Document No. 168990CS

WHITE HOUSE STAFFING MEMORANDUM

DATE: 5/16/84 ACTION/CONCURRENCE/COMMENT DUE BY: _____

SUBJECT: MEETING OF THE CABINET COUNCIL ON LEGAL POLICY WITH THE PRESIDENT
2:00 P.M. - CABINET ROOM - THURSDAY, MAY 17

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	McFARLANE	☑	☐
MEESE	☐	☐	McMANUS	☑	☐
BAKER	☐	☑	MURPHY	☐	☑
DEAVER	☐	☑	OGLESBY	☑	☐
STOCKMAN	☐	☐	ROGERS	☐	☐
DARMAN	☐P	☑S	SPEAKES	☑	☐
FELDSTEIN	☐	☐	SVAHN	☑	☐
FIELDING	☐	☐	VERSTANDIG	☑	☐
FULLER	☐	☐	WHITTLESEY	☑	☐
HERRINGTON	☑	☐	BAROODY	☐	☑
HICKEY	☐	☐	_____	☐	
JENKINS	☐	☐	_____	☐	☐

REMARKS:

ACTION ASSIGNEES ARE INVITED. PLEASE INFORM PATSY FAORO (x2800) IN THE OFFICE OF CABINET AFFAIRS IF YOU WILL ATTEND.

AGENDA: TITLE IX CIVIL RIGHTS LEGISLATION (paper attached)
FEDERAL LAW ENFORCEMENT GUIDELINES (paper attached)

RESPONSE:

Richard G. Darman
Assistant to the President
Ext. 2702

THE WHITE HOUSE

WASHINGTON

May 15, 1984

MEMORANDUM FOR THE PRESIDENT

FROM: JOHN A. SVAHN

SUBJECT: Title IX Civil Rights Legislation

Following the Supreme Court decision in the Grove City case, much controversy has arisen surrounding Title IX. This controversy has resulted in a misinterpretation of the Administration's position vis-a-vis Title IX and has sparked opposition on Capitol Hill with women's groups and civil rights groups. Activity is underway on the Hill to reverse the Grove City decision and to expand civil rights coverage substantially. A policy decision is required for an Administration position on Title IX.

Historical Administration Position

- Federal money to an institution brings civil rights coverage over assisted programs and activities.

- Federal money to individuals does not bring coverage over institutions at which the individuals chose to use those funds, unless Congress expresses intent that payments to individuals be for the benefit of specific institutions for which the funds are earmarked.

Administration Position in Grove City Case

- Pell Grant Program was expressly intended by Congress to be considered federal assistance to the institution attended by student grantees.

- Language of Title IX limited civil rights coverage to the specific program or activity receiving the indirect federal assistance -- in Grove City, the financial aid program of the school.

- The Supreme Court agreed with the Administration position, holding that Pell Grants paid to individual students constituted federal assistance to the college for which these grants were earmarked, and that Title IX coverage is program specific.

Following the Supreme Court's decision in Grove City, DOJ said the Administration's position on program specificity was based solely on their reading of the law as worded by Congress, not on a philosophical opposition to institutionalized civil rights coverage. The DOJ was quoted as saying that they had no objection to Congress expanding the law beyond the program specific approach. They further stated that the Administration's support for opposition would depend on how such legislation was drafted.

Current Administration Position

Expressed in a statement at the press briefing on May 7: "The Administration is not opposed to Congress enacting legislation concerning the scope of Title IX to forbid discrimination by a recipient of federal money. We're now in the process of reviewing the proposed bills and will make specific comments on the legislation as Congress considered the bills."

Current Status

There is strong feeling on Capitol Hill that the Grove City decision regarding Title IX should be reversed through legislation. There are two key approaches to doing this. There is confusion over the impact of each approach. The Administration should take steps to clarify each approach and explain the impact of each. At the same time it would be preferable for the Administration to adopt a policy position regarding Title IX legislation. The two approaches are outlined below.

a) Schneider/Packwood Bills -- H.R. 5011/S. 2363. This was the first major legislation introduced. It would simply overturn the Grove City decision by providing Title IX coverage over institutions as well as programs and activities.

- o 141 co-sponsors in the House, including Sensenbrenner of the House Judiciary Committe. 19 co-sponsors in Senate.
- o Key sponsors and civil rights leaders, while favoring this approach initially, are now pushing for a more expanded scope.

b) Kennedy/Packwood Bill and Simon Bills -- S. 2568/H.R. 5490 -- The Civil Rights Act of 1984. This bill radically expands all civil rights legislation. It is billed as an overturning of the Grove City decision, but its scope is much broader. These bills define a "recipient of federal financial assistance" to include:

- o any public or private agency institution, or entity, or
- o any sub-unit of an agency, plus any larger agency or institution which has a sub-unit recipient,

- o which receives federal financial assistance directly or through another entity or person.

Under this legislation, federal regulation regarding civil rights would be expanded to public and private activity. Theoretically all private activity could be regulated by the federal government under the language of this bill since "entity" includes almost anything and goes far beyond "institution" as is currently in Title IX. Since almost anything can be shown to benefit indirectly from federal assistance in the United States, the far-reaching impact of this legislation is substantial.

The bill has 61 co-sponsors in the Senate, including Senators Baker and Dole is the favored vehicle of the civil rights lobby. It has 128 co-sponsors in the House. Many of the sponsors in both bodies are those who originally sponsored the Schneider/Packwood legislation. Because of its expansion to all civil rights activities, the bill has picked up numerous other interest groups in the civil rights area, including the handicapped.

Options

1) Oppose all legislation that would reverse Grove City decision.

   - Would be viewed as a retrenchment from our previously stated position taken by the Justice Department and by the White House. In all but the smallest of circles, it would be viewed as anti-civil rights and anti-women.

2) Support legislation to clarify the original Title IX language and reverse the Grove City decision without breaking new ground.

   - This option would be perceived as meeting the minimal commitments made by the Justice Department. Under this option, we would support institution-wide coverage rather than program specific coverage. This option would be supportive of the original Schneider/Packwood proposal. It would not expand coverage to all entitites, nor would it expand coverage to institutions and entities benefiting indirectly from federal payments to individuals. While it appears that this was the original position of many members of Congress, Legislative Affairs indicates that support has shifted from this option to the Kennedy/ Packwood bill.

3) Support legislation to clarify Title IX and reverse the Grove City decision and expand coverage to prohibit institution-wide discrimination based on sex, age, race and the handicapped.

This option builds on the original Schneider/Packwood legislation and expands coverage. It adds an age, race and handicapped to Title IX. The Justice Department feels that by adding in the other three categories that we would strengthen our position of opposition to the Kennedy/Packwood bill. It is believed that the expansion would gain more support from the reasonable interest groups involved.

Recommendation

The Department of Justice, OMB, OPD, OCA, Office of Legislative Affairs, the Counsel and the Counsellor to the President recommend Option 3. It is further recommended that Legislative Affairs be directed to discuss this option with the leadership and key sponsors before Presidential decision.

Approve _____ Disapprove _____ Other _____

ADMINISTRATION POLICY STATEMENT
Guidelines for Legislation Involving
Federal Criminal Law Enforcement Authority

1. Purpose. This Administration policy statement established guidelines, for prospective application only, to: (1) guide all Federal agencies in preparation of legislative proposals concerning future grants of law enforcement authority; (2) guide the Department of Justice and the Department of the Treasury in evaluating legislative proposals involving grants of Federal law enforcement authority; and (3) guide the Office of Management and Budget (OMB) in making recommendations, in accordance with Circular A-19, concerning: (a) the submission of such legislative proposals to Congress; and (b) the signing, by the President, of enrolled bills involving grants of Federal law enforcement authority.

2. Background. From time-to-time agencies propose legislation that would extend criminal law enforcement authorities (e.g., authority to conduct a warrantless search or to carry a firearm) to themselves or to other agencies. On other occasions, agencies are asked to provide Congress with reports on pending bills that would extend such authority. No guidelines have been available to the agencies, however, to ensure a consistent approach to proposed or pending legislation that contains criminal law enforcement authority. Guidelines of this nature are necessary in order to provide sound criteria and a systematic process for considering such authorities when proposed, and to avoid unnecessary and undesirable proliferation of criminal law enforcement authorities.

3. Definitions. For the purpose of this policy statement, the following definitions apply:

a. Accredited Course of Training. A course of instruction offered by the Federal Law Enforcement Training Center, or an equivalent course of instruction offered by another Federal agency.

b. Agency. Any executive department or independent commission, board, bureau, office, agency, Government-owned or controlled corporation, or other establishment of the Government, including any regulatory commission or board and the Office of the Inspector General of a department or agency.

c. Covert Investigative Technique. Electronic surveillance, an undercover operation, the use of a paid informant, or any other method of obtaining evidence of crime in a clandestine manner other than by means of routine surveillance or from a volunteer informant.

d. Pending Bill. Any bill or resolution that has been introduced in Congress or any amendment to a bill or resolution while in committee or when proposed for House or Senate floor consideration during debate. Also, any proposal placed before the conferees on a bill that has passed both Houses.

e. Proposed Legislation. A draft bill or any supporting document (e.g., Speaker letter, section-by-section analysis, or statement of purpose and justification) that an agency wishes to present to Congress for its consideration. Also, any proposal for, or endorsement of, legislation included in an agency's annual or special report or in other written form that an agency proposes to transmit to Congress, or to any Member or committee, officer or employee of Congress, or staff of any committee or Member, or to make available to any study group, commission, or the public.

f. Report (including testimony). Any written expression of official views prepared by an agency on a pending bill for (1) transmittal to any committee, Member, officer, or employee of the Congress, or the staff of any committee or Member, or (2) presentation as testimony before a congressional committee. Also, any comment or recommendation on a pending bill that is included in an agency's annual or special report that an agency proposes to transmit to Congress, or to any Member or committee, officer or employee of Congress, or staff of any committee or Member, or to make available to any study group, commission, or the public.

4. General Policy. In general, an agency should not have criminal law enforcement authority unless:

a. the agency's ability to perform an essential function within its jurisdiction is significantly hampered by its lack of criminal law enforcement authority;

b. the agency's need for such law enforcement authority cannot be met effectively by assistance from law enforcement agencies with such authority;

c. adequate internal safeguards and management procedures exist to ensure proper exercise of the authority by the agency; and

d. the advantages attributable to the agency's possession of the authority can reasonably be expected to exceed the disadvantages that are likely to be involved in its exercise of the authority.

5. Guidelines. Before submitting to OMB for coordination and clearance any proposed legislation or report on a pending bill that would extend criminal law enforcement authority to an

agency, an agency shall make a determination that the proposed extension of criminal law enforcement authority is in substantial compliance with the following guidelines, as applicable:

a. Authority to Carry a Firearm. An agency should not be authorized to permit an employee to carry a firearm unless:

(1) there is a significant likelihood that, in the course of performing his assigned duties, the employee will be placed in situations in which his use of a firearm would be permitted by law to:

(i) protect himself from a threat of imminent death, serious bodily injury, or kidnapping;

(ii) prevent another person from causing imminent death or bodily injury to, or kidnapping of, a person who is under his protection; or

(iii) prevent the imminent loss or destruction of, or damage to, property of substantial value that is under his protection.

(2) it is unlikely that timely and effective assistance will be available from another agency;

(3) the employee has graduated from an accredited course of training in the carrying and use of firearms, and is currently qualified in their use; and

(4) the agency agrees that, if the requested authority is granted, the agency will establish policies and procedures, approved by the Attorney General, for preventing the unauthorized use or misuse of firearms by its employees, including a requirement that an employee's authority to carry a firearm be approved by a designated senior official of the agency on a case-by-case basis.

b. Authority to Seek and Execute an Arrest or Search Warrant. Except as provided in section 5f. of this policy statement, an agency should not be authorized to permit an employee to seek and execute an arrest warrant or a search warrant unless the authority is limited to the arrest of a person who there is reason to believe has committed an offense within the jurisdiction of that agency, or an offense involving resistance to the employee's authority, or to a search for, and seizure of, property related to such an offense, and:

(1) there is a significant likelihood that, in the course of performing his assigned duties, the employee will frequently encounter situations in which it is necessary to make such an arrest or search;

(2) it is unlikely that timely and effective assistance will be available from another agency;

(3) the employee has graduated from an accredited course of training in the execution of arrest and search warrants; and

(4) the agency agrees that, if the requested authority is granted, the agency will establish policies and procedures, approved by the Attorney General, for preventing the unauthorized use or misuse of the power to seek and execute arrest or search warrants by its employees.

c. Authority to Make a Warrantless Arrest. An agency should not be authorized to permit an employee to make an arrest without a warrant unless the authority is limited to the arrest of a person who the employee has probable cause to believe has committed a felony, or a person who has committed a felony or a misdemeanor in the employee's presence, and:

(1) there is a significant likelihood that, in the course of performing his assigned duties, the employee will frequently encounter situations in which it is necessary to make such an arrest promptly;

(2) it is unlikely that timely and effective assistance will be available from another agency;

(3) the employee has graduated from an accredited course of training in the exercise of the power to arrest; and

(4) the agency agrees that, if the requested authority is granted, the agency will establish policies and procedures, approved by the Attorney General, for preventing the unauthorized use or misuse of the power to arrest by its employees.

d. Authority to Serve a Grand Jury Subpoena or Other Legal Process. An agency should not be authorized to permit an employee to serve a grand jury subpoena, a summons, a court order, or other legal process unless:

(1) there is a significant likelihood that, in the course of performing his assigned duties, the employee will frequently encounter situations in which it is necessary to serve such process;

(2) it is unlikely that service can be made conveniently or expeditiously by personnel of another agency;

(3) the employee has been trained in the requirements of service of process; and

(4) the agency agrees that, if the requested authority is granted, the agency will establish policies and procedures, approved by the Attorney General, for preventing the unauthorized use or misuse of the power to serve process by its employees.

e. Authority to Administer an Oath or Affirmation. An agency should not be authorized to permit an employee to administer an oath or affirmation unless:

(1) there is a significant likelihood that, in the course of performing his assigned duties, the employee will frequently encounter situations in which it is necessary or desirable to take a person's statement or testimony under oath or affirmation;

(2) it is unlikely that the oath or affirmation can be administered as conveniently or expeditiously by personnel of another agency;

(3) the employee has been trained in the requirements of administering oaths and affirmations; and

(4) the agency agrees that, if the requested authority is granted, the agency will establish policies and procedures, approved by the Attorney General, for preventing the unauthorized use or misuse of the power to administer oaths on affirmations by its employees.

f. Authority to Use a Covert Investigative Technique. An agency should not be authorized to permit an employee to use a covert investigative technique unless:

(1) there is a significant likelihood that, in the course of performing his assigned duties, the employee will frequently encounter situations in which it is necessary to use such a technique;

(2) it is unlikely that timely and effective assistance from an agency with expertise in the use of such a technique will be available;

(3) the employee has graduated from an accredited course of training in the use of such a technique; and

(4) the agency agrees that, if the requested authority is granted, the agency will establish policies and procedures, approved by the Attorney General, for preventing unauthorized use or misuse, or the appearance thereof, of such techniques by its employees, including a requirement that an employee's authority to use a covert investigative technique be approved by a designated senior official of the agency on a case-by-case basis.

6. Additional Explanation. Additional details concerning the interpretation of these guidelines are attached to this policy statement.

7. Effective Date. This policy statement is effective on publication.

8. Inquiries. Questions or inquiries regarding the requirements of this policy statement may be directed to the Assistant Director for Legislative Reference, Office of Management and Budget, Washington, D.C. 20503. Questions or inquiries regarding criminal law enforcement authorities generally may be directed to the Associate Attorney General, Department of Justice, Washington, D.C. 20530.

Attachment

COMMENTARY ON GUIDELINES FOR LEGISLATION INVOLVING FEDERAL CRIMINAL LAW ENFORCEMENT AUTHORITIES

1. In General. This attachment provides additional detail with respect to the way in which the law enforcement guidelines contained in the foregoing policy statement are to be interpreted and applied. Citations to particular sections refer to the applicable sections of the policy statement.

2. General Policy. Section 4 sets forth in general terms the fundamental criteria to be used in deciding whether to assign criminal law enforcement authority to an Executive branch department or agency whose primary mission is not enforcement of Federal criminal law. Section 5 addresses with greater particularity the issues involved in considering the assignment of specific kinds of law enforcement authority, such as authority to carry firearms or to execute search warrants. Not covered by these guidelines is the issue of providing Federal statutory "protection" against violent crime to employees whose duties include enforcement of Federal law. Although it may be desirable to afford such "protection" to all Federal law enforcement personnel, as a back-up to State statutes covering the same crimes, the issues involved in making that determination are not the same as those raised by proposals to expand an agency's law enforcement powers.

It should be noted at the outset that these guidelines are deliberately couched in the negative. This approach is taken, because indiscriminate grants of law enforcement power within the Executive branch can have undesirable consequences, including the inefficient use of limited law enforcement resources and the imposition of unnecessary burdens on effective Federal law enforcement. Thus, the guidelines emphasize the principle that the assignment of criminal law enforcement authority to an agency whose primary responsibility -- unlike the Federal Bureau of Investigation (FBI), for example -- does not involve enforcement of Federal criminal law should be the exception rather than the rule.

The policy statement of general policy describes the essential prerequisites to a grant of any type of criminal law enforcement authority. The first and most important of these requirements, set out in paragraph a. is that the agency have a genuine need for the authority in question. The issue of need is to be approached by asking whether lack of law enforcement authority significantly hampers the agency's ability to perform an essential function within its jurisdiction. To answer this question, it is necessary to consider, first, the scope of the agency's jurisdiction; second, the nature of its essential functions; and third, the effect of lack of criminal law enforcement powers on its ability to perform those functions.

As to the first of these considerations (the scope of the agency's jurisdiction), the mere existence of agency jurisdiction to enforce certain laws -- even if some of those laws carry criminal penalties -- does not by itself warrant granting the agency criminal law enforcement powers. Virtually all agencies have some form of criminal jurisdiction. In many instances, however, criminal sanctions have been provided for conduct that bears no resemblance to offenses within the traditional bounds of Anglo-American criminal law. In these instances, resort to the criminal enforcement process may frequently be inappropriate. Moreover, even statutes that justifiably carry criminal penalties ordinarily provide civil or administrative sanctions, as well. With respect to these statutes, the better enforcement policy may be to rely on such non-criminal inducements to ensure compliance with the law, reserving criminal prosecution as a measure of last resort for the most serious cases.

The second consideration (the nature of the agency's essential functions), is closely related to the first. It involves an examination of the agency's responsibilities with respect to the matters within its jurisdiction. Those responsibilities may be purely administrative, or they may involve the performance of investigative, protective, or guard functions, as well. In these instances, it is necessary to determine whether performance of the function is essential, or only tangential, to accomplishment of the agency's mission.

Assuming that an agency has criminal enforcement jurisdiction, that a fair number of offenses within its jurisdiction warrant application of criminal sanctions, and that effective performance of the agency's mission requires that it take steps to prevent or detect such offenses, the final consideration to be weighed is whether the agency's lack of criminal law enforcement authority significantly hampers its ability to take these steps. This will depend, of course, on the nature of the steps to be taken and on the type of law enforcement power that is lacking. The absence of authority to execute a search warrant, for example, would not seem an impediment to an agency whose enforcement jurisdiction is limited to the performance of protective or guard functions. In short, an agency should not be given criminal law enforcement authority unless it can demonstrate that lack of authority significantly impairs its ability to discharge a function that is essential to the performance of its statutory responsibilities. If the agency can make such a demonstration, it will then be necessary to consider the remaining factors.

Paragraph b. of section 4 assumes that an agency has met the test of need described in paragraph a. and raises the question whether that need can be met effectively by assistance from a traditional law enforcement agency.

One such alternative approach, for example, might be to have the FBI or the Secret Service make an arrest on behalf of the agency. Another might be to confer temporary law enforcement authority on certain employees of the requesting agency by designating them special duty agents of the Department of Justice for a limited period. A number of factors should be considered in deciding whether such an alternative is preferable. Among these are the kind of assistance required; the length of time during which the assistance will be needed; the ability and willingness of traditional law enforcement agencies to provide the assistance in a timely manner, in light of the restrictions imposed upon them by their own statutory jurisdiction and responsibilities, enforcement priorities, and resources; and the legal basis for conferring special deputy agent status on employees of non-law enforcement agencies.

The provision of timely and effective support by a traditional law enforcement agency can best be assured by means of a Memorandum of Understanding. Typically, such a memorandum reflects an agreement between an agency lacking law enforcement authority and one having such authority concerning the circumstances and conditions under which the latter will render law enforcement assistance to the former. The Department of Justice can supply interested agencies with copies of each memoranda that other agencies have found useful in the past. Only if a satisfactory Memorandum of Understanding cannot be arranged, and if no other method is available for ensuring timely and effective assistance from a traditional law enforcement agency, should a non-law enforcement agency be authorized to exercise law enforcement powers in aid of its mission.

Paragraph c. of section 4 specifies, as another prerequisite to granting an agency law enforcement authority, that adequate internal safeguards and management procedures exist to ensure proper exercise of the authority by the agency. This requirement raises questions of training, supervision, and oversight in relation to the agency's ability to exercise the requested authority in a professional manner. As is made clear in the following specific guidelines, an agency must provide assurance that the employees who it permits to exercise law enforcement powers have received the training necessary to qualify them to exercise those powers properly. In addition, the agency must provide those employees with adequate supervision, pursuant to policies and procedures approved by the Attorney General, to prevent unauthorized use or misuse of authority. Finally, the agency's performance in exercising law enforcement authority should be subject to effective oversight within the Executive branch and by the appropriate committees of Congress. To facilitate such oversight, the agency should maintain statistics summarizing its use of the particular law enforcement powers it has been granted.

Paragraph d. of section 4 requires a judgement that the advantages attributable to the agency's possession of the authority can reasonably be expected to outweigh the disadvantages likely to be involved in the agency's exercise of the authority. Foremost among the possible disadvantages to be considered in this balancing process are the risks of interference with the work of traditional law enforcement agencies. Such interference might occur as a result of the difficulties of coordinating the investigative activities of numerous agencies or as a result of inadvertent intrusion into the jurisdiction of traditional law enforcement agencies. It might take the form of conflicting undercover operations or the making of untimely or unlawful arrests or seizures that could prejudice other investigations or jeopardize prosecutions. Also to be considered under this heading is the danger that an agency's misuse of authority might lead Congress to restrict the exercise of such authority by traditional law enforcement agencies as well as by the agency at fault.

Monetary costs should be considered as well. These might include the expenses of additional training and equipment that would be incurred by the agency; the cost of providing early retirement and civil service benefits to a larger number of Federal law enforcement officers (to the extent that an obligation to provide such benefits would follow a grant of law enforcement authority); the waste of resources that would result from duplicative investigative capabilities and efforts; and the financial drain of having to defend, and pay judgments in, civil suits for misuse of law enforcement authority. The assessment of these costs must be predicated, of course, on reasonable approximations and estimates.

Finally, there is a category of potential disadvantages that, while difficult to quantify, nevertheless deserve consideration. Among these might be a slackening of the agency's non-criminal enforcement efforts, additional burdens for the Government under the Freedom of Information and Privacy Acts, and heightened concerns over interference with civil liberties as a result of proliferation of Federal agencies with law enforcement powers.

Against the potential disadvantages that may be involved in granting a particular type of law enforcement authority to a particular agency must be weighed the potential benefits in terms of the agency's enhanced ability to carry out its mission and the consequences of its improved performance for effective and efficient Federal law enforcement in general. The agency's performance might be improved as a result not only of its ability to exercise new powers but also as a consequence of its greater ability to attract and retain highly qualified employees by holding out to them the prospect of having the authority to perform their duties effectively. An additional benefit could be avoidance of the delays and drains on the resources of

traditional law enforcement agencies that might result from relieving them of obligations to render assistance to other agencies.

3. Guidelines.

a. Authority to Carry a Firearm.

Of all the forms of law enforcement authority that may be conferred on a Federal agency, the authority to permit its employees to carry firearms has the greatest potential for serious harm to individuals and to the interests of the Government. Yet it is often essential to the effective performance of an employee's duties that he be allowed to exercise such authority. This guideline recognizes the need for Federal employees to carry firearms in certain situations, but at the same time establishes limiting criteria to ensure that the potential for harm is minimized.

The first of these criteria is the requirement that there be a significant likelihood that the agency personnel on whose behalf firearms authority is sought will, in the course of performing their assigned duties, confront situations in which the use of a firearm would be lawful. Thus, firearms authority should not be granted on the basis of a mere possibility that an employee may at some time in the course of his work find it comforting or even useful to have a gun. Such a loose standard would permit the arming of hundreds of employees who have no real need to carry weapons. Instead, there must be a substantial probability that the employee's work will place him in situations in which it is essential that he be armed and in which his use of a firearm would be lawful. Whether such situations are likely to arise in the course of an employee's duties will depend largely on the nature of the offenses he will be called upon to prevent or investigate, as well as on the types of offenders he can be expected to confront.

As a general matter, the carrying of a firearm would be warranted when there is a reasonable probability that: (i) the employee will be threatened with imminent death, serious bodily injury, or kidnapping; (ii) the employee will be required to prevent another person from causing imminent death or bodily injury to, or kidnapping of, a person who is under his protection; or (iii) the employee will be required to prevent imminent loss or destruction of, or damage to, property of substantial value that is under his protection.

Examples of situations that would meet these requirements are: (i) when the employee's duties require him to make arrests or execute search warrants; (ii) when the employee is assigned to protect another person who there is reason to believe may be subjected to acts or threats of violence; (iii) when the

employee's job is to protect property of substantial value which there is reason to believe may be the subject of attempted theft or destruction; and (iv) when the employee's duties primarily involve public safety or property protection functions on Federal property. A greater severity of potential bodily injury is necessary to justify the carrying of a weapon for self-protection (serious bodily injury) than is needed to warrant the carrying of a firearm to protect others (any degree of bodily injury). This distinction is made because an employee's statutory duty to protect others requires that he safeguard them from attempts to inflict any kind of physical injury, whereas his use of deadly force for self-protection is warranted only when he is threatened with serious bodily injury.

Subparagraph (1)(iii) of section 5a. covers only situations in which there is no reason to anticipate danger to the employee himself or to a person under his protection. Ordinarily, the law does not permit the use of a firearm for the sole purpose of protecting property. In some situations, however, the extraordinary value of the property to be protected may justify the carrying of a firearm. How valuable the property must be to warrant armed protection cannot be specified in precise terms. Although some property may not have great intrinsic value, its loss or destruction could nevertheless have very serious consequences. Certainly, an appropriate measure of value should encompass property the loss or destruction of which would cause substantial damage to a vital interest of the United States. For example, protection of property essential to maintaining national security, or to ensuring the uninterrupted flow of energy or communications, would warrant the carrying of firearms, even if persons are not likely to be injured directly by threats to such property. The same would be true of Federally-owned dams and reservoirs, or nuclear facilities and materials, protection of which is necessary to prevent potentially catastrophic damage to pubic health or safety. Of course, if the value of the property is such that the law does not permit deadly force to be used to protect it, an employee responsible for safeguarding the property should not be authorized to carry a firearm.

Paragraph (2) of section 5a. requires the exploration of possible alternatives before an agency is authorized to permit its employees to carry firearms. Only if it appears unlikely that timely and effective assistance will be available from another agency should such authority be granted. Ordinarily, it will be impractical to seek outside assistance if the employee works in a remote area, if communication is difficult for other reasons, if the need for a weapon arises unexpectedly, or if there is a need to have a substantial number of armed guards on hand at all times. On the other hand, if the danger can be anticipated and met effectively by assigning an employee with arms-carrying authority to accompany the employee who lacks such authority, that course should be preferred.

The third requirement of section 5a., set forth in paragraph (3), is that the employee who is to be authorized to carry a firearm must have graduated from an accredited course of training in the carrying and use of firearms and must be currently qualified in their use. The purpose of this requirement is to ensure not only that employees possess the technical expertise to handle firearms safely and effectively, but also that they have the ability to exercise sound judgment regarding the circumstances under which it is appropriate to use their weapons. The first part of this requirement could be met by completion of the appropriate course of training at the Federal Law Enforcement Training Center at Glynco, Georgia, or an equivalent course of instruction offered by another Federal agency that provides necessary knowledge or competency. The second part of the requirement mandates periodic reevaluation of the employee's ability to exercise discretion in the use of firearms and periodic review, by means of firing range examinations, of his proficiency in the use of the particular type of firearm he is authorized to carry.

As a final safeguard against unauthorized use or misuse of arms carrying authority, paragraph (4) requires that the agency agree to establish policies and procedures, acceptable to the Attorney General, to govern the manner in which such authority is assigned and exercised within the agency, and to ensure the accountability of individual employees and their superiors for the proper use of such authority. These policies and procedures should include a requirement that an individual's authority to carry a firearm be approved on a case-by-case basis, or on a functional basis, by a designated senior official of the agency.

b. Authority to Seek and Execute an Arrest or Search Warrant.

The authority to seek and execute arrest and search warrants, covered by section 5b. is not a general authority to arrest and search for evidence relating to any type of offense. Rather, the powers referred to cover only offenses over which the agency has jurisdiction and offenses involving resistance to an employee's authority (e.g., assaulting the employee to prevent him from exercising his authority to execute a search or serve a subpoena). An additional limitation, signalled by the reference to section 5f., is that the search warrant authority referred to does not include power to seek authorization for, or to engage in, any type of electronic surveillance. This authority is treated separately, along with other covert investigative techniques (e.g., engaging in undercover operations and using paid informants), the exercise of which requires particular care and supervision.

Regarding the necessity for conducting searches, one factor to be considered is whether an alternative method, such as the use of a subpoena, is available and would be equally effective.

Paragraphs (2), (3), and (4) involve essentially the same considerations as the counterpart requirements for obtaining authority to carry firearms. With reference to paragraph (2), as it relates to search warrant authority, additional factors to be considered are the location of the search, the nature of the items to be seized, the need for special expertise in identifying those items, and the amount of time that will be needed to complete the search.

c. Authority to Make a Warrantless Arrest.

Unlike section 5b., which limits arrest and search warrant authority to offenses within the agency's jurisdiction and offenses involving resistance to an employee's authority, section 5c. deals with broader authority to make warrantless arrests for any offenses committed in the employee's presence or for felonies committed outside his presence for which there is probable cause to arrest. Thus, in addition to permitting a warrantless arrest for an offense over which the agency has jurisdiction and an offense involving resistance to the agent's authority, section 5c. provides a foundation for the warrantless arrest of a person who the employee has probable cause to believe has committed a felony under Federal or State law, as well as a person who, in the employee's presence, commits a felony or a misdemeanor in violation of Federal or State law. This provision recognizes the desirability of permitting a Federal employee in an emergency situation to exercise common law arrest power. Explicit recognition of Federal arrest authority in emergency situations involving violations of State law should serve to protect Federal employees against uncertainties concerning their authority that might arise under State laws governing citizens' arrests.

Like the authority to carry a firearm and the power to seek and execute arrest and search warrants, authority to make warrantless arrests should not be granted merely on the basis of convenience or speculative need. Instead, before an agency should be authorized to permit its employees to make warrantless arrests, it should make a convincing showing that, in the course of their duties, its employees can frequently be expected to encounter situations that present a need to arrest offenders promptly rather than waiting until warrants have been obtained. Examples of sufficiently exigent circumstances are situations in which the offense threatens immediate injury to persons or property, situations in which delay might reasonably be expected to permit the offender to escape, commit additional offenses, or destroy evidence, and situations in which the offense threatens to thwart the employee in carrying out his duty. If the agent is authorized under this guideline to make a warrantless arrest, he may also, of course, conduct a warrantless search incident to arrest.

Whether another agency can be relied upon to make the arrest depends on the same factors that determine whether the arrest must be made promptly, as well as on the availability of personnel from the other agency and the time it would take them to provide assistance.

Required safeguards against unlawful or inappropriate use of arrest authority (i.e., training, supervision, and oversight), backed up by approved policies and procedures are similar to those applicable to the carrying of firearms.

d. Authority to Serve a Grand Jury Subpoena or Other Legal Process.

Whereas authority to carry firearms, make arrests, and conduct searches should be granted only in response to a need that cannot be met by calling on another agency, power to serve a grand jury subpoena or other process may be conferred on the basis of a less rigorous standard: when there is a need that can be met more conveniently or expeditiously by the employee than by personnel of another agency. Factors bearing on the application of this guideline include time constraints, familiarity of the employee with the appearance and likely whereabouts of the person to be served, and any difficulties that might be anticipated in making service. In connection with this last factor, if there is reason to believe that the employee may be placed in danger in the course of attempting to make service, and if the employee is not authorized to carry a firearm, assistance should be sought from an agency whose personnel do have firearms authority. Considerations relevant to the requirements set forth in paragraphs (3) and (4) are similar to those discussed above in connection with the same requirements with respect to other types of authority, except that the employee's training need not have been acquired through an accredited training course.

e. Authority to Administer an Oath or Affirmation.

Unlike the other authorities discussed above that should not be conferred except out of necessity, authority to administer oaths and affirmations may be granted when it is either necessary or desirable that the employee take a statement or testimony that is sworn, or formally affirmed, to be true. Greater latitude is permitted here, because exercise of the power is not likely to be intrusive or to have harmful consequences, and because of the difficulty of making a determination that administration of an oath or its equivalent is necessary in order to ensure that the person being questioned responds fully and truthfully.

In other respects, the requirements of this guideline are essentially the same as the corresponding requirements in the preceding guidelines, except that the employee's training need not have been acquired through an accredited course of training.

In light of the lesser risk of harm from misuse of this authority, less formal training is acceptable as a basis for permitting employees to administer oaths and affirmations.

f. Authority to Use a Covert Investigative Technique.

The use of covert investigative techniques is often a necessary part of the process of Federal law enforcement, particularly with respect to offenses that, unlike common law crimes, are committed in secrecy or are readily concealed. On the other hand, because these techniques involve secrecy on the part of the Government, they are often perceived as subject to abuse. Moreover, when abuses do occur, they frequently threaten fundamental rights and invariably jeopardize the Government's investigation or prosecution. For these reasons, an agency should not be authorized to permit its employees to employ these techniques except under the most compelling circumstances and with the strongest possible guarantees against misuse.

With respect to each technique, the essential questions bearing on agency authorization are whether fulfillment of the agency's mission is likely to require regular use of the technique; whether, for reasons of economy, effectiveness, or otherwise, it would be preferable to rely on an agency with established expertise in the use of the technique; and whether the agency's policies and practices governing the use of the technique, as well as the training of its employees, give satisfactory assurance both that the technique will not be abused and that the appearance of abuse will be avoided. As an additional safeguard, the agency's policies and practices regarding the use of covert investigative techniques should require that the use such techniques be approved on a case-by-case basis, or a functional basis, by a designated senior official of the agency. Such high level approval is desirable because, as noted above, the use of these techniques is often subject to criticism and carries unusual potential for causing grave harm to individuals a well as to Federal law enforcement interests.

It should be noted that section 5f. does not address the technique of attempting to secure cooperation by promising a potential witness that he will not be prosecuted or that he will not be prosecuted fully, by promising a favorable sentencing recommendation, by offering him participation in the Witness Protection Program of the U.S. Marshals Service, or by holding out to him the prospect of a similar benefit. Appropriate use of such promises requires careful consideration of a number of factors including the degree of the potential witness's complicity relative to others involved in the case and the value of his cooperation in light of the requirements for successful prosecution. Ordinarily, the prosecutor rather than the investigator is in the best position to assess these factors and determine whether a promise is warranted. Accordingly, Federal investigators should not be given independent authority to make such promises in return for cooperation. This does not mean, of course, that an employee may not make such an offer when specifically authorized by the prosecutor.

CONTROL OF THE PROLIFERATION OF FEDERAL CRIMINAL LAW ENFORCEMENT AUTHORITY

Summary

Authority to engage in Federal law enforcement functions -- including exercise of traditional police powers -- has been granted by Congress in the past to numerous Federal agencies. Such authority is frequently being sought by additional agencies. There have never existed any general standards against which the assignment of such authority might systematically be evaluated. Since such authority involves the most potentially intrusive of all governmental powers, a responsible government should assure that it is granted cautiously, monitored carefully, and exercised responsibly. It is important -- both from the standpoint of safeguarding the individual liberties of innocent citizens and of assuring the effective operation of government -- that the Administration employ reasonable standards for evaluating future proposals for further statutory grants of Federal law enforcement authority.

Such standards, in the form of guidelines contained in an Administration Policy Statement, are attached.

Background

Departments and agencies throughout the Executive Branch frequently seek increased law enforcement authority. There exists today no systematic process for evaluating such proposals for expanded authority against fixed, objective standards. Instead, decisions are made on a case-by-case basis without reference to established criteria, with the result that the Federal law enforcement establishment is becoming a loose confederation of relatively independent, specialized "mini-police" forces.

This proliferation of Federal law enforcement authority is largely a result of two factors. First, the substantive responsibilities assigned many Federal agencies require that some of their employees perform work that may, under certain circumstances, subject the employees to some degree of danger. Second, Congress, over a period of several decades, has exhibited the tendency not only to over-regulate, but to over-criminalize. When Congress imposes a new statutory requirement on a regulated activity, it has become almost routine for it to include a criminal penalty for the requirement's violation. As a result, in addition to the traditional Federal criminal statutes, there are approximately 1,300 Federal statutes imposing criminal sanctions on regulated activities somewhat related to traditional criminal activities, and approximately 1,700 Federal statutes carrying criminal penalties for violations of regulatory requirements that bear no relation at all to traditional criminal conduct. Having so many criminal statutes within their jurisdiction, Federal agencies with substantive responsibilities of a civil nature have tended to expect that grants of Federal criminal law enforcement authority are a reasonable concomitant.

As a result of the perceived danger to employees and of the perceived logic of enforcing criminal statutes through criminal investigators, there now exist approximately 100 Federal agencies assigned one form or another of criminal law enforcement responsibility. Many regulatory compliance offices have developed national networks of field offices with investigators who

consider themselves to be primarily in the business of criminal investigation and enforcement. About 20 agencies have developed security forces with protection responsibilities. The individuals exercising these investigative and protective responsibilities commonly have been granted the power to make arrests, carry firearms, execute search warrants, serve subpoenas, and engage in other potentially sensitive activities characteristic of a traditional law enforcement agency.

The requests by Federal agencies for additional law enforcement authority are increasing in number. This is partly the result of the congressional assignment of additional regulatory functions. It is partly the result of heightened concerns about security. The practice is fueled by the fact that once an organization embarks upon a newly assigned function carrying criminal law implications, it commonly hires employees with some kind of law enforcement background who promptly tend to assume the necessity of being accorded a full panoply of enforcement powers. It appears the trend will continue. If it does, the most serious potential consequences are:

1. an increased likelihood of unexamined and uncoordinated Federal law enforcement activities;

2. a considerable variation in the recruitment, training, and supervision of individuals exercising Federal law enforcement authority;

3. a lack of oversight and evaluation of the various Federal law enforcement programs;

4. an increased likelihood of occasional misuse of sensitive investigative techniques -- such as undercover operations -- which could lead to congressional limitations on the proper use of such techniques by the FBI and other traditional law enforcement agencies;

5. an increase in the risk of Federal exposure to civil suits;

6. an increased likelihood of infringement upon the individual liberties of innocent citizens; and

7. an inefficient allocation of resources that may result from duplication of law enforcement efforts.

Discussion

It is not advisable to seek to amend existing statutes that have already granted law enforcement authority to various Federal agencies. It is advisable -- indeed necessary to a responsible Administration program -- to assure a rational means of evaluating future requests for conferral of law enforcement authority.

Today, when legislative requests for expanded law enforcement authority are submitted to OMB in the course of the legislative clearance process, OMB is required to attempt to evaluate the reasonableness of the request without the benefit of recognized standards, and must rely in large measure upon the comments from the traditional law enforcement agencies -- principally, the

Department of Justice and the Department of the Treasury -- to call attention to matters of questionable necessity or propriety. The process suffers from the customary shortcomings of ad hoc reviews.. Moreover, the traditional law enforcement agencies are placed in the position of seeming automatically to defend their general, government-wide law enforcement responsibilities against incursions by specialized agencies. Thus, their comments, although well founded, may be misperceived as merely a defense of parochial interests. In addition, OMB often finds itself hard-pressed to justify its denial of such requests in a convincing fashion without the ability to point to a guiding framework of considerations. As a result, interested congressional committees tend to view the Administration, in opposing such proposals, as reflecting the narrow interests of Justice and Treasury and failing to recognize the general "public interest" as they perceive it. The Administration thus tends to lose the argument issue-by-issue and agency-by-agency before authorization committees which are frequently sympathetic to the desire of agencies within their jurisdiction to establish their "own" investigative forces.

What is needed is a set of guidelines for evaluating proposed legislation that would create new Federal criminal law enforcement authorities. Those guidelines could be used by agencies in drafting legislative proposals, by traditional law enforcement agencies in reviewing the proposals submitted by other agencies, and by OMB in making recommendations concerning draft legislation and concerning the President's signing of enrolled bills.

In recognition of the existing need, a working group was created late last year to prepare draft guidelines for these purposes. The working group consisted of representatives from the White House Office of Policy Development, the Office of Management and Budget, the Department of Justice, and the Department of the Treasury. The draft guidelines prepared by the working group were disseminated to other Federal agencies for evaluation and comment.

The attached "Guidelines for Legislation Involving Federal Criminal Law Enforcement Authority," in the form of an Administration Policy Statement, is the product of the working group's effort, and reflects many of the recommendations submitted by the various Federal agencies which commented on the original draft. The guidelines are prospective only. They encompass standards for evaluating future requests for authority to carry firearms, to seek and execute arrest and search warrants, to make warrantless arrests, to serve grand jury subpoenas or other legal process, to administer oaths, and to use various covert investigative techniques. They thus cover virtually all kinds of law enforcement power that agencies have requested in the past -- including, in the interests of completeness, some kinds of power that do not necessarily require statutory authorization.

Recommendation

It is recommended that the attached "Guidelines for Legislation Involving Federal Criminal Law Enforcement Authority" be promulgated as an Administration Policy Statement to:

1. guide all Federal agencies in their preparation of legislative proposals concerning future grants of law enforcement authority;

2. guide the Department of Justice and the Department of the Treasury in evaluating legislative proposals involving grants of Federal law enforcement authority; and

3. guide OMB in making recommendations concerning:

(a) the submission of such legislative proposals to Congress; and

(b) the signing by the President of enrolled bills involving grants of Federal law enforcement authority.