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EEOC Story

60 MINUTES
Vol. XXIII, No. 27
FINAL--3/24/91

"THE NUMBERS GAME"

OPEN

SAFER

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of NOT playing the numbers game...
We'll explain in a moment.

Mike's been a traveling salesman
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Nine years ago, he decided to
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He borrowed \$3,000 on his
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\$148,000 please and we want it
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60 MINUTES

"THE NUMBERS GAME"

Vol. XXIII, No. 27

FINAL -- 3/24/91

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I froze... I froze in my chair. I, I, I was... I was... I got... I started feeling my chest bouncing around. I don't... I don't think it was a heart attack, but I'll tell you something, it was the next thing to it. I just was frozen with shock.

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What caused that shock was the EEOC -- the Equal Employment Opportunity Commission. It found Mike guilty of racial discrimination. It just didn't make sense. The only two employees who are not Hispanic or black are Mike and his father Leon -- a survivor of Auschwitz. As for the rest of the company, Welbel hires only minorities, 18 Hispanics and 8 blacks now work there.

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Our track record with minority hiring, I would challenge three M, Pillsbury. Nobody has the profile of hiring minorities as Daniel Lamp Company.

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Mike's troubles began in February, 1989, when a black woman named Lucille Johnson who had applied for a job was not hired. She filed a complaint with the Chicago office of the EEOC. She claimed she didn't get the job because she was black.

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Do you remember her?

MR. WELBEL:

No, no. As a matter of fact, I've never met her, nor do I know who she is. I know her only from the paperwork that's involved.

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So she filled out an application.

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Yes, she filled out an application, and she sought employment. And, ah, for one reason or another, she wasn't... she wasn't... she wasn't hired. Certainly not because she's black.

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You say for one reason or another. That sounds ominous when somebody says for one reason or another...

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It wasn't long before two investigators from the EEOC showed up at the door of the Daniel Lamp Company to check out Lucille Johnson's complaint. They wanted to go through Welbel's records. He said, "Help yourself."

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And to be perfectly frank, it was a very cordial relationship while they were investigating us. I... I certainly felt I had nothing to hide. You know, we've got... we've got all minority, a combination of black and Hispanic. Frankly, I took the matter very lightly.

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good times, Mike will have as many as 30 people working, in bad times, as few as 12. It seems a happy enough shop, if a bit noisy with everyone's radio tuned to a different station.

Jonathan Poe is a packer in the shipping department. Christine Castillo is the floor manager of the assembly line where she deals with everything from production output to color coordination.

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This mauve may clash with that cranberry.

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Lou Perales is the general manager. Zena drives the delivery truck, and also assembles lamps.

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I got the job right off, you know, right off the top.

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So what's... You think the government's just crazy or what?

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Yeah.

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I've been with the company eight years, and I never seen Mike being discriminated against anybody. And since... all that time I've been seeing Hispanic and black people working here.

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But that's not what the EEOC says it saw during three inspections in 1989 and 1990. It says it found no blacks working there. Mike says, that may be true from time to time because of his transient work force.

Jim Lafferty, Director of Legislative Affairs for the EEOC, says he is not impressed by that argument.

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So what's his sin?

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His sin is that he discriminated against someone who applied for a job there. Lucille Johnson, who's a very qualified worker, applied for a job there, and she was denied the job, and it was given to someone who was less qualified.

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But that's a curious business because people sometimes only work a couple of days, and just don't show up again.

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If there was such a great movement of employees in and out of there, why didn't there happen to be any black employees moved in and out of there during that time.

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But there were.

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We don't know that.

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What helped to make Lafferty's case against Mike Welbel was the EEOC's computer. It told the agency that based on 363 companies employing a hundred or more people, and located within a three mile radius of Daniel Lamp, Daniel Lamp should employ at any given moment exactly 8.45 blacks, which to Mike Welbel sounded like a quota. And the law says the EEOC can't set quotas.

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But if he has three black employees, and doesn't hire a fourth for whatever reason, and that fourth accuses him of discrimination, do you prosecute?

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Yes, we do. It's not that there's a magical number. Please believe me, we are not... we don't set magical numbers for people like Mr. Welbel to meet.

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That's what Mr. Lafferty says. But in a sense, it did set numbers by telling Mike that based on other larger companies personnel, Darrel Lamp should employ 8.45 blacks.

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Any way you slice the pie, it's a quota system.

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But if they said, look, Mike, you've got to have eight blacks working for you, could you live with that?

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Could I live with it? Yes. Is it more difficult than hiring by qualification, yes. 'Cause what the government's asking me to do is hire by color. They're saying, look, this black, this black individual may not... may not be as qualified, but that's who we want to see in your work place. What they have become is, they do the hiring, and I run the place under their direction. I no longer decide who's good and who's bad.

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That, in effect, has already happened. For beyond Lucille Johnson, the feds told Welbel there were seven other people he should have hired.

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And by no stretch of the imagination could these applicants qualify. Now, I shouldn't say all of them. And so maybe one or two people were as good as somebody else that was hired, three and four were not. They weren't even... not even close.

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As we've said, the EEOC demanded that Mike pay \$148,000 in back wages to blacks he didn't hire. They've since reduced that to \$124,000. But they want Mike to go even further.

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What the government wants us to do is they want us to come up with a fund of ten thousand dollars, and put an ad in publications in the area saying more or less, it says, if you... if you apply to the Daniel Lamp Company in 1980... 1988 to 1989, you may have been discriminated against. Please contact our office. Do you know what would happen out here? There'd be a mob scene. I would need... I would need 25 percent of Chicago Police Department to come and monitor the crowds. Really, what I have to do is pay people for work they haven't done. Frankly, that's absurd. It just doesn't make any sense.

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You also wanted to spend, I believe, ten thousand dollars to advertise for unknown blacks, ah, who he never hired, correct?

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Right. That's right.

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So he... there could be a thousand people trying out, right.

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There could be any number of people.

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Claiming that they had been discriminated against by the Daniel Lamp Company.

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He rounded that amount off to \$350, and sent it to Lucille Johnson for lost wages, and he also offered her a job. She refused the money, and never opened the letter with the job

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At that time, I said, you've just put me out of business. I'm no longer around. I'm not longer here. I'm out. That's what I told them. That there's not this kind of money here. We're dealing in a small business. It's a penny, nickel, dime business, and there's no way we can meet that. We would have to liquidate what we have. I may or may not have to sell the property itself too, but we would be out of business. As surely as I'm standing here, we'd be out of business.

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Well, my opinion is they... they probably didn't have anything else better to do. We're not AT&T, we're not IBM. We're a little dirty employee lamp shop on the west side of Chicago. Who are we bothering?

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The government's position is firm. All companies, regardless of size, must conform. Daniel Lamp says, it hires mainly Hispanics because it's on the Hispanic side of the tracks in this part of town in which ethnic demarcations

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MARY LOU GONZALES:

I live in that neighborhood. I know what goes on in that neighborhood. And I certainly know that if Daniel Lamp Company closes its doors, what we're gonna end up with is 26 people probably on public aid, probably on unemployment, and then going for food stamps. Government wants people to be substantially sustaining their own. And Daniel Lamp Company does not only have Hispanics. It has black employees who are also gonna end up in the same line. Now does that make sense? I don't think so.

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Welbel's main source of employees is the Spanish Job Coalition, a group that tries to find jobs for minorities, for blacks as well as Hispanics. Carlos Ponce, its director, says Mike Welbel does not discriminate.

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This is a mistake. I think too often we expect government and our elected officials never to make mistakes. What's wrong with just saying, this wasn't... this wasn't our best effort.

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Carlos Ponce feels the government should forget about small companies like Daniel Lamp in the inner city, and take a look at the suburbs.

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Where do they draw the line? These... these... these corporate sanctuaries in the suburbs, with their little lakes and ponds around them, and they moved out there, and blacks and Hispanics certainly can't buy into the housing market out there. So where's the equity there.

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Is there going to be a last minute reprieve for him where you can make some kind of deal and just let him be, and he'll hire his... the correct number of blacks, and you'll let him off the hook? Any chance of that?

MR. LAFFERTY:

There's no correct number. And we're not... we're not in the position of letting people off the hook.

MR. WELBEL:

It's very hard to work under these conditions, but I'm trying as best as I can to assure to people that everything will be all right. I really don't know that everything will be all right. But how could somebody work knowing that everyday he may be out of a job. So we take it day by day, and I said, don't worry, somehow it'll work out. I don't know that it will.

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Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01a. Memo	From C. Boyden Gray to POTUS Re Civil Rights - 60 Minutes Segment (1 pp.)	4/16/91	P5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff to the President, Office of the
Series: Sununu, John, Files
Subseries: White House Offices File
WHORM Cat.:
File Location: Counsel
 (Gray) (1991) [2]

Open on Expiration of PRA
 (Document Follows)
 By JP (NLGB) on 4/21/08

Date Closed:	12/21/2004	OA/ID Number:	29178-003
FOIA/SYS Case #:	1998-0004-F[2]	Appeal Case #:	
Re-review Case #:	2005-0426-S	Appeal Disposition:	
P-2/P-5 Review Case #:		Disposition Date:	
AR Case #:		MR Case #:	
AR Disposition:		MR Disposition:	
AR Disposition Date:		MR Disposition Date:	

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P-1 National Security Classified Information [(a)(1) of the PRA]
 P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

Freedom of Information Act - [5 U.S.C. 552(b)]

(b)(1) National security classified information [(b)(1) of the FOIA]
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 (b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
 (b)(9) Release would disclose geological or geophysical information

THE WHITE HOUSE

WASHINGTON

April 16, 1991

MEMORANDUM FOR THE PRESIDENT

FROM: C. BOYDEN GRAY

Original signed by CBG

SUBJECT: Civil Rights - 60 Minute Segment

As you asked, I have looked into the Daniel Lamp Company case that was featured on a 60 Minutes segment in late March (a copy of your note is attached). The case may be settled soon, and I do not believe we should do anything now.

The matter is being handled by the EEOC, whose Chairman, Evan Kemp, is strongly opposed to quotas (Art Fletcher and the Civil Rights Commission are not involved). And the case is not nearly so simple as it appeared in the 60 Minutes segment. EEOC does not claim that the company failed to meet a quota of 8.45 blacks. Rather, EEOC is charging that the company intentionally and systematically discriminated against blacks. EEOC does rely on one piece of evidence that has a quota flavor: the company often had no black employees, and only had 5 at the time of the suit, despite the fact that the available workforce was somewhere between 25% and 56% black. But there was other evidence: (1) the company rejected at least one qualified black applicant, lied about the reason, and hired a less qualified non-black applicant a few days later; (2) the owner illegally destroyed records of who applied for jobs even after being warned of the legal requirement; (3) the company recruited primarily from Hispanic organizations and took steps that discouraged walk-in applicants.

It is possible that EEOC is wrong about the owner's motivations and is pursuing him too aggressively. But it is also possible that the owner believed it was OK to discriminate against blacks if he hired other minorities instead; if so, he was breaking the law. The case is not clear-cut, and I think we should stick to our usual rule against intervening in enforcement actions. Nor should we comment publicly while the case is in litigation.

60 Minutes oversimplified the case, but it illustrated an important point. Although the greatest incentives for quotas arise from "disparate impact" cases (which are based solely on statistics without proof of intentional discrimination), statistics are also used as evidence to prove intentional discrimination cases. Thus, the "disparate impact" section in the Democrat bill (on which most of the discussion about quotas has focused) is not the only section that will foster quotas. Their bill also allows unlimited jury awards in intentional discrimination cases. Given the realities of economics and jury behavior, this will surely encourage increased misuse of statistics in these cases and create additional incentives for employers to use quotas to avoid the risk of catastrophic jury verdicts.

cc: Governor Sununu

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01b. Note	From POTUS to C. Boyden Gray Re 60 Minutes Segment (1 pp.)	3/30/91	P-5	

Collection:

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**THE WHITE HOUSE
WASHINGTON**

DATE: 3-30-91

FROM THE PRESIDENT

TO: Boyden cc John Sununu

This 60 Minutes Transcript relates a terrible tale of government harrassment against an employer who doesn't meet his QUOTAS.

Is tyhere naythign we can do. Is there an inspector General whom we can ask to review this case.

Can you call this to Fletcher's attention and ask for an explanation?

Has this been shown to Members of Congress who could help bring equity to this situation.

Car

THE WHITE HOUSE

WASHINGTON

April 10, 1991

MEMORANDUM FOR GOVERNOR JOHN H. SUNUNU
CHIEF OF STAFF TO THE PRESIDENT

FROM:  GREGORY S. WALDEN
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: EMPLOYMENT OF WILLIAM LYTTON

I have reviewed the retention by the White House of Mr. William Lytton, to serve as part of the White House Counsel's Office team, without compensation, in order to provide continuing support and advice in connection with certain ongoing Iran-Contra matters. Mr. Lytton's status is that of a "special Government employee," as that term is defined in 18 U.S.C. 202(a). A special Government employee includes any Executive Branch employee "retained, designated, appointed or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis." I understand that Mr. Lytton is not expected to serve beyond one hundred and thirty days.

The appointment of Mr. Lytton without compensation does not contravene the general prohibition on acceptance by the United States of voluntary services, so long as Mr. Lytton recognizes that he is not to be compensated. The employment memoranda and proposed letter to Mr. Lytton satisfy that condition.

As a special Government employee, Mr. Lytton is subject to certain standards of conduct, although he will not need to alter his employment with General Electric (or, in all likelihood, any other affiliation). I have previously discussed these restrictions with Mr. Lytton, and sent him a guidance memorandum that explains the various standards and restrictions to which he is subject by virtue of his Federal appointment. It is my firm conclusion, based on my understanding of Mr. Lytton's Federal responsibilities and my knowledge of Mr. Lytton's various interests, that his employment does not create any conflict of interest or appearance of conflict of interest.

THE WHITE HOUSE

WASHINGTON

April 10, 1991

MEMORANDUM FOR GOVERNOR JOHN H. SUNUNU
CHIEF OF STAFF TO THE PRESIDENT

FROM: C. BOYDEN GRAY 
COUNSEL TO THE PRESIDENT

SUBJECT: William Lytton

As we discussed yesterday, I am forwarding draft talking points regarding the hiring of William Lytton as a non-paid special Government employee in the Office of the White House Counsel (See Tab A). I am also attaching a letter for your review and signature formalizing the hiring of Mr. Lytton, (Tab B), and a memorandum from Greg Walden of my office opining that there is no legal or ethical obstacle to this arrangement (Tab C). With your approval, I would like to make this action effective today.

While assigned to the Counsel's Office, Mr. Lytton will perform duties of a sensitive and confidential nature. In order for him to perform these duties, I am requesting that he be placed on the White House Access List effective 4/10/91 for a period of six months, to be renewed on an as needed basis.

Thank you for your consideration of this matter.



APPROVE

DISAPPROVE

Attachments

THE WHITE HOUSE

WASHINGTON

April 10, 1991

Dear Mr. Lytton:

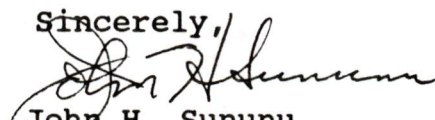
This letter confirms the arrangement between you and the White House Office with respect to your providing services to the White House. It is understood that you will be serving as a special Government employee and will not be compensated for services performed.

The services you will be performing will be to provide continuing legal support and advice as part of the White House Counsel's Office team regarding the investigation of the Iran Contra affair by the Office of Independent Counsel Lawrence E. Walsh.

If the foregoing is acceptable, please sign the original of this letter in the space indicated below and return it to:

Paul W. Bateman
Deputy Assistant to the President for Management
and Director, Office of Administration
The White House
Washington, D.C. 20500

Sincerely,



John H. Sununu
Chief of Staff

Mr. William Lytton
129 Ladderback Lane
Devon, PA 19333

I hereby agree to the foregoing terms of this agreement.

William Lytton

Date

Draft Talking Points for Marlin Fitzwater

William Lytton has been retained as a consultant by the White House Counsel's office to provide continuing legal support and advice regarding the investigation of the Iran Contra affair by the office of Independent Counsel Lawrence E. Walsh. Mr. Lytton supervised White House cooperation with the IC's investigation on a full time basis during 1987, and served as a legal consultant on an intermittent basis thereafter. His continuous service to the Office of the President has been a part of the White House's carrying out of its pledge of cooperation with the investigators. It will assist in ensuring proper consideration of technically complicated and precedentially significant legal issues that are unique to the Presidency and arise from time to time.

He will serve as a Special Government Employee providing advice on an as needed basis and will receive no compensation. He is Vice President and General Counsel of General Electric Aerospace.

EEOC Story

60 MINUTES
Vol. XXIII, No. 27
FINAL--3/24/91

"THE NUMBERS GAME"

OPEN

SAFER

Mike Welbel of Chicago is guilty of NOT playing the numbers game... We'll explain in a moment.

Mike's been a traveling salesman pitching everything from shoes to furniture.

Nine years ago, he decided to start his own business.

He borrowed \$3,000 on his Chevy Station Wagon and started the Daniel Lamp Company... named after his son.

The business did not exactly prosper, but Mike Welbel was doing okay -- until last July when the Federal Government told Mike; \$148,000 please and we want it now.

"THE NUMBERS GAME"

Vol. XXIII, No. 27

FINAL -- 3/24/91

MR. WELBEL:

I froze... I froze in my chair. I, I, I was... I was... I got... I started feeling my chest bouncing around. I don't... I don't think it was a heart attack, but I'll tell you something, it was the next thing to it. I just was frozen with shock.

SAFER:

What caused that shock was the EEOC -- the Equal Employment Opportunity Commission. It found Mike guilty of racial discrimination. It just didn't make sense. The only two employees who are not Hispanic or black are Mike and his father Leon -- a survivor of Auschwitz. As for the rest of the company, Welbel hires only minorities, 18 Hispanics and 8 blacks now work there.

MR. WELBEL:

Our track record with minority hiring, I would challenge three M, Pillsbury. Nobody has the profile of hiring minorities as Daniel Lamp Company.

-2-

SAFER:

Mike's troubles began in February, 1989, when a black woman named Lucille Johnson who had applied for a job was not hired. She filed a complaint with the Chicago office of the EEOC. She claimed she didn't get the job because she was black.

SAFER:

Do you remember her?

MR. WELBEL:

No, no. As a matter of fact, I've never met her, nor do I know who she is. I know her only from the paperwork that's involved.

SAFER:

So she filled out an application.

MR. WELBEL:

Yes, she filled out an application, and she sought employment. And, ah, for one reason or another, she wasn't... she wasn't... she wasn't hired. Certainly not because she's black.

SAFER:

You say for one reason or another. That sounds ominous when somebody says for one reason or another...

MR. WELBEL:

Okay.

SAFER:

Why wasn't she hired?

-3-

MR. WELBEL:

Well, we don't know on that particular day why she wasn't hired. When one is not hired is because they don't qualify for their job, or we don't have an opening, or somebody else was better qualified for the job. So one of the... one of those reasons, that's the reason she didn't get hired.

SAFER:

It wasn't long before two investigators from the EEOC showed up at the door of the Daniel Lamp Company to check out Lucille Johnson's complaint. They wanted to go through Welbel's records. He said, "Help yourself."

MR. WELBEL:

And to be perfectly frank, it was a very cordial relationship while they were investigating us. I... I certainly felt I had nothing to hide. You know, we've got... we've got all minority, a combination of black and Hispanic. Frankly, I took the matter very lightly.

SAFER:

Daniel Lamp Company is not exactly IBM in its record keeping, its personnel department, or for that matter, in its benefits. It's about as small a manufacturing company as you'll find in Chicago. It's in an old building of the southwest side, broken into so many times that Mike has had to bar every window in the place. He employs 26 people, starting salary, \$4.00 an hour. They assemble cheap to medium priced lamps. There are a few people who've been with Mike for years, but mainly people come and go. In

-4-

SAFER: (continued)

good times, Mike will have as many as 30 people working, in bad times, as few as 12. It seems a happy enough shop, if a bit noisy with everyone's radio tuned to a different station.

Jonathan Poe is a packer in the shipping department. Christine Castillo is the floor manager of the assembly line where she deals with everything from production output to color coordination.

MAN:

This mauve may clash with that cranberry.

SAFER:

Lou Perales is the general manager. Zena drives the delivery truck, and also assembles lamps.

SAFER:

What happened when you applied for a job here?

ZENA:

I got the job right off, you know, right off the top.

SAFER:

So what's... You think the government's just crazy or what?

WOMAN:

Yeah.

SAFER:

Zena?

ZENA:

I know discrimination when I see it, and I would tell 'em, believe me.

-5-

SAFER:

Jonathan, any problems?

JONATHAN:

As long as I've been here, you know, it's like everybody's one... one happy family.

CHRISTINE:

I've been with the company eight years, and I never seen Mike being discriminated against anybody. And since... all that time I've been seeing Hispanic and black people working here.

SAFER:

But that's not what the EEOC says it saw during three inspections in 1989 and 1990. It says it found no blacks working there. Mike says, that may be true from time to time because of his transient work force.

Jim Lafferty, Director of Legislative Affairs for the EEOC, says he is not impressed by that argument.

SAFER:

So what's his sin?

MR. LAFFERTY:

His sin is that he discriminated against someone who applied for a job there. Luckille Johnson, who's a very qualified worker, applied for a job there, and she was denied the job, and it was given to someone who was less qualified.

SAFER:

But that's a curious business because people sometimes only work a couple of days, and just don't show up again.

-6-

MR. LAFFERTY:

If there was such a great movement of employees in and out of there, why didn't there happen to be any black employees moved in and out of there during that time.

SAFER:

But there were.

MR. LAFFERTY:

We don't know that.

SAFER:

Some stayed there two days and some stayed longer.

MR. LAFFERTY:

We really don't know that. And unfortunately, there are no records that'll indicate that to us.

SAFER:

But Mike's records show, and we were able to independently confirm, that eleven blacks worked at Daniel Lamp during the period of the EEOC investigation.

SAFER:

But quite apart from records, doesn't your nose tell you that this really isn't much of a case, and that Mike Welbel is probably not a racist, he's a little guy trying to... trying to make a living, and he loses, he hires people some weeks, he lets people off the next week, people leave of their own accord. Don't you take the human factor into account, not just these cold statistics?

MR. LAFFERTY:

Well, unfortunately, we have to rely on not only the

-7-

MR. LAFFERTY: (continued)

statistics, but on the word of Lucille Johnson and seven other people who've come forward since then telling us that they had also experienced discrimination during that period at Daniel Lamp.

SAFER:

What helped to make Lafferty's case against Mike Welbel was the EEOC's computer. It told the agency that based on 363 companies employing a hundred or more people, and located within a three mile radius of Daniel Lamp, Daniel Lamp should employ at any given moment exactly 8.45 blacks, which to Mike Welbel sounded like a quota. And the law says the EEOC can't set quotas.

MR. LAFFERTY:

We really haven't said that. What we said is, these are what the companies around you are doing. You've discriminated against this woman...

SAFER:

Stop being a Federal bureaucrat for a minute, and tell me what you're really telling him. What are you really telling him?

MR. LAFFERTY:

Don't discriminate. Obey the law.

SAFER:

But if he has three black employees, and doesn't hire a fourth for whatever reason, and that fourth accuses him of discrimination, do you prosecute?

-8-

MR. LAFFERTY:

Yes, we do. It's not that there's a magical number. Please believe me, we are not... we don't set magical numbers for people like Mr. Welbel to meet.

SAFER:

That's what Mr. Lafferty says. But in a sense, it did set numbers by telling Mike that based on other larger companies personnel, Darrel Lamp should employ 8.45 blacks.

MR. WELBEL:

Any way you slice the pie, it's a quota system.

SAFER:

But if they said, look, Mike, you've got to have eight blacks working for you, could you live with that?

MR. WELBEL:

Could I live with it? Yes. Is it more difficult than hiring by qualification, yes. 'Cause what the government's asking me to do is hire by color. They're saying, look, this black, this black individual may not... may not be as qualified, but that's who we want to see in your work place. What they have become is, they do the hiring, and I run the place under their direction. I no longer decide who's good and who's bad.

SAFER:

That, in effect, has already happened. For beyond Lucille Johnson, the feds told Welbel there were seven other people he should have hired.

-9-

MR. WELBEL:

And by no stretch of the imagination could these applicants qualify. Now, I shouldn't say all of them. And so maybe one or two people were as good as somebody else that was hired, three and four were not. They weren't even... not even close.

SAFER:

As we've said, the EEOC demanded that Mike pay \$148,000 in back wages to blacks he didn't hire. They've since reduced that to \$124,000. But they want Mike to go even further.

MR. WELBEL:

What the government wants us to do is they want us to come up with a fund of ten thousand dollars, and put an ad in publications in the area saying more or less, it says, if you... if you apply to the Daniel Lamp Company in 1980... 1988 to 1989, you may have been discriminated against. Please contact our office. Do you know what would happen out here? There'd be a mob scene. I would need... I would need 25 percent of Chicago Police Department to come and monitor the crowds. Really, what I have to do is pay people for work they haven't done. Frankly, that's absurd. It just doesn't make any sense.

SAFER:

You also wanted to spend, I believe, ten thousand dollars to advertise for unknown blacks, ah, who he never hired, correct?

-10-

MR. LAFFERTY:

Right. That's right.

SAFER:

Explain the logic of that.

MR. LAFFERTY:

Well, to find if there were other applicants who had been denied jobs on the basis of their race.

SAFER:

So he... there could be a thousand people trying out, right.

MR. LAFFERTY:

There could be any number of people.

SAFER:

Claiming that they had been discriminated against by the Daniel Lamp Company.

MR. LAFFERTY:

That's right.

SAFER:

So far, the only person to be offered money at all was the person who filed the original complaint: Lucille Johnson.

MR. WELBEL:

Their determination, by EEOC standards, she was to get \$340.01. In my own mind, I said, it's not fair, but Mike, you can live with it. It's not so... not so terrible.

SAFER:

He rounded that amount off to \$350, and sent it to Lucille Johnson for lost wages, and he also offered her a job. She refused the money, and never opened the letter with the job

-11-

SAFER: (continued)

offer. She also didn't want to talk to us. Welbel told the EEOC he could live with all of its demands, except for that big one, the \$124,000 one.

MR. WELBEL:

At that time, I said, you've just put me out of business. I'm no longer around. I'm not longer here. I'm out. That's what I told them. That there's not this kind of money here. We're dealing in a small business. It's a penny, nickel, dime business, and there's no way we can meet that. We would have to liquidate what we have. I may or may not have to sell the property itself too, but we would be out of business. As surely as I'm standing here, we'd be out of business.

SAFER:

Why do you think the government went after this company? After all, there's 26 people working here.

MAN:

Well, my opinion is they... they probably didn't have anything else better to do. We're not AT&T, we're not IBM. We're a little dirty employee lamp shop on the west side of Chicago. Who are we bothering?

SAFER:

The government's position is firm. All companies, regardless of size, must conform. Daniel Lamp says, it hires mainly Hispanics because it's on the Hispanic side of the tracks in this part of town in which ethnic demarcations

-12-

SAFER: (continued)

are clearly defined.

Mary Lou Gonzales runs a social service group in the community. She says the whole fuss is good intentions gone haywire.

MARY LOU GONZALES:

I live in that neighborhood. I know what goes on in that neighborhood. And I certainly know that if Daniel Lamp Company closes its doors, what we're gonna end up with is 28 people probably on public aid, probably on unemployment, and then going for food stamps. Government wants people to be substantially sustaining their own. And Daniel Lamp Company does not only have Hispanics. It has black employees who are also gonna end up in the same line. Now does that make sense? I don't think so.

SAFER:

Welbel's main source of employees is the Spanish Job Coalition, a group that tries to find jobs for minorities, for blacks as well as Hispanics. Carlos Ponce, its director, says Mike Welbel does not discriminate.

MR. PONCE:

This is a mistake. I think too often we expect government and our elected officials never to make mistakes. What's wrong with just saying, this wasn't... this wasn't our best effort.

-13-

SAFER:

Carlos Ponce feels the government should forget about small companies like Daniel Lamp in the inner city, and take a look at the suburbs.

MR. PONCE:

Where do they draw the line? These... these... these corporate sanctuaries in the suburbs, with their little lakes and ponds around them, and they moved out there, and blacks and Hispanics certainly can't buy into the housing market out there. So where's the equity there.

SAFER:

Is there going to be a last minute reprieve for him where you can make some kind of deal and just let him be, and he'll hire his... the correct number of blacks, and you'll let him off the hook? Any chance of that?

MR. LAFFERTY:

There's no correct number. And we're not... we're not in the position of letting people off the hook.

MR. WELBEL:

It's very hard to work under these conditions, but I'm trying as best as I can to assure to people that everything will be all right. I really don't know that everything will be all right. But how could somebody work knowing that everyday he may be out of a job. So we take it day by day, and I said, don't worry, somehow it'll work out. I don't know that it will.

60 MINUTES
Vol. XXIII, No. 27
FINAL--3/24/91

"THE NUMBERS GAME"

CLOSE

SAFER

Everyday Mike Welbel delays
paying the penalty, the amount he
owes the Government goes up a
couple of hundred dollars.

Meantime, the Government has filed
a lawsuit to collect.

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
02a. Memo	From C. Boyden Gray to John Sununu Re Line Item Veto (1 pp.)	7/3/91	P-5	

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By JP (NLGB) on 10/28/05

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THE WHITE HOUSE

WASHINGTON

July 3, 1991

THE CHIEF of STAFF
has seen

MEMORANDUM FOR GOVERNOR SUNUNU

FROM: C. BOYDEN GRAY *mg*

SUBJECT: Line Item Veto

Attached is a memo summarizing recent work on the line-item veto. Everything we've learned so far indicates that we do not have an adequate basis for testing the theory at this time. We will, however, continue working on it.

Attachment

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
02b. Memo	From Nelson Lund to C. Boyden Gray Re Line Item Veto (2 pp.)	7/3/91	P-5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff to the President, Office of the
Series: Sununu, John, Files
Subseries: White House Offices File
WHORM Cat.:
File Location: Counsel
 (Gray) (1991) [2]

Open on Expiration of PRA
 (Document Follows)
 By JP (NLGB) on 10/28/05

Date Closed:	12/21/2004	OA/ID Number:	29178-003
FOIA/SYS Case #:	1998-0004-F[2]	Appeal Case #:	
Re-review Case #:	2005-0426-S	Appeal Disposition:	
P-2/P-5 Review Case #:		Disposition Date:	
AR Case #:		MR Case #:	
AR Disposition:		MR Disposition:	
AR Disposition Date:		MR Disposition Date:	

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P-1 National Security Classified Information [(a)(1) of the PRA]
 P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

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THE WHITE HOUSE

WASHINGTON

July 3, 1991

MEMORANDUM FOR C. BOYDEN GRAY

FROM:

NELSON LUND 

SUBJECT:

Line-Item Veto

As you know, the "inherent line-item veto" theory originated in a newspaper op-ed by Stephen Glazier in 1987. The Department of Justice subsequently concluded, in a detailed and tightly reasoned legal opinion, that this theory is without merit. Consistent with your instructions, the Department of Justice and I have been studying this matter with an eye to determining whether the DOJ opinion should be reconsidered.

Recent developments include the publication of three law review articles on the subject. The most substantial of the three, written by Washington lawyers Greg Sidak and Tom Smith, argues that the President's "veto power" should be understood to include decisions by the President to treat unconstitutional statutory provisions as nullities. This approach, which I suggested to Sidak after reviewing a preliminary draft of the article, is useful to the Administration because (1) it provides a theory under which the President is already testing a kind of "inherent line-item veto"; and (2) it suggests the framework for a sensibly graduated litigation strategy.

With respect to the Glazier theory, Sidak and Smith argue that it should be carefully considered, but they are also careful not to endorse it. The other two articles, both written by law students, are not so cautious. Both articles essentially conclude that Glazier's theory is valid.

Unfortunately, these articles are little more than rehashes of arguments that were refuted with devastating force in the DOJ legal opinion. Each of these student authors spills a lot of ink reviewing the historical record prior to the adoption of the Constitution, but neither is able to develop a logically defensible argument for finding a line-item veto inherent in the Constitution as adopted. Both authors founder on a simple fact: the Founders were aware of the problems that would be addressed by a line-item veto, and yet they gave no indication, either in the language of the Constitution or in their discussions about that language, that they meant to create such a device.

A great deal of study has now been devoted to the theory of the inherent line item veto. The more one learns about this subject,

the more clear it becomes that any attempt to test the theory in court will create a fruitless distraction from realistic efforts to preserve Presidential authority. And such a test case could also become a major embarrassment for the President.

It is of course possible that further study will uncover some reason to justify a reconsideration of the DOJ opinion. We will keep looking.

Withdrawal/Redaction Sheet

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Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
03. Memo	From C. Boyden Gray to POTUS Re WH Control Over Independent Agencies (2 pp.)	5/17/91	P-5	

Collection:

Record Group: Bush Presidential Records
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THE WHITE HOUSE

WASHINGTON

May 17, 1991

91 MAY 17 PM 4:06

MEMORANDUM FOR THE PRESIDENT

FROM:

C. BOYDEN GRAY *cmh*

SUBJECT:

White House Control Over Independent Agencies

You have asked me to recount why we, and the Reagan Administration generally, decided in 1981 not to be more aggressive in bringing the so-called "independent" agencies under greater Presidential control.

This was a political decision, not a legal one. To be sure, most lawyers (including the Justice Department's Office of Legal Counsel) believed at the time that the status of the President's constitutional authority over independent agencies was more uncertain than his authority over non-independent agencies. However, the driving force behind the decision was a belief that it would require a great deal of work simply to bring the executive agencies under effective Presidential control, and that an attempt to do the same for "independent" agencies was not worth the political cost. Remember that, in 1981, we had not yet firmly established Presidential control over rulemaking by executive agencies. We therefore focused our energies where the benefit was greatest -- i.e., EPA, Agriculture, Labor and other executive departments and agencies with large regulatory dockets.

Today, the situation is different in four respects. First, we have firmly established the principle of White House review of regulatory decisionmaking by executive departments and agencies. Much work remains, to be sure. For example, the absence of a political head of OIRA has made effective review more difficult. But the basic principle has been established within the Executive Branch.

Second, exerting greater control over independent agencies has become more important in at least four important areas: energy, banking, transportation, and telecommunications. It is now obvious that the independent agencies have a tremendous impact on these sectors of the economy, and can no longer be ignored by any Administration wishing to pursue rational and effective regulatory policies. For example, the policies of the Federal Energy Regulatory Commission have an enormous effect on the price of natural gas and (to a lesser extent) electricity as compared with oil. Those policies therefore exert a powerful influence on petroleum usage and imports. Similarly, through their influence over financial instruments, financial markets and regulatory standards, the SEC and the FDIC have a pervasive impact on Administration efforts to ensure the safety and soundness of

banks and thrifts. The Interstate Commerce Commission has a tremendous impact on the transportation sector of the economy, from rail transportation to trucking to barge and bus service. And the Federal Communications Commission exerts an equally if not more powerful influence over the development of the communications sector of the economy, as well as the costs of services provided by that sector.¹

In short, it is now clear that many independent agencies control important pieces of the overall economic and regulatory puzzle. The absence of effective White House review therefore means that our attempts to create and implement national policy have major gaps, ranging from merely bothersome to debilitating.

Third, there now appears to be greater political support for increased Administration control over independent regulatory agencies. For example, the American Bar Association has urged that one of the principal reforms put in place at the recommendation of your Regulatory Relief Task Force -- the OMB review process for regulations proposed by Executive agencies -- be extended to independent agencies as well. Similarly, our own banking regulators, echoing the views of many within the financial institutions industry, have urged that all regulation of federally insured financial institutions be brought firmly within the control of the Administration. Congress, moreover, seems less inclined to give independent agencies jurisdiction over important economic issues than it once was.

Fourth, intervening judicial decisions appear to open the way for greater Presidential control over independent agencies. In particular, the Supreme Court's decision in the so-called "independent counsel" case (Morrison v. Olsen) is interpreted by many lawyers as having rejected the notion that there is any constitutionally significant difference between "independent" and "executive" agencies.

I therefore believe the time is right for a major Administration effort to eliminate the gaps in our energy, banking, transportation, and telecommunications policies by bringing the relevant independent agencies more firmly under the President's control. The arguments against doing so in 1981 no longer apply.

¹ As you are aware, I have disqualified myself from matters involving the FCC. I will therefore not participate in the formulation of specific Administration proposals for regulatory reform in the telecommunications sector.

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04. Paper	Re Independent Agencies (11 pp.)	n.d.	P5	

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I. Background

A. What is an "independent agency"? (insulation from POTUS control/removal limitations)

B. Why are there "independent agencies"? (progression from Myers to Humphrey's Executor)

C. The current status of independent agencies (Morrison's treatment of control and removal issues)

II. Options

--Application of E.O. 12291's procedural requirements to the independent agencies;

--Application of E.O. 12291's substantive requirements to the independent agencies;

--Compliance with OMB Circulars A-11 and A-19 (budget, legislation, bill comments, testimony);

--Presidential directive not to take a particular course;

--Presidential directive to take a particular course;

--Removal (greatest litigation risk)

III. Litigation

--Litigation will inevitably result from selection of any option; its outcome will be important to the Presidency.

--In addition to a thorough political risk analysis, our strategy must reflect litigation considerations.

--Possible types of litigation: by private party if agency head complies, by private party if agency head does not comply, over removal.

IV. Economic Policy/Deregulation/Domestic Policy Support

--Implementation of options should reflect overall policy objectives: deregulation, all the more indispensable given economic difficulties, and support for the President's economic and domestic initiatives (FERC being directed to take action to implement the energy strategy, or Breeden to drop banking regulation to conform with coordinated banking reform).

--Should be somewhat across the board (include at least 3/4 agencies) to avoid the suggestion of singling anyone out.

V. Caveats

There are other legal and prudential limitations on Presidential control not related to the "independence" of the agency (statutory limits on discretion, APA, due process, tradition of non-intervention in enforcement, adjudications, contracts, grants).

The Federal Reserve is assumed to be a special case, to which the options discussed here are inapplicable.

The National Labor Relations Board

It's been nearly three years since the Supreme Court ruled in Communications Workers v. Beck that a union may exact from an employee who must join the union as a condition of employment only fees or dues necessary to "perform[] the duties of exclusive representative of the employees in dealing with the employer on labor-management issues[,]" i.e., collective bargaining, contract administration and grievance adjustment. In particular, a union may not spend an employee's fees or dues for political or other purposes, over the objection of the employee. But because no law requires a union to notify its employees of these protections, many employees do not know of their rights.

The basic principles of this ruling were included in the Administration's campaign finance reform bill introduced in the last Congress, and are included in the Senate Republican bills in this Congress. Despite support for this reform from across the political spectrum (i.e., Common Cause), Democrats are not likely to embrace this provision under any circumstance, because of their dependence on labor union support.

The Beck reforms can also be implemented by the National Labor Relations Board without legislation. This could be done either by a rulemaking (the NLRB has rulemaking authority but has only rarely used it) or by a series of adjudications in individual cases brought by the General Counsel, the NLRB's usual method of making policy. The President could either direct the NLRB to consider whether to promulgate a rule requiring conspicuous and regular notice to employees of their rights,¹ or direct the General Counsel to pursue a more aggressive enforcement strategy on this issue. A Presidential directive to the NLRB to enforce the employee protections recognized in Beck would both accomplish our substantive objective and would obviate our campaign finance provision, which is not likely to pass, in any event.

The NLRB is comprised of five members serving five-year terms. Board members are appointed by the President, with the advice and consent of the Senate, and are removable by the President, "upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause." The General Counsel, who has "final

¹Over two years ago, the National Right to Work Legal Defense Foundation petitioned the Department of Labor to issue a rule requiring the posting of workplace notices advising employees of the Beck protections. The Labor Department initially told the Foundation that it lacked authority to require such a notice. Although the request apparently is still under advisement, there is no indication that the Department is inclined to act.

authority, on behalf of the Board" with respect to investigating charges of unfair labor practices and issuing complaints in court, is also a Presidential appointee subject to Senate confirmation, who serves a four-year term. But no statute restricts the President's authority to remove the General Counsel.

The Beck issue has great potential for mobilizing the support of the 15 million or so American workers who are unionized, and will enlist the support of most public interest groups on the right and left. Union dues or fees average \$330 per employee per year; only 10-25% of this amount has historically gone for union activities related to bargaining. Any action to implement Beck is certain to antagonize organized labor.

FEDERAL ENERGY REGULATORY COMMISSION
Electricity Transmission Access Policy

For some years the FERC has pursued the desirable goal (endorsed in the NES) of increasing the extent to which utilities make their transmission lines available to other participants in wholesale power markets. (These include other utilities and non-utility generators.) FERC lacks authority to order utilities to provide transmission access, however, and it has not developed general policies regarding the terms and conditions under which such access should best be provided. It has instead adopted a case-by-case quid pro quo approach that has become quite controversial.

This approach has been most evident in merger cases. The FERC uses methods that are inconsistent with modern antitrust analysis to find that (apparently) any firm that owns a transmission line has significant market power. It then agrees to approve a proposed merger if (possibly among other things) the merged firm agrees to provide transmission access to all comers, under conditions that vary from case to case and typically at prices to be determined later by the FERC.

This approach will at best lead to the adoption of a patchwork of access policies, depending on which firms come before the FERC with a request and on what conditions the FERC staff decides to set. Some of these policies may turn out on close examination not be desirable. Because the FERC has not clearly defined either the obligation to provide access to other parties or the methods to be applied in regulating rates, utilities feel their profits are at risk and complain about conflicts between FERC decisions and their obligations under State law and regulation. State commissions feel their constituents' retail rates may be increased to subsidize transmission services provided to out-of-state firms. Utilities are increasingly reluctant to take any requests to the FERC, particularly requests to approve efficiency-enhancing mergers. Because the FERC's approach to the analysis of market power is so at odds with antitrust doctrine, there is some risk that this whole line of decisions may be rejected by an appellate court.

Options include: 1) Do nothing; or 2) The President could issue a formal directive to FERC to initiate a rulemaking proceeding to adopt a rule which would establish antitrust standards for merger cases.

FEDERAL COMMUNICATIONS COMMISSION
Spectrum Allocation Issues

Spectrum use and management will be one of the most critical, if not the most critical, telecommunications issue in the coming years. Pursuant to the Communications Act of 1934, the FCC is charged with the responsibilities of allocating and assigning frequencies for all radio stations in the United States, except those controlled and used by the United States government (those frequencies are allocated by the Department of Commerce's National Telecommunications and Information Agency (NTIA)).

The FCC has traditionally allocated uses and users of spectrum on a very specific basis. Within allocations, there are even suballocations. This process has resulted in the inefficient use of the spectrum, entrenchment of existing technologies, and, most importantly, the stifling of spectrum-based technological innovation.

A new approach incorporating market forces must be implemented to increase the efficient use of the spectrum. NTIA has recently issued a report that advocates reducing the number of these suballocations and relying instead solely on broader "macro" allocations. This will allow for several possible uses within a broad allocation. In fact, NTIA recommends that the FCC conduct general rulemaking proceedings to decrease the number of suballocations based on the type of user and to allow more sharing among the mobile radio services.

Spectrum management affects every telecommunications issue and moving toward a more market-driven spectrum management policy will increase American competitiveness in this area. For instance, there has been much criticism that there is not enough spectrum allocated for mobile radio services (with too much being allocated to broadcasting). Additionally, even for that spectrum allocated to mobile radio, there are very specific uses and users mandated. If more spectrum was able to be allocated to mobile radio services and could be used for many purposes, cellular telephone may prove to be a real threat to local telephone exchanges' market power.

In addition to NTIA's recommendation that the FCC begin rulemaking proceedings, this issue is also timely because there is legislation on the Hill to free up a substantial chunk of the spectrum from government control and allocate it for commercial purposes. If this reallocation occurs, the FCC will have the responsibility for allocating and assigning these frequencies. This round of allocations may be an important first step toward moving toward a more flexible, market-driven allocation scheme.

The President could issue a directive to the FCC to promulgate rules for allocating spectrum that are consistent with the NTIA proposals.

SECURITIES AND EXCHANGE COMMISSION
Mark to Market Accounting

The SEC, led by Chairman Richard Breeden, has been urging the implementation of mark-to-market accounting by deposit institutions. The commission has urged the American Institute of Certified Public Accountants (AICPA) and the Financial Accounting Standards Board (FASB) to require banks and other financial institutions to carry their investment portfolios and certain residential mortgage loans at market value. Under generally accepted accounting principles, financial institutions may use a historical cost framework, or book value.

The SEC contends that market value accounting would provide better information to investors, regulators, and financial statement users. This proposal, however, has drawn criticism from both Fed Chairman Greenspan and Comptroller of the Currency Clarke. Greenspan, in a letter to Breeden, warned that a move to mark-to-market accounting could be overly costly and burdensome for financial institutions and may not serve its intended purpose. He also noted that mark-to-market accounting may be inappropriate for a large portion of a typical institution's assets.

Similarly, Clarke argued that such a move would represent a major change in banking policy and could substantially affect bank earnings, liquidity, asset quality, banks' appetite for holding U.S. government securities, and that such rules may force banks to make investment decisions that they would normally not make.

The battle over this issue may be fought in Congress, where there is a growing movement to mandate some changes in accounting practices used by deposit institutions. Assuming the Administration decides that the Comptroller of the Currency's concerns are well-founded, options would include: 1) taking no action; 2) directing the SEC to cease promoting this idea; 3) directing the SEC to take actions consistent with the Administration's view before the Congress and directing it to submit any recommendations or testimony for OMB clearance. There is a statutory prohibition against this last option which would have to be addressed.

COMMODITY FUTURES TRADING COMMISSION
Dual Trading Rulemaking

The CFTC has issued a notice of proposed rulemaking which would greatly restrict dual trading by commodity brokers. Dual trading commonly is understood to refer to the practice of trading by a floor member in two capacities - that of a "trader" (or a principal) and that of a "floor broker" (or an agent) - within a specified time period. A dual-trading broker is one who trades for his own account as a principal and for the account of a customer as an agent.

Because of concerns that dual trading has facilitated abusive trading practices, the CFTC has proposed a rule that would ban dual trading, except in certain limited circumstances. The Department of Justice Antitrust division filed comments which were critical of the CFTC's analysis. The Justice Department took no position on the proposed rule but noted that the CFTC had not conducted a proper cost-benefit analysis and therefore may have overestimated the benefits attributable to the proposed rule. In particular, the Department concluded that the CFTC had not fully considered the benefits that may result from dual trading. The Department also suggested that the CFTC should consider whether enhanced enforcement would produce a superior cost-benefit result to that achievable by restricting dual trading.

The CFTC may decide on its own not to go forward with this rule. The President could, however, direct that result.

INTERNAL REVENUE SERVICE
Consolidated Tax Adjustment Rule

The IRS has proposed a rule which applies when a regulated utility has one or more separate unregulated subsidiaries. If a subsidiary has a net operating loss, filing a consolidated return generally lowers the firm's total tax bill. Should the customers of the regulated firm share that benefit of consolidation? The IRS rule says "yes" while common sense and sound economic policy say "no."

The IRS rule would allow state commissions to lower the rate base of the regulated firm by the amount of the tax benefit. The proposed rule is formally analogous to the current treatment of accelerated depreciation under regulation.

This rule could have dramatic effects on certain actors in the marketplace. For instance, consider the task of rebuilding the telephone system in Kuwait (although the rule would apply to electric, gas and other utilities as well). Both IBM and Bell Atlantic might be interested in this project, and both would likely anticipate tax losses in its first year. All else equal, Bell Atlantic would be disadvantaged relative to IBM because regulators would cut its domestic telephone earnings as a consequence of those tax losses. Thus this rule raises the cost to regulated firms of investing in unregulated activities. This result runs counter to the thrust of the Administration's MFJ position and to the Cabinet-level requests that U.S. telephone companies become active in Kuwait and Eastern Europe. It also offends common sense -- why should phone rates in the District depend on Bell Atlantic's activity in Kuwait? It also violates the general policy principles (stated in the Economic Report of the President and elsewhere) that ratepayers should be insulated from the consequences (good or bad) of unregulated activities; cross-subsidy should be avoided.

FEDERAL COMMUNICATIONS COMMISSION
Financial Interest and Syndication Rule

The fin-syn rule adopted by the FCC in 1970 limits the broadcast networks' financial interest in television programming. The FCC promulgated the fin-syn rule in 1970 to lessen the alleged bargaining power of the networks in relation to the Hollywood studios. Specifically, the rule prohibits the networks from 1) obtaining any financial interest in American-made programming not produced by the network (which is most); 2) syndicating any programs domestically; and 3) syndicating programs in foreign countries (except for the few programs actually produced by the networks). The principal beneficiary of this rule are the major Hollywood studios, which are increasingly foreign-owned.

According to the Justice Department's Antitrust Division, the rule has reduced efficiency and competition in the program supply market. Moreover, many commentators have argued that the rule disadvantages American companies from competing against foreign companies here in the United States.

The FCC issued a notice for proposed rulemaking in January, 1990 to consider modifying the rule. The Department of Justice and the Federal Trade Commission staff filed comments urging total repeal of the rule. The Department of Commerce advocated modifying the rule rather than complete repeal. Unfortunately, the Commission is likely to adopt a rule, by a 3-2 vote, that neither advances efficiency advocated by Justice nor diversity in programming as advocated by Commerce and will still substantially limit the networks' interest in programming and protect Hollywood studios from competition. In fact, the FTC staff's recent comments on the anticipated rule concludes that it "may lead to a result that is less desirable than complete elimination or complete retention of the rules . . . [this rule] represents the kind of compromise that might leave consumers worse off."

The vote looks as if it will be as follows: Commissioners in favor of adopting the regulatory rule are Duggan (D) (appointed by Bush); Marshall (R) (appointed by Bush); and Barrett (R) (appointed by Bush). Commissioners in favor of substantially repealing the rule immediately and sunseting it wholly out of existence eventually are Chairman Sikes (R) (appointed by Bush) and Quello (D) (appointed by Reagan). The Commission is expected to vote on a proposed rule on April 9, 1991.

Options include: 1) do nothing; 2) letter from President confirming that Sununu framework, as set forth in Sununu letter to Oxley, should guide Commission's decision; or 3) a formal directive from the President to Commission instructing them to adopt a rule that meets certain requirements.

Enforcement options for directive would include litigation private parties challenging any rule inconsistent with

Presidential directive and removal of non-complying Commissioner.
A detailed risk assessment analysis of any of these options is
necessary before making a decision.

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I. Background

A. What is an "independent agency"? (insulation from POTUS control/removal limitations)

B. Why are there "independent agencies"? (progression from Myers to Humphrey's Executor)

C. The current status of independent agencies (Morrison's treatment of control and removal issues)

II. Options

--Application of E.O. 12291's procedural requirements to the independent agencies;

--Application of E.O. 12291's substantive requirements to the independent agencies;

--Compliance with OMB Circulars A-11 and A-19 (budget, legislation, bill comments, testimony);

--Presidential directive not to take a particular course;

--Presidential directive to take a particular course;

--Removal (greatest litigation risk)

III. Litigation

--Litigation will inevitably result from selection of any option; its outcome will be important to the Presidency.

--In addition to a thorough political risk analysis, our strategy must reflect litigation considerations.

--Possible types of litigation: by private party if agency head complies, by private party if agency head does not comply, over removal.

IV. Economic Policy/Deregulation/Domestic Policy Support

--Implementation of options should reflect overall policy objectives: deregulation, all the more indispensable given economic difficulties, and support for the President's economic and domestic initiatives (FERC being directed to take action to implement the energy strategy, or Breeden to drop banking regulation to conform with coordinated banking reform).

--Should be somewhat across the board (include at least 3/4 agencies) to avoid the suggestion of singling anyone out.

V. Caveats

There are other legal and prudential limitations on Presidential control not related to the "independence" of the agency (statutory limits on discretion, APA, due process, tradition of non-intervention in enforcement, adjudications, contracts, grants).

The Federal Reserve is assumed to be a special case, to which the options discussed here are inapplicable.

March 27, 1991

The Independent Regulatory Agencies

Independent regulatory agencies reflect the Progressive dream that public administration can be separated from politics. They have long outlived that dream because Congress has been unwilling to cede authority over them to the President. Because the President cannot effectively oversee independent agencies' policy-making, these agencies' decisions may be inconsistent with important Administration policies and principles. Since the cumulative economic impact of independent agencies' decisions is comparable to that of Executive Branch administrative actions, this lack of coherence can be a serious obstacle to the President's ability to formulate and carry out economic policy. The discussion that follows is limited to the independent agencies that engage in economic regulation.

Energy The Federal Energy Regulatory Commission (**FERC**) regulates gas pipelines (rates and construction) and wholesale electricity markets; it thus has a key role to play in implementing the National Energy Strategy. The Secretary of Energy may propose rules to FERC on which it must vote.

- o FERC has been criticized for delays in approving new gas pipeline projects and for its approach to increasing electricity transmission access.
- o The Secretary of Energy might well propose a rule that would make regulation of gas pipelines consistent with the NES.

Transportation The Interstate Commerce Commission (**ICC**) regulates interstate surface transportation; it affects the impact of deregulation and the success of the National Transportation Strategy. The Federal Maritime Commission (**FMC**) regulates waterborne offshore transportation; its policies have arguably affected the sealift to the Gulf.

- o The ICC has proposed a rule that would guide consideration of environmental and energy factors in Commission decisions.
- o The FMC has proposed a rule to implement recent legislation imposing new requirements on freight forwarders and is reviewing the Shipping Act of 1984.

Communications The Federal Communications Commission (**FCC**) has primary Federal responsibility for telecommunications policy, though Commerce, Justice, and Defense also have important roles. Many argue that telecommunications policy is central to the Nation's technological future. The Postal Rate Commission (**PRC**) recommends rates and classifications to the Postal Service.

- o The FCC has proposed a rule expanding cable rate regulation and is considering standards for HDTV.
- o It would implement proposed legislation that would free up additional spectrum for civilian use.

Antitrust The Federal Trade Commission (FTC) shares civil antitrust enforcement with Justice. Its case-specific decisions shape National policy, but it does relatively little rule-making.

- o The FTC has recently brought resale price maintenance cases that appear inconsistent with Justice enforcement policy.
- o It is conducting an apparently desirable rule-making in the merger area.

Financial Institutions The Federal Deposit Insurance Corporation (FDIC) manages the three key insurance funds; its policies interact closely with those of the Office of the Comptroller of the Currency and the Office of Thrift Supervision. The Federal Reserve Board of Governors (FRB) has important bank regulatory responsibilities. The policies of these agencies could be key to the success of the Administration's banking reform proposals.

- o The FDIC can raise deposit insurance premiums unilaterally, even if this would worsen the current credit crunch.
- o It is reported to be considering giving financial assistance to weak but solvent banks -- a major policy change.
- o The FRB and the Department of Justice approach to the analysis of bank mergers differently.

Financial Markets The Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) supervise of the Nation's securities exchanges and futures markets. These markets are central to the health and efficiency of the Nation's financial sector. Under new legislation, the SEC has a very full rule-making agenda, and the CFTC has also been active.

- o The SEC has been lobbying the FASB to require greater use of market value accounting; the Administration has argued that moving too rapidly to this approach would effectively raise capital standards and worsen the credit crunch.
- o The SEC has not yet approved accounting changes proposed by the banking and thrift regulators in order to improve credit conditions.
- o The CFTC's rule on dual trading has drawn hostile Justice Department comments.

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
06. Memo	From Constance Newman to John Sununu Re Erosion of Executive Branch Authority (4 pp.)	n.d.	P-2, P-5	

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff to the President, Office of the
Series: Sununu, John, Files
Subseries: White House Offices File
WHORM Cat.:
File Location: Counsel
 (Gray) (1991) [2]

Open on Expiration of PRA
 (Document Follows)
 By JP (NLGB) on 10/28/05

Date Closed:	12/21/2004	OA/ID Number:	29178-003
FOIA/SYS Case #:	1998-0004-F[2]	Appeal Case #:	
Re-review Case #:	2005-0426-S	Appeal Disposition:	
P-2/P-5 Review Case #:		Disposition Date:	
AR Case #:		MR Case #:	
AR Disposition:		MR Disposition:	
AR Disposition Date:		MR Disposition Date:	

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P-1 National Security Classified Information [(a)(1) of the PRA]
 P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
 P-3 Release would violate a Federal statute [(a)(3) of the PRA]
 P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
 P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
 P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

Freedom of Information Act - [5 U.S.C. 552(b)]

(b)(1) National security classified information [(b)(1) of the FOIA]
 (b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

OFFICE OF THE DIRECTOR

MEMORANDUM FOR THE HONORABLE JOHN SUNUNU
Chief of Staff, The White House
FROM: *Constance B. Newman*
CONSTANCE B. NEWMAN
Director, OPM
CHASE UNTERMAYER *CGU*
Director, OPP *14 Feb*
SUBJECT: Erosion of Executive Branch Authority

OVERVIEW

We are greatly concerned about the increasing erosion of executive branch authority by the Congress, particularly in the area of personnel and staffing. This trend, which noticeably began after the 1984 presidential election, has been swiftly accelerating since the 1988 presidential election. The effects of this trend have already begun to hamper executive agencies' ability to effectively carry out administration policies and programs. Entering the tenth consecutive year of Republican control of the executive branch, this trend will only continue to worsen unless steps are taken to counter and stem the tide.

EROSION OF PERSONNEL AND STAFFING AUTHORITY

The pace of legislative encroachment on the President's political prerogatives has definitely quickened in recent years, although it is not a new development. The reform ethic which produced the Pendleton Act has in a sense not yet abated. From a civil Service which originally set aside approximately 10 percent of Federal employees (mostly clerical) in the competitive service, we have evolved today to a point where only about one-tenth of one percent of the workforce is comprised of political appointees. Another change that indicated erosion of the level of political appointments in government was the establishment of the quasi-independent Postal Service. Along with the return of the Republicans to the White House, however, has also come a return of attempted and successful curbs on the President's remaining political appointments.

-- In FY 1986, the Department of Transportation was restricted to a total of 138 political appointments (including PAS, non-career SES and Schedule C's) in the general provisions of its appropriations measure. This provision has been rolled-over in each succeeding appropriations bill.

-- In 1987, Rep. Schroeder, Chairman of the House Civil Service

Subcommittee, introduced the "Excellence in Government Management Act." The bill contained roughly a dozen provisions adversely affecting political appointees, the most egregious of which would have (a) placed a limit of 1,000 on the number of Schedule C's in the GS/GM 13-15 range, and (b) based the percentage of permitted non-career SES appointments on "filled positions" rather than "allocated SES positions" for purposes of the 10 percent government-wide limit and the 25 percent agency limit on such political appointments. This proposed "clarification" of existing law would have produced a significant drop in available senior political appointments.

-- In 1988, Schroeder's bill passed the House Civil Service Subcommittee and the full Committee with bipartisan and virtually unanimous support and was placed on the House suspension calendar. Only after a concerted effort by OPM, the White House, Congressional allies such as Rep. Gingrich, and outside support groups such as the Heritage and Free Congress Foundations, was the measure pulled from the suspension calendar and effectively killed as Congress moved to adjournment.

-- In 1988, Congress passed legislation authorizing the Department of Veterans Affairs which contained provisions limiting the number of Schedule C's to 15, allowing only 5 percent of filled SES positions to be designated as non-career (which currently yields about 13 slots), limiting political DAS positions to one-third, and placing various restrictions on how the President may fill some of his PAS slots.

-- In FY 1989, Congress reduced the limit on political appointees at the Department of Transportation from 138 to 120.

-- In 1989, the Appropriations Subcommittee for VA, HUD and Independent Agencies attempted to eliminate political appointments to all DAS and equivalent positions in affected agencies (including NASA and EPA). Only after strenuous effort by OPM, the White House and the agencies involved was the damage limited to a 13 percent limit on non-career SES at HUD. OPM was allowed to waive this limit, which it did, setting HUD's limit at 21.6 percent or 26 out of a possible 30 non-career slots. A similar and possibly stricter House effort can be expected in 1990.

-- In 1989, Rep. Schroeder again introduced an "Excellence in Government Management Act" with the same political restrictions as before. Rep. Sikorski held hearings on the number of political appointees in October.

-- In 1990, legislation to create a new Department of the Environment was introduced containing the following provisions:

- (a) In the Senate: a limit on non-career SES of 12 percent of filled positions, and a requirement that

one-half of DAS slots be career, and;

- (b) In the House: a limit on non-career SES of 10 percent of filled positions, and a requirement that two-thirds of DAS slots be career.

-- February, 1990, Senator Glenn has draft legislation entitled "The Public Service Act of 1990." Glenn is currently circulating this draft among his colleagues on the Government Affairs Committee for comment. An initial poll of Republican staff on this proposed legislation finds no significant opposition. This bill would seek to codify many of the recommendations outlined in the report of the Volker Commission. Two of the most egregious provisions are:

- (a) A limit on non-career SES of 10 percent of available positions for the Office of Personnel Management, and;
- (b) A government-wide limit of 2,000 political appointments by the President. This would include PAS, SES and all Schedule C positions. (Presently, there is no statutory limit on the number of political appointments available to the President.)

These restrictions, aimed primarily at the SES, have been put forward despite the fact that the Civil Service Reform Act (CSRA) of 1978 already contains blanket restrictions, which have been followed, on political appointees in the SES, to wit, no more than 10 percent of allocated SES positions government-wide may be non-career, and no more than 25 percent of such positions may be non-career in most agencies. Further, half of all SES positions are designated career-reserved, and as such may only be filled with career civil servants.

Clearly, these additional restrictions on the President's political prerogatives strike at the heart of executive authority; the ability of the Chief Executive to translate his public mandate into Administration policies and actions. Creeping elimination of the President's political appointees deprives him of one of his chief tools to ensure that the public's will is done.

CAUSES OF THE EROSION TREND AND WHY IT HAS FESTERED

As is natural in our democratic system, the political party which does not control the executive branch seeks ways to limit the party which does. As one party keeps control of the executive branch for an extended period of time, the attempts by the opposition party to limit authority accelerate. It is much easier for the opposition party to limit authority if it controls the legislative branch, as is the case presently. Additionally, the post-Watergate proliferation of the Congressional Committee system has permitted Congress to expand well beyond its oversight role head-long into micro-management of executive branch policies and programs.

It appears the Administration is not now organized to monitor and react to legislative encroachment on executive authority government-wide. As witnessed by the litany above, there exists no effective central body or office to devote the attention necessary to protect the authority of the President. Also, it has not been identified as a priority among administration appointees. Therefore, although it affects individual agencies and programs, there is no coordinated clearing house or method of response from the administration.

RECOMMENDATIONS AND CONCLUSION

If this administration is to continue to govern effectively through 1992 and beyond, a coordinated effort will be needed to combat the continued erosion of executive authority at the hands of the Congress. We strongly recommend the following steps:

- 1). The President designate an executive branch working group or task force composed of various political appointees to monitor and respond to continued erosion of executive branch authority;
- 2). The President meet with the Republican Congressional leadership to inform them of this situation and to enlist their support and assistance in halting and reversing the trend;
- 3). The President communicate to all agency heads that this is a significant problem and he wants their cooperation in identifying and responding to existing and further encroachment efforts;
- 4). The White House Office of Legislative Affairs communicate to all relevant agency bureau and/or office heads that they are to monitor instances of erosion, report to the working group and take any necessary action, and;
- 5). Finally, all heads of agencies which are affected, or which could be affected, by legislative encroachment be provided boilerplate testimony against such encroachment every time they appear before Congressional committees on the relevant matter.

The executive branch's ability to govern has already been hampered by the legislative encroachment on personnel and staffing prerogatives. Absent any action by the administration to counter this trend, executive authority will continue to be eroded culminating in political and administrative impotence.

We are available to meet with you to discuss the subject of this memorandum at your earliest convenience, particularly in light of the pending legislation which would elevate EPA to cabinet status.

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
07. Report	CIA Contacts with Congress in 1989 (2 pp.)	n.d.	(b)(1)	S

Collection:

Record Group: Bush Presidential Records
Office: Chief of Staff to the President, Office of the
Series: Sununu, John, Files
Subseries: White House Offices File
WHORM Cat.:
File Location: Counsel
 (Gray) (1991) [2]

Document Declassified
(Document Follows)
 By JP (NLGB) on 9/27/99

Date Closed:	12/21/2004	OA/ID Number:	29178-003
FOIA/SYS Case #:	1998-0004-F[2]	Appeal Case #:	
Re-review Case #:	2005-0426-S	Appeal Disposition:	
P-2/P-5 Review Case #:		Disposition Date:	
AR Case #:	98-0004-F/2	MR Case #:	
AR Disposition:	Released in Full	MR Disposition:	
AR Disposition Date:	9/27/1999	MR Disposition Date:	

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STATISTICS ON CONGRESSIONAL SUPPORT

The following information reflects Agency contacts with Congress for 1989.

Contacts with Congress

Contacts with Members	
DCI/DDCI Breakfast/Lunch	17
DCI/DDCI Testimony	39
Individual Members Briefed	194
Committee Briefings	<u>44</u>
Total	294
Staff Briefings	<u>653</u>
Grand Total	947

Shown below are breakdowns of two of the above categories:

Individual Members Briefings by Committee

SSCI	28
HPSCI	46
SAC	5
HAC	7
Other	53
Individual	<u>55</u>
Total	194

The "Other" category includes briefings of 11 other Committees. Senate Foreign Relations, House Foreign Affairs, Senate and House Armed Services Committees accounted for most of these other briefings.

Staff Briefings by Committee

SSCI	286
HPSCI	140
SAC	27
HAC	36
Other	<u>164</u>
Total	653

Publications Provided to Congress

Publications sent to Congress in 1989: 3671 classified documents, and we estimate that about 3550 separate unclassified documents were sent. It appears that the number of documents provided to the Hill will be down somewhat this year.

Constituent Mail:

<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>
392	355	323	230

~~SECRET~~
UNCLASSIFIED

DECLASSIFIED
PER E.O. 12958
JGP 11/8/99
CASE No. 78-0044-F

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STATISTICS ON CONGRESSIONAL SUPPORT

The following information reflects Agency contacts with Congress for the period 1 January - 31 March 1990.

Contacts with Members

DCI/DDCI Breakfast/Lunch	2
DCI/DDCI Testimony	7
Individual Members Briefed	37
Committee Briefings	<u>22</u>
Total	68

Staff Briefings	<u>233</u>
Grand Total	301

Shown below are breakdowns of two of the above categories:

Individual Members Briefings by Committee

SSCI	4
HPSCI	10
SAC	2
HAC	0
Other	5
Individual	<u>16</u>
Total	37

Staff Briefings by Committee

SSCI	86
HPSCI	66
SAC	5
HAC	10
Other	<u>66</u>
Total	233

Publications Provided to Congress

Publications sent to Congress in 1990: 766 classified documents, and an estimated 926 unclassified documents.

Constituent Mail:

1990 to date: 97

~~SECRET~~
UNCLASSIFIED