

THE WHITE HOUSE
WASHINGTON

ACTION

MEMORANDUM FOR THE PRESIDENT

THROUGH: JOHN PODESTA

FROM: SAMUEL BERGER, ASSISTANT TO THE PRESIDENT FOR
NATIONAL SECURITY AFFAIRS

BRUCE REED, ASSISTANT TO THE PRESIDENT FOR
DOMESTIC POLICY AND DIRECTOR OF THE DOMESTIC
POLICY COUNCIL

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RON KLAIN, ASSISTANT TO THE PRESIDENT AND CHIEF
OF STAFF AND COUNSELOR TO THE VICE PRESIDENT

JACK LEW, DIRECTOR, OFFICE OF MANAGEMENT AND
BUDGET

CHARLES RUFF, COUNSEL TO THE PRESIDENT

SUBJECT: Proposed Biological Terrorism Provisions in the
Omnibus Crime Bill

Purpose

To determine the Administration's position on proposed
biological terrorism provisions of the Omnibus Crime Bill.

Background

There is consensus within the Administration that serious gaps
exist in current federal bioterrorism laws. In contrast to
chemical, nuclear or radiological weapons, there are currently
few laws in place designed to limit the availability of
hazardous biological materials to the general public. While
current laws are adequate to punish perpetrators after they
unleash biological agents, they are not designed to ensure that

cc: Vice President
Chief of Staff

these substances are kept out of the wrong hands in the first place. Additionally, bioterrorism is a growing concern in Congress and we believe that many on both sides of the aisle will be watching to see if the Administration will produce a draft bill with a strong law enforcement focus before introducing their own proposals.

DOJ's goal in proposing this legislation is to ensure that potentially hazardous biological materials do not fall into the wrong hands. HHS agrees with this goal, but is concerned that some of the proposed restrictions could chill vital scientific research into these agents that may be necessary to safeguard public health, and may cause concern within the medical and scientific community. With these dual concerns in mind, there is interagency agreement that the proposed Omnibus Crime Bill include new provisions establishing criminal penalties for:

- **Possession of biological agents not justified by a peaceful purpose.** Under this provision, whether possession is justified would be determined by type, quantity and purpose for possessing the agent.
- **Unsafe handling of harmful biological agents.** This provision would criminalize the actions of those who, with conscious disregard for public health and safety, handle select biological agents in a manner that grossly deviates from accepted norms.
- **Unregistered possession and unauthorized transfer of selected biological agents.** This provision recognizes that authorities should be aware of who is handling the most deadly biological agents. Although establishing an initial inventory may pose a challenge to the scientific community, any additional reporting burden will be minimal for scientific facilities that already comply with CDC transfer regulations. You would have 60 days after this legislation takes effect to designate the agency that would be responsible for the registration process.
- **Knowingly perpetrating a hoax regarding the use of biological agents.** This provision is necessary given the recent spate of such hoaxes as the rash of anthrax scares around the United States.

The Administration will submit to Congress a statement indicating that we will review the bill's provisions with representatives of the scientific community over a 60 day

period, after which the Administration will advise Congress of any proposed changes deemed necessary.

Remaining Issues for Resolution

There is interagency disagreement on one remaining set of issues that addresses categories of individuals who would be prohibited from possessing dangerous select biological agents. Justice believes it is necessary to enact a provision which would, absent a waiver, criminalize the possession of dangerous biological agents by certain categories of "restricted individuals". The categories Justice suggests are nearly identical to those that are applied to firearms. Justice believes that this provision, which permits waivers to be issued in most circumstances, will be only minimally intrusive on the legitimate research community. NSC and DPC agree with DOJ.

HHS accepts the principle of prohibiting categories of "restricted individuals" from working with select biological agents. However, it believes that the provision as drafted is far too restrictive and would chill valid scientific endeavors; thus HHS proposes a more narrow definition of "restricted individual" which it believes will sufficiently limit access to these dangerous agents while protecting the privacy interests of the individuals involved and proving less disruptive to the nation's research institutions. HHS also proposes a different system for waivers and proposes to make clear that employers are not required to investigate employees to determine whether they fall into one of the restricted categories. OMB, White House Counsel and OSTP agree with HHS.

The different views with respect to the categories of individuals to be restricted are outlined below. Under each category, waivers would be available.

1. Individuals under indictment

DOJ believes that, absent a waiver, an individual under indictment for any felony should be restricted from handling harmful biological agents because he or she may pose either a safety or security concern. HHS believes inappropriate to restrict access to select agents to anyone who has yet to be convicted of any crime.

_____ Option 1: Restrict access, absent a waiver, for any individual under indictment for any felony.

_____ Option 2: Restrict access, absent a waiver, for any individual under indictment for any felony crime involving the use or attempted use of force against another person or use of controlled substances where the maximum penalty is not less than five years, or bribery or espionage.

_____ Option 3: Do not restrict access to individuals who are under indictment but have not been convicted of any crime.

2. Individuals convicted of a felony crime or dishonorably discharged from the military

DOJ believes that, absent a waiver, an individual who is convicted of any felony or dishonorably discharged for any reason from the military should be restricted from handling select biological agents because they may pose either a safety or security concern. DOJ notes that convicted felons lose many other rights, including their right to vote. HHS believes that the Justice language is not adequately tailored to capture those individuals who might pose a security risk or a danger.

_____ Option 1: Restrict access, absent a waiver, for an individual convicted of any felony.

_____ Option 2: Restrict access, absent a waiver, for any individual under indictment for any felony crime involving the use or attempted use of force against another person or use of controlled substances where the maximum penalty is not less than five years, or bribery or espionage.

3. Individuals who are unlawful users of or are addicted to any controlled substance

DOJ believes that individuals who are either addicted to or who are unlawful users of controlled substances should be restricted from handling biological agents because they may pose either a safety or security concern. HHS does not object to a restriction on unlawful users of controlled substances, but believes that this provision would capture individuals such as abusers of prescription pain medicine who are unlikely to pose safety or security risks. Moreover, it is difficult to independently verify this factor.

_____ Option 1: Restrict individuals are using or are addicted to any controlled substance.

_____ Option 2: Restrict individuals who are unlawfully using any controlled substance.

4. Individuals who have been adjudicated as mental defective or committed to a mental institution

DOJ believes that an individual who has been adjudicated as a mental defective or who has been committed to a mental institution could pose a security or safety threat. HHS believes it is inappropriate to exclude a scientist for a mental illness the treatment of which included hospitalization. Mrs. Gore, as your mental health advisor strongly agrees with the HHS position.

_____ Option 1: Restrict individuals, absent a waiver, who have been adjudicated as mentally defective or have been committed to any mental institution.

_____ Option 2: Do not restrict such individuals.

5. Alien other than an alien lawfully admitted for permanent residence

DOJ believes that this provision is necessary for security reasons. HHS believes that given the international collaborative research that occurs in our labs, the provision is overly-broad and will cast a broad brush of suspicion over foreign nationals in general, diminishing our ability to continue attracting world-class scientists to this field of research.

_____ Option 1: Restrict access of only persons who are citizens of countries designated by the Secretary of State as sponsors of terrorism.

_____ Option 2: Restrict access of non-permanent resident aliens who are citizens from countries other than NATO and major non-NATO allies (as defined in the Foreign Assistance Act).

There are also disagreements over how the waiver provisions should be handled. Under the Justice provision, the employer may grant waivers in most circumstances. However, waiver requests for non-permanent resident aliens require approval, with consultation with the Attorney General, from an Agency designated by you. HHS agrees that waivers should be available, but believes that employers will be reluctant to grant waivers for fear of incurring liability should the waived individual

later be shown to be associated with illicit activity. To alleviate these concerns, HHS proposes that DOJ, not the employer, be responsible for granting waivers. While DOJ does not object to a government role in granting waivers, it believes that the agency or agencies involved should be left to Presidential designation.

Concur with HHS Option on waivers _____

Concur with DOJ Option on waivers _____

Finally, HHS would like to make it sufficient for the employer to inquire on the job application form whether an individual qualifies as a "restricted individual" in order to meet their responsibility under the law. Specifically, HHS would like to add the following sentence: "Nothing in this section shall be construed to imply an obligation on the part of the employer to conduct a background investigation." DOJ has agreed in principle that no such obligation is intended for the employer.

Concur with HHS language _____

MS HYPE from US



Jose Cerda III

08/11/99 05:53:17 PM

Record Type: Record

To: Karen Tramontano/WHO/EOP@EOP
cc: See the distribution list at the bottom of this message
Subject: Bioterrorism Dispute/Crime Bill Introduction

Karen, et.al.:

As all of you know, an internal dispute on the scope of the bioterrorism provision in the crime bill has prevented us from forwarding the President's legislation to the Hill for several months now. It was bad enough that we couldn't formally forward our crime bill during the debate on the recent juvenile crime and gun bills, but -- at this point -- it's become downright embarrassing and -- more importantly -- drawn the attention of Senator Kyle and Rep. Bliley, whose committees are specifically awaiting our recommendation on this issue. In fact, just this week Rep. Bliley fired off an angry letter to the AG (I believe his third to date) demanding to know who was holding up our crime bill and bioterrorism legislation.

Although we long ago came to agreement on most of the substantive issues, there is still disagreement between DOJ and HHS (and some of us internally) on one key provision: what individuals should be restricted from handling select biological agents. To try and get this resolved, I'd like to make both a substantive and process recommendation:

1. Compromise position. There is, I believe, a natural compromise that reflects where the majority of WH staff are on this issue, and we should consider it immediately. That position is:

(a) Restrict access to select biological agents by:

- All persons under indictment (DOJ position). DPC, OMB, NSC, and OVP all strongly support this position. Counsel, OSTP and HHS would not restrict indicted persons from handling biological agents, or at least narrow the restriction to persons indicted for certain serious felonies, bribery, or espionage.
- All convicted felons (DOJ position). DPC, OMB, NSC, and OVP. Again, Counsel, OSTP and HHS support a narrower restriction that applies to certain serious felonies, bribery, or espionage.
- Unlawful users of drugs and drug addicts (DOJ/HHS position). It is my understanding that, if decoupled from the proposed restriction for persons adjudicated mental defective, no one is opposed to this provision.
- Non-permanent resident aliens from the 40-50 countries that are not NATO or major non-NATO allies, unless waived by the employer (DOJ position). This is the most controversial of the restrictions. DPC, NSC, OVP, and OMB strongly support it. Counsel, OSTP and HHS strongly oppose it, and instead recommend limiting access only to non-resident aliens from the 6 countries that sponsor terrorism. NSC points out that such a limitation would render the restriction meaningless, since we don't have no formal relations with these 6 countries.

(b) Do not restrict access to select biological agents by persons who are adjudicated mentally defective (HHS position). Although DPC, NSC and OMB support keeping this restriction, which already applies to all gun purchasers, we would defer to OVP's strong opposition to this categorical restriction.

2. Internal White House Meeting. Although I do not believe any more meetings on this issue are required, if you think it would be helpful, I'd recommend simply sitting down with senior staff from the WH offices, and starting with a discussion of the compromise proposed above. Any issues that could not be resolved and taken off the table during the meeting could then be forwarded to the President for decision. Although we (DPC) have thought it irresponsible and unnecessary to buck so many of these issues to the President for decision, I don't know what else to recommend at this point if WH folks can't come to agreement. Also, I don't think there's anything to be gained from another interagency meeting on this topic. We've gone over and over this with HHS and DOJ, with different WH offices siding with them on different issues. We simply need to let them know what the final decisions are.

Jose'

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Carolyn T. Wu

09/09/99 10:45:28 AM

Record Type: Record

To: See the distribution list at the bottom of this message
cc: Melissa J. Prober/WHO/EOP@EOP
Subject: Bioterrorism



Just reminder.....

----- Forwarded by Carolyn T. Wu/WHO/EOP on 09/09/99 10:44 AM -----



Carolyn T. Wu

09/08/99 10:18:00 AM

Record Type: Record

To: See the distribution list at the bottom of this message
cc: Melissa J. Prober/WHO/EOP@EOP
Subject: Bioterrorism

Bruce Reed and Karen Tramontano will be holding a meeting on bioterrorism tomorrow, (Thursday, September 9) at noon in the Roosevelt Room. The following people plus one are invited to attend:

Sylvia Mathews
Beth Nolan
Shelly Peterson
Eric Holder
Kevin Thurm
Eric Liu
Jim Steinberg
Neal Lane
David Beier

Please contact me if you have any questions. x61987. Thanks.

Message Sent To:

September 29, 1999

*Crime -
Bioterrorism*

MEMORANDUM FOR JOHN PODESTA

FROM: KAREN TRAMONTANO
BRUCE REED

RM

CC: SANDY BERGER
NEAL LANE
JACK LEW
CHARLES BURSON
BETH NOLAN

SUBJECT: Proposed biological terrorism provisions in the Omnibus Crime Bill

Purpose

To finalize the Administration's position on the proposed biological terrorism provisions of the Omnibus Crime Bill, so that the legislation can be sent to Congress.

Executive Summary

This memo is to inform you of the consensus recommendations reached within EOP regarding the bioterrorism provisions of our crime bill. As you know, there has been a great deal of interagency contention over provisions that would bar certain categories of individuals from possessing select biological agents. Through a meeting earlier this month and follow-up discussions, we have brokered a compromise upon which all interested EOP offices (DPC, NSC, OSTP, OMB, OSTP, and WH Counsel) can agree. We will now move forward to incorporate the recommendations into our crime bill unless you express any concerns.

Background

It is widely agreed that serious gaps exist in current law regulating possession and transfer of select biological agents. In contrast to chemical, nuclear or radiological weapons, there are currently few laws in place designed to limit the availability of hazardous biological materials to the general public. While current laws are adequate to punish perpetrators after they unleash biological agents, they are not designed to ensure that these substances are kept out of the wrong hands in the first place. Additionally, bioterrorism is a growing concern in Congress and we believe that many on both sides of the aisle will be watching to see if the Administration will produce a draft bill with a strong law enforcement focus before introducing their own proposals.

The Department of Justice goal in proposing legislation is to ensure that potentially hazardous biological materials do not fall into the wrong hands. HHS agrees with this goal, but has raised concerns that some of the proposed restrictions could chill vital scientific research that may be necessary to safeguard public health, and may cause concern within the medical and scientific

community. With these dual concerns in mind, there is interagency agreement that the proposed Crime Bill include new provisions establishing criminal penalties for: possession of biological agents not justified by a peaceful purpose; unsafe handling of harmful biological agents; unregistered possession and unauthorized transfer of selected biological agents; and knowingly perpetrating a hoax regarding the use of biological agents.

Issues for Resolution

Transmittal of the Crime Bill has been held up since May by an interagency dispute over the categories of individuals who would be prohibited from possessing dangerous select biological agents, unless they received a waiver.

In order to address safety and security concerns, Justice believes that it is necessary to enact provisions which would criminalize the possession of dangerous biological agents by certain classes of individuals. The categories proposed by DOJ are similar to those that are applied to firearms, including individuals who are: (1) convicted of a felony crime; (2) under indictment for a felony crime; (3) unlawful users or addicts of any controlled substance; or (4) adjudicated as mentally defective or committed to a mental institution. DOJ believes that these provisions, which permit employer waivers to be issued in most circumstances, would be only minimally intrusive on the legitimate research community.

While HHS accepts the principle of prohibiting categories of "restricted individuals" from working with select biological agents, it believes that the DOJ provisions are too restrictive and could chill valid scientific research. HHS supports a narrower definition of "restricted individual" that it believes will sufficiently limit access to dangerous agents while proving less disruptive to the nation's research institutions.

The agencies also disagree over the waiver provisions. Under the Justice proposal, the employer would be permitted to grant waivers for individuals in the prohibited categories in most circumstances. HHS believes that employers would be reluctant to grant waivers for fear of incurring liability for waived individuals. HHS prefers that a Federal agency – designated by the President after the bill passes – determine the waiver policy, including whether waivers should be granted by a government agency or whether employers should make waiver determinations. Instead would prefer that DOJ provide the waiver, instead of employers.

The most contentious issue has been DOJ's proposal to prohibit any non-permanent resident alien from handling select biological agents unless the U.S. Government provided a waiver. This would include many visiting students and scientists admitted under temporary visas. HHS strongly opposed the proposal over concern that it could cast suspicion over foreign nationals in general, and diminish our ability to continue to attract world-class scientists to this field of research. While the agencies disagreed over the breadth of the proposal, both agencies agreed it is appropriate for a federal agency to provide waivers for this category of individuals.

Consensus Recommendations

On September 9, we held a meeting to resolve the areas of disagreement. In addition to the Departments of Justice and Health and Human Services, many interested EOP offices also attended including DPC, NSC, OMB, WH Counsel, OSTP, OVP, and the Chief of Staff's Office. During the meeting, the EOP offices reached a compromise position on the prohibited persons categories. Based on follow up discussions led by OMB, we have also arrived at consensus positions on the visiting foreign nationals and waiver issues that have the agreement of all interested EOP offices.

A. Prohibited persons categories

Within the prohibited persons categories, we agreed that the legislation should include:

- Individuals convicted of a felony crime or dishonorably discharged from the military.
- Individuals under indictment for any felony crime.
- Individuals who are unlawful users of any controlled substance. We agreed to drop language which would have also prohibited individuals who are "addicted to" any controlled substance.

We also agreed to exclude individuals who have been adjudicated as mental defective or committed to mental institutions from the list of prohibited persons.

B. Waivers

While at the 9-9 meeting we discussed an option to allow employers to grant waivers with the assistance of HHS guidance, we have since reached a new consensus position negotiated by OMB. The new compromise would specify that a federal agency (designated by the President after the bill's passage) will determine the waiver policy, including whether waivers should be granted by the government or whether employers should make waiver determinations, with our without government guidance.

C. Foreign nationals admitted under temporary visas

As an alternative to DOJ's original proposal to generally bar *any* non-permanent resident alien from handling select biological agents absent a federal government waiver, we agreed upon a narrower provision that would focus on the countries with which we have the greatest national security concerns. The compromise provision would require federal government waivers for non-permanent resident aliens from any country designated by the State Department as a state sponsor of terrorism (7 countries). This provision will address national security concerns, with no significant impact on legitimate research activities.