the part of the trustees to ensure that the actions of third parties do not result in the violation of any law or regulation on the part of any individual, including the President. Neither do I imagine that the public would object if White House ethics officials advised third parties in relation to any limitations that must be imposed on their activities. You point out that the Office of the Counsel to the President has "as a longstanding and legitimate part of its duties, pursued legal remedies against private parties who falsely claimed Presidential endorsement of their activities." In my view, it is equally legitimate to provide advance guidance in an effort to avoid inaccurate or misleading claims of authority.

OVERSIGHT OF TRUST

As the trust carries out its functions over time, we expect that circumstances will again arise demanding that the trust determine if a proposed course of action may constitute a solicitation within the meaning of § 2635.202. Just as OGE has provided advice to Mr. Cardozo concerning 5 C.F.R. part 2635, we believe it will also be proper for White House ethics officials to do so.²⁸

²⁷See 5 C.F.R. § 2635.808.

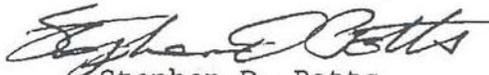
²⁸The duties of each agency's "designated agency ethics official" (and any "deputies") are described in § 2638.203.

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You believe that a violation of the solicitation prohibition may already have occurred. I would note that this and certain other issues relating to the trust are now the subject of pending litigation to which I as Director of OGE am a party defendant as to a related Freedom of Information Act matter. We are being represented in that case by the Department of Justice. Accordingly, I will make no further comment on this matter at this time.²⁹

We trust this information will be of assistance.

Sincerely,



Stephen D. Potts
Director

cc: The Honorable Lloyd N. Cutler
Special Counsel to the President

The Honorable Frank W. Hunger
Assistant Attorney General
Civil Division
Department of Justice

²⁹Judicial Watch, Inc. v. Hillary Rodham Clinton, et al.,
No. 1:94CVO1688 (D.C.C. filed Aug. 4, 1994).