

NLWJC- Kagan

Counsel - Box 006 - Folder 009

FBI Files Amendments

THE WHITE HOUSE

WASHINGTON

June 19, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN *AK*

SUBJECT: "FBI FILES" AMENDMENTS TO BUDGET BILL

At Kathy's request, I substituted for her at a meeting in Jody Torkelson's office to discuss possible amendments to the Treasury, Postal Service, and General Government Appropriations Act, concerning the use of FBI files. I came late (I didn't hear about the meeting until a half-hour into it), so I may not have gotten absolutely everything, but here's the basic gist:

The Act will be considered in full committee next Thursday. (It was marked-up in subcommittee yesterday.) At that time, some Republicans may try to offer amendments dealing with, among other things, the maintenance, transfer, and use of FBI files. Copies of the amendments currently floating around are attached to this memo. Rep. Obey is trying to cut a deal to prevent this from happening: under the deal, which also involves a congressional pay raise, Reps. Hyde and Klinger would ask Republican members of the Budget Committee to keep out of this issue. If that does not work, we need a strategy to deal with these amendments.

Jody asked the Counsel's Office to prepare two documents that will aid in fashioning and effecting such a strategy: first, draft legislation of our own, essentially putting Jack's new guidelines in statutory form; and second, an analysis of the Republican amendments listing the various absurdities that they would accomplish.

On the first, Martha suggested working with Bob Damus to get this into an Appropriations Bill format. On the second, Frank Reeder seemed very knowledgeable. Among other things, he noted that the bills might destroy the FBI's ability to gather information or the White House's ability to do routine vetting; that they might apply not only to the White House, but to the Secret Service, GSA, and OPM; that they might limit the ability of this Administration to appoint employees of former Administrations; and that they would require the White House to destroy files the moment an employee leaves her position. (I have not checked whether any of these things are true; I am here only reporting what Reeder said at the meeting.)

I said we could have these things done by Friday. Then, either Friday afternoon or Monday morning, the same group will gather to discuss the documents and the best strategy to take on the Hill.

The two alternative Hill strategies discussed were (1) to try to work with the Republicans before the committee vote, showing them that their amendments are absurd and persuading them to go for ours instead; and (2) to let the Republicans do what they want, attempt to embarrass them in public by highlighting the lunacy of their proposals, and taking our amendment out of the bag at the last minute as an alternative. Martha, Jody, and Barbara Chow all agreed that we need some kind of amendment of our own, because the Democrats on the Committee would be unwilling to buck the Republicans on this issue without offering substitute legislation.

Finally, Jody also asked the Counsel's Office to look into the Privacy Act issues raised by the recent revelations on the FBI files. (I do not think there is a Friday deadline on this part of the assignment.) Are we covered under the Act or exempt from it? Have we violated the Act? If so, what kind of sanctions would we face? Frank Reeder offered his help on this subject as well; Jody noted that he had helped to draft the Act when on the Hill.

I'll be glad to do whatever part of this you want me to, or to pass it all off to David and Trey, who I gather have been working on the new procedures. Given the Friday deadline, you should try to assign these projects quickly.

Title III or Title V

None of the funds made available

Amendment by Mr. Kingston, Mr. Wolf and Mr. Forbes

No funds in this Act shall be used to review, request or maintain Federal Bureau of Investigation background investigation reports of former Administration employees unless the employee is currently employed by the White House *and authorized same.*

**AMENDMENT TO THE TREASURY, POSTAL
SERVICE, AND GENERAL GOVERNMENT
APPROPRIATIONS BILL, 1997.
OFFERED BY MESSRS. WOLF & KINGSTON**

At the appropriate place, inset the following:

1 **SEC. ____ . ENSURING THAT INDIVIDUALS WHOSE**
2 **BACKGROUND INVESTIGATION REPORTS WERE**
3 **DISSEMINATED TO THE WHITE HOUSE FOR NO**
4 **OFFICIAL PURPOSE ARE PERMITTED TO EXAMINE**
5 **SUCH REPORT IN AN EXPEDITED MANNER.**

6 **(a) IN GENERAL.**—Pursuant to section 552 or 552a of title 5,
7 United States Code, the Director of the Federal Bureau of
8 Investigation shall make a person's background investigation
9 report available, without fee or charge, to such person for review
10 not later than 30 days after such person submits a written request to
11 the Federal Bureau of Investigation seeking access to his
12 background investigation report.

13 **(b) DEFINITIONS.**--

14 **(1)** For the purpose of this section, the term
15 "background investigation report" means any report,
16 record, or file compiled and maintained by the Federal
17 Bureau of Investigation, which the general counsel of the

1 **Federal Bureau of Investigation concluded was**
2 **disseminated to the White House without justification or**
3 **official purpose, and the dissemination of which was the**
4 **subject of and impetus for the June 14, 1996, report of the**
5 **General Counsel of the Federal Bureau of Investigation**
6 **titled, "The Dissemination of FBI File Information to the**
7 **White House."**

8 (2) For the purpose of this section, the term
9 **"person" means any individual whose background**
10 **investigation report, as defined by paragraph (1), was**
11 **disseminated to the White House.**

AMENDMENT TO WOLF & KINGSTON AMENDMENT
OFFERED BY MR. LIVINGSTON

(c) Provided further, that any person to whom such background investigation report(s) have been delivered, whether directly or indirectly from the FBI, shall provide within 5 calendar days of receipt of such report, written notification to the subject of said report that it has been received, together with the purpose for which it has been transferred, unless the Director of the Federal Bureau of Investigation certifies that such notification will jeopardize an official investigation of violation of the laws of, or will pose a threat to the security of the United States of America

(d) any person who receives a copy of such report and willfully fails to provide notification required in paragraph (c), shall be deemed in violation of the Privacy Act (P.L.), and shall be held personally liable for civil damages to the aggrieved party in an amount of up to, but not to exceed \$100,000.

Report Language**Treasury, Postal Service, and General Government****Appropriations Bill, 1997****Offered by Messrs. Wolf & Kingston****FBI Files Wrongfully Disseminated to the White House**

The Committee is concerned about reports that certain White House officials requested Federal Bureau of Investigation (FBI) background reports on individuals who were not seeking access to the White House or employment with the Administration. An FBI report concluded that the transmittal of these reports constituted "egregious violations of privacy." As of June 14, 1996, the FBI identified 408 files sought and received by the White House "without justification." There remains some question whether there were other files that were improperly sought by the White House and disseminated by the FBI. Because egregious violations of privacy have taken place, the Committee believes that the victims of such violations should be able to review those files in an expeditious manner. Therefore, the Committee has included language which directs the FBI to make the improperly requested and disseminated files available to the person about whom the file was compiled. The FBI must make such files available within 30 days after receiving a written request therefor. Furthermore, the requesting person shall not bear the cost of the request for information.

June 17, 1996

**Representative Horn's Amendment Requiring the President
to Personally Request FBI Files**

Effective safeguards are now in place

- On Friday, June 14, Chief of Staff Panetta and Counsel to the President Quinn announced an effective new policy for obtaining FBI background files.
- FBI background files can only be obtained with the consent of the subject or with the written approval of the White House Counsel and the Attorney General or Deputy Attorney General.

Requiring the President to sign for each requested file would be inefficient

- Now that an effective system is in place, the President should not be expected to spend his time signing background file requests.
- Hundreds of background checks are processed each year. Asking the President of the United States to "sign-off" on each one would not lead to an effective use of his time.
- The same process for requesting background files had been in place for many administrations. This administration has instituted a stronger process. In no cases were Presidents asked to review each background file request prior to it being made.

Room 145 6-19-96 Files amends.

Markup yesterday

Full cube - next Thurs.

Amends on file / among others

Cut ORD for Health Care

Trying to cut deal - pay raise

Hyde/Klinger - stay out of this!

Anything we'd accept? / What's wrong w/ it?

Not want escape clauses for vetting etc.

ST: We should draft acceptable one along Jack's guidelines

Give to Demos? / wh of Repub.? (do they want it?)

↳ Counsel's Office

Wh of Demos to get it in appropriate format.

Need analysis of what they all mean - undermine - stupid practically speaking.

e.g. - King

- have to destroy right away?

- never appoint R/B appointees again?

- SS can't do background inves

↳ not just WH

GSA
OP M

Privacy Act -
are we covered
or exempt?

Sanctions?
Have we violated?

kills FBI info gathering.

||

Ken/
sit down w/ Oby -

wk w/ them - pt out
pubs?

m-embarrass them in
public?

Indep council statute -

who's covered?

Kennedy - above 100?

Poss Amends.

End of wk -

have draft - alternative

and criticism

↳ what it does

shortly
FBI alt. -

wherever we

think we have
our stuff.

Think abt

other like amends that could
come up?

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

19-Jun-1996 05:44pm

TO: Jodie R. Torkelson
TO: Franklin S. Reeder
TO: Barbara C. Chow
TO: Elena Kagan

FROM: Martha Foley
 Office of the Chief of Staff

SUBJECT: TPO

I talked to LEP about our approach on the bill. He was very pleased that we were drafting a second degree along the lines we discussed and that we were putting together arguments against the amendments that had been offered. He was quite enthusiastic about talking to Obey and asking him to sit down with us. I will urge him to do that maybe on Thursday or at the picnic...

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

20-Jun-1996 11:03am

TO: Jodie R. Torkelson
TO: Franklin S. Reeder
TO: Barbara C. Chow
TO: Elena Kagan

FROM: Martha Foley
 Office of the Chief of Staff

SUBJECT: Not urgent -- news coverage of TPO mark-up

FYI.

Small point, but neither the WSJ nor the Post reported the amendments on WH, files etc., in their coverage of the TPO subcom mark-up the other day. (I don't recall seeing any story in the NY Times.)

This was because they covered the huge whack that the IRS took in some depth.

(I think the possibility that 2000 workers would be laid off as a result of that cut may have been dominating Steny's thoughts when we met with him.)

Anyway, the lack of coverage (which does surprise me) may help to contain slightly the enthusiasm for more mischief at full committee. At least they were not rewarded for it by the press coverage.

White House Office Budget

18-Jun-96

Comparison of President's Request to Enacted Level
FY 1984 - 1996

Fiscal Year	President's Request	Enacted	% Change
1984	\$23,413	\$23,186	-1.0%
1985	24,985	25,189	0.8%
1986	24,906	23,835	-4.3%
1987	25,725	24,824	-3.5%
1988	26,779	26,426	-1.3%
1989	27,950	27,950	0.0%
1990	30,639	30,232	-1.3%
1991	32,799	32,799	0.0%
1992	34,885	34,885	0.0%
1993	43,972	42,796	-2.7%
1994	38,914	38,754	-0.4%
1995	41,632	39,902	-4.2%
1996	40,193	39,412	-1.9%

- o As a general rule, Congress enacted appropriations for the White House within 1% or so of the President's request during fiscal years 1984 through 1992
 - FY 1986 reduction of 4.3% was an across-the-board Gramm, Hollings, Rudmann sequester
 - FY 1987 reduction of 3.5% included \$729,000 in program reductions and \$172,000 in denied supplemental requested for the pay raise

- o The White House Office was funded at the request level for 3 of 4 years during the Bush Administration (1989-92)

White House Office Budget

18-Jun-96

Comparison of Nominal and Constant Dollars
FY 1992 - 1997

Fiscal Year	Nominal	Constant (non-inflated)	% Change by Fiscal Year
1992	34,885	34,885	0.0%
1993	42,796	41,744	19.7%
1994	38,754	36,283	-13.1%
1995	39,902	36,607	0.9%
1996	39,412	34,999	-4.4%
1997	40,193	34,371	-1.8%

Constant (non-inflated) spending at the White House has declined slightly during this Administration.

- o After initial investment to replace antiquated infrastructure in FY 1993, in constant (non-inflated) terms the WHO budget has remained relatively constant
- o The WHO request for FY 1997 in constant (non-inflated) dollars is 1.5% less than the last Bush budget in FY 1992

June 18, 1996

The Presidential and Executive Office Accountability Act - HR
3452

The PEOAA Seeks to Apply the Following Workplace Laws to the EOP:

- Antidiscrimination provisions of Title VII, ADEA, ADA and Rehab Act of 1973
 - Prohibits discrimination in employment actions affecting Title 3 employees (WHO, OVP, OPD, Exec Res).*
 - Substantially duplicates provisions of 1991 Civil Rights Act that already prohibits such discrimination. One change is PEOAA applies the private sector provisions of Title VII, rather than the public sector provisions that apply elsewhere in federal government; differences are marginal only. PEOAA also imposes counselling/mediation/adjudication procedures for resolving EEOC issues.
- Family and Medical Leave Act
 - Guarantees 12 weeks of unpaid leave for birth or adoption of child, family care, etc.
 - FMLA currently applies as a matter of law to Title 5 employees, and as a matter of Administration policy to Title 3 employees.
- Fair Labor Standards Act
 - Sets minimum wage for all workers; requires payment of overtime for work over 40 hours, except for managerial, administrative and professional workers; prohibits use of comp time.
 - FLSA currently covers Title 5 employees. Title 3 employees are **not** covered by FLSA. Exec Res has paid overtime since 1970's on voluntary basis.

* The great majority of EOP employees (two-thirds) are "Title 5" employees hired under the civil service appointment authority of Title 5. Employees in four of the EOP entities (WHO, OVP, OPD, and Exec Res) are "Title 3" employees appointed directly by the President pursuant to Title 3, "without regard to any other provision of law regulating the employment or compensation of persons in the Government service."

- Access to Facilities and Programs Under ADA
 - Extend private-sector protections of ADA governing access to facilities and programs to EOP offices and to the White House Complex.
 - EOP offices already covered by non-discrimination provisions of Rehabilitation Act and Architectural Barriers Act, which apply to the entire executive branch. EOP has issued its own regulations covering all EOP offices and agencies. Further, GSA follows Rehab Act and Architectural Barriers Act accessibility guidelines in all GSA-owned buildings, including the entire White House complex other than the Exec Res. These provisions are substantially similar to ADA provisions, which apply only to private and state government employers. However, there are minor differences in standards (i.e., pitch of ramps, etc.) that may require changes on Complex if ADA provisions applied.
- Occupational Safety and Health Act
 - Apply private-sector OSHA enforcement procedures to EOP offices -- including formal notifications and citations by the Secretary of Labor, and the power to seek court injunctions to enforce compliance.
 - Entire executive branch, including EOP entities, already under obligation to follow general OSHA standards. Further, GSA also subject to OSHA, covering all buildings on Complex other than Exec Res.
- Federal Service Labor-Management Relations (5 USC Ch. 71)
 - Would extend to all EOP employees the unionization and collective bargaining rights enjoyed by career federal employees.
 - Title 5 EOP employees are currently covered by these provisions; there are no unions in the EOP. Title 3 employees are not covered by provisions and do not currently have the right to unionize or to bargain collectively.
- Employee Polygraph Protection Act of 1988
 - Would extend to all EOP employees private-sector restrictions on employers' use of polygraphs. EPPA permits use of polygraphs for intelligence and counter-intelligence purposes, and for investigations into physical and economic loss.

- No present comprehensive statute governing polygraph use in executive branch. President Johnson issued 1969 memorandum (still followed) setting guidelines for national security and law enforcement use of polygraphs. OPM has proposed regulations prohibiting polygraph use for personnel screening outside of national security context.
- Worker Adjustment and Retraining Notification Act
 - Would extend the 60-day notice provisions in the "plant closing" law to the EOP. Notice requirement triggered by facility closing or mass layoff that requires firing 50 or more employees. PEOAA contains exception for Presidential transitions -- 60-day notice not required for such layoffs.
 - Title 5 employees are covered by RIF provisions that require 60 days' notice in the event of reductions in force (including facility closings or mass layoffs). Title 3 employees not covered by any notice provisions.
- Veterans' Employment and Reemployment Rights (38 USC Ch. 41)
 - Would extend to all EOP employees protections against discrimination against veterans, and entitlement of veterans to their former positions at the conclusion of active duty (absent changed circumstances).
 - Title 5 employees are currently covered by these provisions. Title 3 employees are not formally covered; however, during the Gulf War the last Administration provided WHO employees leave and re-employment rights under the predecessor statute. This Administration would presumably do the same.

June 17, 1996

**Representative Spence's Amendment to Remove Key Elements
of the White House Communications Agency's Mission
Statement**

Background:

Representative Spence's amendment to the recently passed Defense Authorization Act removes many services currently being provided to the President from the WHCA Mission Statement. Services that WHCA no longer would be permitted to provide include:

- lighting and sound systems at Presidential events;
- photographic support to the President's photographers; and,
- stenographic support when the President speaks.

Although the amendment removes authority to provide these services from DoD, it makes no provision for ensuring that the \$7.8 million estimated cost for these services continues to be funded under another agency's budget.

WHCA has provided the same services for many decades

- This should not be a partisan issue. Although the DoD IG recently challenged WHCA's mission statement, it is important to note that WHCA's mission has remained unchanged since 1962.
- This administration has provided no new taskings to WHCA.
- WHCA has provided the same services to many administrations-
 - stenographers date back to Johnson; news wire services to at least Carter; camera equipment for many years.

No one argues that the President should not be provided with these services; the only issue has to do with who should pay

- Everyone agrees that these are services that should be provided for this President and future Presidents. The only issue has to do with who pays for the services.
- These services are historically included in WHCA's budget.
- The IG made no allegation that these services are illegal or that they should not be provided by WHCA -- their only concern is with whether WHCA or another entity should fund them.

- The White House does not object to this in principle as long as funds for these services are transferred to another agency's (WHO or OA) budget.

The White House Office budget can't absorb the cost for these services

- The \$7.8 million estimated cost of these services equals about 20% of the White House Office's FY 96 budget.
- If provision of these services is to be removed from the DoD budget, a transfer of funds from the DoD budget is necessary to ensure that the President continues to receive adequate support.

This amendment represents micromanagement of the Department of Defense

June 17, 1996

Proposed Staff and Funding Cuts

Background:

The Budget Resolution proposes that the EOP be reduced by 15 percent to "carry our the President's pledge ..." to reduce staff.

The objective of the 25% reduction was to reduce personnel in the EOP, exclusive of OMB and USTR, which are Cabinet level agencies. This includes both staff on the EOP payroll and staff borrowed for the agencies

- This is a true on board count to avoid the charge that we borrow for the agencies to make up the difference.
- The definitions used are the same as these used in the Bush Administration.
- The President fulfilled his commitment to cut the EOP staff by 25% on October 1, 1993, the beginning of FY 1994.
- The EOP has maintained and continues to maintain the levels established by the 25% staff reduction.
- Even with the addition of 80 FTEs and 30 non-reimbursable detailees to ONDCP in FY 1997, the President remains committed to keeping staffing levels within the 1,072 limit for the EOP.

The President did not pledge to reduce EOP funding by 25%, commensurate with the staffing reduction

The proposed 15% cut would be devastating

- This reduction would begin an erosion of the institution of the Office of the President.
- Agencies would be forced to eliminate additional positions beyond the 25% staff reduction in FY 1993.
- Agencies would have a more difficult time attracting and retaining top quality staff.
- Staff training would be reduced or eliminated.
- The availability of research capabilities such as subscriptions and commercial databases would be scarce.

- Maintenance work would be limited to bare operational minimum.
- The capacity to process and respond to Presidential correspondence would be impaired.
- Public outreach through satellite communications would be reduced.
- Development of EOP computer systems would be severely limited, will quickly regress, and future Presidents will be faced with outdated support systems.
- Further development of EOP on-line via internet would be curtailed and limit future public access to Presidential documents and correspondence.

June 17, 1996

Legislation to Pay Legal Expenses for the 7 terminated Travel
Office Employees

Background:

On May 19, the House passed a Clinger bill to authorize reimbursement without limit to travel office employees for legal expenses incurred, to be paid from amounts in Treasury not otherwise appropriated. The Senate has not yet passed such a bill.

The President has indicated he would sign such a bill if it reached his desk.

Potential Problems

- As noted above, the Administration has no objection to the Clinger bill.
- Our only concern would be if it were required to be paid from out of the White House appropriations.

June 17, 1996

Elimination of CEA

Background:

The House Budget Resolution proposed eliminating the CEA. A similar proposal was included in the House version of the Treasury-Postal bill last year.

Alternatively, there would be a proposal to eliminate or substantially reduce the economic analysis capability of the NEC or OMB.

The CEA is an important tool that has served presidents of both parties since 1946

- If CEA did not exist, most of its functions would have to be performed elsewhere, yielding little, if any, net budgetary savings, and adversely affecting the effectiveness of the Executive Branch. Their essential work includes:
 - providing the President with strong macroeconomic analysis and advice on a range of domestic and international economic policy issues.
 - performing economic forecasts
- Every President since Harry Truman has looked to the CEA for rigorous and independent economic analysis and advice. Other essential CEA functions include:
 - monitoring key economic indicators and providing the President with memoranda analyzing current economic events;
 - producing the "Weekly Economic Briefing of the President" and the annual Economic Report of the President; and
 - preparing the monthly *Economic Indicators* for the Joint Economic Committee of the U.S. Congress.
- In both Democratic and Republican Administrations, CEA advocates policies that facilitate the workings of the market and the importance of market incentives, efficiency and productivity.

- The current CEA structure is critical to the performance of its functions, since it:
 - is not embedded in a particular agency so is not constrained by a need to defend particular programs or policies;
 - does not represent any particular interest group; and
 - is able to attract high quality economists.

The NEC and OMB staff perform very different and critical functions

- The NEC does policy coordination. It was created by the Nixon Administration and used by each president since.
- The OMB economists do fiscal economics or analysis in support of budget reviews.

June 17, 1996

Pennsylvania Avenue Funding Moratorium

Background:

Because of two recent legislative proposals (Sen. Grams resolution calling for Pennsylvania Avenue to be reopened and the provision within the Interior budget that precludes the National Park Service from spending any money, public or private, on Pennsylvania Avenue), it is possible that someone may attempt to attach similar amendments to the Treasury, Postal budget. From a security perspective, the worst case scenario would be for someone to include language in the Secret Service's appropriation limiting their spending on Pennsylvania Avenue related efforts.

General Comments About Beautification Efforts

- Work so far has only included temporary steps to beautify the area. This work is not related to the long-term vision that the National Park Service released last week.
 - No final decisions have been made on the long-term plans. The National Park Service is collecting public feedback on their long-term proposals.
- None of the elements of the short-term beautification effort are irreversible. If security conditions change in the future, all short-term steps can be revised or reversed.
- Under the interim plan, Pennsylvania Avenue will continue to remain as a street. The new guardbooths and planters are only intended to improve the appearance. They certainly will look and function better than the USSS security vehicles and jersey barriers that have been blocking each end of Pennsylvania Avenue.

Long-term Plans for the Avenue

- The Secret Service has said that, to ensure safety from a vehicular explosive device, they do not have another suitable alternative to closing the Avenue.
- Given that no alternative solutions are anticipated, the National Park Service has been working on long-term plans to functionally improve and beautify the area.
 - On Wednesday, May 22, the National Park Service publicly released one "preferred" plan and four other alternatives for the long-term redesign of the Avenue.

- Although the National Park Service has identified what they believe is the "preferred alternative," the final decision has not been made. Before a final plan can be selected, the National Park Service is asking the public for feedback on all the alternatives.

Next steps

- All the long-range alternatives ("the preferred" and the four others) are being shared with the public for review and a chance to comment. Public comments are due to the National Park Service by June 28.
- The Director of the National Park Service will use the public feedback to help him make a final decision on a plan for the area. This decision could come as early as July, 1996.

Cost information

- Any long-term renovations will require a combination of public and private financing.
- Because the long-range plans call for changes that require involvement of many Federal agencies, potential funding sources include many different agency budgets. Neither the National Park Service nor the Secret Service would be asked to pay the entire cost of the long-term efforts.
- Implementation of the plan will be a multi-phase effort. No one expects funding for the renovation to become available at one time. Steps will be accomplished as funding becomes available.
- The National Park Service released very tentative cost estimates. The "preferred" alternative is estimated to cost between \$45-50 million. The other alternatives range in cost from \$20 million (this is for the "least change" alternative) to over \$80 million (for the "most change" alternative).

The National Park Service has worked to make this an inclusive process

- The Chief of Staff originally asked the National Park Service to have interim improvements in place by September, 1995. However, several factors combined (i.e., the furloughs, lengthy procurement requirements, delays in manufacturing, discovery of trolley tracks under the Avenue) to cause this project some delay.

- Many groups and individuals have been included. The National Park Service has worked with individuals, other agencies and organizations (from public and private sectors; from the Executive and Legislative branches; from the District of Columbia; from urban planners and design professionals) to develop the design alternatives.

June 17, 1996

Presidential And Executive Office Accountability Act - HR 3452

Background:

- The PEOAA was introduced in the House by Congressman Mica on May 14, 1996 with over 100 co-signers (103-R; 1-D). Hearings are expected on June 26, 1996 before Cong. Steve Horn's subcommittee.
- It is conceivable that the bill would be submitted as an amendment to the Treasury-Postal appropriation bill.

Summary Analysis of PEOAA

Workplace provisions -- Would apply 11 major workplace laws to employees within the WHO and EOP; modelled closely on the Congressional Accountability Act of 1994, P.L. 104-1;

- Most provisions (7 out of 11) already apply to all the agencies and offices of the EOP -- 10 out of 11 apply to the Title 5 agencies (which employ 2/3 of EOP employees).
- As a general matter, there is likely to be little substantive change to the operations of the EOP. However, taken together the employment provisions could substantially limit the President's ability to hire and fire employees in the WHO, OVP, OPD, and Exec Res. This raises constitutional separation-of-powers concerns. Further, some provisions raise significant practical concerns.

CFO Provisions -- Would create a Chief Financial Officer within the Executive Office of the President. Also would subject EOP agencies to financial statement and auditing requirements.

Special Government Employee Provisions -- Would create a special definition of "special government employee" that would apply only within the EOP. Would include a wide range of individuals not ordinarily considered "employees" of the federal government. SGE's are subject to conflict-of-interest statutes, to financial reporting requirements, to the Standards of Ethical Conduct, and to post-employment restrictions.

Likely Administration Position

- No firm decisions yet on Administration position.
- Our current thinking is to support the bill but:
Insist on amendments to:

- strike the provisions that give courts and administrative bodies in discrimination suits the power to order the President to hire or reinstate Presidential appointees;
 - OLC believes this provision to be unconstitutional
- permit continued use of unpaid volunteers;
 - this provision would effectively deny hundreds of Americans, primarily senior citizens and school children, the opportunity to work in the White House
- clarify the President's right to hire and fire based on political compatibility or party affiliation;
 - the PEOAA is silent on this point, whereas Congress explicitly allowed political criteria to be used in hiring and firing political staff
- remove the requirement to establish a Chief Financial Officer for the EOP (while leaving the CFO Act accountability and auditing requirements)
 - the EOP is not a single institution, nor does any single entity exercise operational control over the others; so there is no institutional framework in which to place a CFO. But accountability and auditing requirements are worthy.
- retain the current definition of "special government employee" within the EOP
 - current definition already addresses concerns by subjecting those individuals who exercise government functions and supervise government employees to the criminal conflict of interest laws and regulations. Broadening scope of law would dramatically hinder the President's ability to consult and receive advice and information from persons outside of the government

Propose other amendments to:

- apply federal rather than private sector versions of workplace laws (e.g., ADA and OSHA) to the EOP
 - potential for great administrative confusion -- e.g., where GSA (not an EOP entity) is subject to federal version, but tenant agencies are subject to private version, which applies?

- authorize additional positions/funding (2-3 persons) to implement
 - PEOAA imposes significant rulemaking/enforcement responsibilities on the President without any funds or personnel; Congress created a new office for itself in CAA with \$2+ million annual budget and 17+ employees, admittedly to carry out a much broader task

THE WHITE HOUSE

WASHINGTON

June 19, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMANFROM: ELENA KAGAN *ek*

SUBJECT: "FBI FILES" AMENDMENTS TO BUDGET BILL

Handwritten notes:
S/K
P
J
I
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At Kathy's request, I substituted for her at a meeting in Jody Torkelson's office to discuss possible amendments to the Treasury, Postal Service, and General Government Appropriations Act, concerning the use of FBI files. I came late (I didn't hear about the meeting until a half-hour into it), so I may not have gotten absolutely everything, but here's the basic gist:

The Act will be considered in full committee next Thursday. (It was marked-up in subcommittee yesterday.) At that time, some Republicans may try to offer amendments dealing with, among other things, the maintenance, transfer, and use of FBI files. Copies of the amendments currently floating around are attached to this memo. Rep. Obey is trying to cut a deal to prevent this from happening: under the deal, which also involves a congressional pay raise, Reps. Hyde and Klinger would ask Republican members of the Budget Committee to keep out of this issue. If that does not work, we need a strategy to deal with these amendments.

Jody asked the Counsel's Office to prepare two documents that will aid in fashioning and effecting such a strategy: first, draft legislation of our own, essentially putting Jack's new guidelines in statutory form; and second, an analysis of the Republican amendments listing the various absurdities that they would accomplish.

On the first, Martha suggested working with Bob Damus to get this into an Appropriations Bill format. On the second, Frank Reeder seemed very knowledgeable. Among other things, he noted that the bills might destroy the FBI's ability to gather information or the White House's ability to do routine vetting; that they might apply not only to the White House, but to the Secret Service, GSA, and OPM; that they might limit the ability of this Administration to appoint employees of former Administrations; and that they would require the White House to destroy files the moment an employee leaves her position. (I have not checked whether any of these things are true; I am here only reporting what Reeder said at the meeting.)

I said we could have these things done by Friday. Then, either Friday afternoon or Monday morning, the same group will gather to discuss the documents and the best strategy to take on the Hill.

The two alternative Hill strategies discussed were (1) to try to work with the Republicans before the committee vote, showing them that their amendments are absurd and persuading them to go for ours instead; and (2) to let the Republicans do what they want, attempt to embarrass them in public by highlighting the lunacy of their proposals, and taking our amendment out of the bag at the last minute as an alternative. Martha, Jody, and Barbara Chow all agreed that we need some kind of amendment of our own, because the Democrats on the Committee would be unwilling to buck the Republicans on this issue without offering substitute legislation.

Finally, Jody also asked the Counsel's Office to look into the Privacy Act issues raised by the recent revelations on the FBI files. (I do not think there is a Friday deadline on this part of the assignment.) Are we covered under the Act or exempt from it? Have we violated the Act? If so, what kind of sanctions would we face? Frank Reeder offered his help on this subject as well; Jody noted that he had helped to draft the Act when on the Hill.

I'll be glad to do whatever part of this you want me to, or to pass it all off to David and Trey, who I gather have been working on the new procedures. Given the Friday deadline, you should try to assign these projects quickly.

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