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11/15/83

THE WHITE HOUSE
WASHINGTON

TO:

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SAC
ASR ✓

FROM: Richard A. Hauser
Deputy Counsel to the President

FYI: _____

COMMENT: _____

ACTION: _____

My recollection is that a
memo setting forth our
objections to the draft SPIN
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and forwarded to Dtg where,
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THE WHITE HOUSE
WASHINGTON

July 7, 1983

FOR: FRED F. FIELDING
RICHARD A. HAUSER ←

FROM: PETER J. RUSTHOVEN *AB*
SHERRIE M. COOKSEY *enc*
JOHN G. ROBERTS, JR. *JGR*

SUBJECT: Final Draft of the SPIN
Report for the Attorney General

OVERVIEW

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*FBI
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Recommendation number four on page 43 is one with which we absolutely disagree. As we have discussed previously, we do not believe that it is in the best interest of this Administration or any President to attempt to reach a formal agreement with the Senate through which all SPIN material necessary for the exercise of the Senate's advice and consent responsibilities would be provided to it by the FBI. We believe that providing any SPIN information to the Senate is wholly at the prerogative of the President and should be governed by past practices and traditions as well as the facts of each particular nomination. We do not believe that a formal agreement would in any way advance the President's interests.

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CONCLUSIONS AND RECOMMENDATIONS

Based on the foregoing, we recommend you discuss this matter privately with Ed Schmults at your earliest convenience, and secure an agreement from Schmults that certain changes will be made in this report prior to its finalization. Additionally, we seriously question whether this report should be made public at any time. Finally, we recommend that you advise Schmults, if necessary, that we are prepared to disavow this report if it is not changed and is released in its current form, and that, if the Attorney General sends this report in its current form to us, we will not adopt its recommendations.

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THE WHITE HOUSE

WASHINGTON

May 25, 1984

MEMORANDUM FOR PETER J. RUSTHOVEN
SHERRIE M. COOKSEY
JOHN G. ROBERTS, JR.

FROM: RICHARD A. HAUSER *RAH*

SUBJECT: Final Draft of the SPIN Report for the
Attorney General

We have been advised that the Attorney General and Director Webster wish to finalize the SPIN Report. Mr. Fielding has scheduled a meeting for Tuesday, May 29, 1984, after the staff meeting to discuss this issue. Please let me know as soon as possible if you have additional comments. Your earlier memorandum is attached.

Thank you.

Attachment

THE WHITE HOUSE

WASHINGTON

July 7, 1983

FOR: FRED F. FIELDING
RICHARD A. HAUSER

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COMMENTS ON SECTION V

We disagree with the recommendation set forth at the top of page 42 that an Executive Order and Attorney General guidelines should establish the procedures governing the initiation of SPIN investigations and dissemination of the results of such investigations. In our opinion, there should be no formalization of the Memorandum of Understanding (MOU) executed between the transition and the FBI other than to include within the MOU a clause that such memorandum will continue throughout the tenure of the President-elect's term in office. Obviously, MOU's are much more flexible (and less public) documents, whereas any change in an Executive Order to meet the problems of a particular case could invite public and media scrutiny and criticism.

The second recommendation on page 42 is not objectionable to the extent that it recommends that short investigative deadlines should be avoided wherever possible; however, we do disagree with the paragraph in that recommendation that refers to "best efforts" investigations. As stated previously, we do not believe this "category" of investigations should be created or recognized.

We do not disagree with the recommendation at the top of page 43 that, as a general rule, the name of a nominee should not be formally announced, and confirmation hearings should not be scheduled, until the White House Counsel's Office has an opportunity to review the results of the background investigation. We recommend, however, that the fact that this is the current practice in the White House be included in discussion of this recommendation. Furthermore, the process has to remain flexible to accommodate the occasional need of the President to announce immediately his intention to nominate an individual to fill a vacant position; thus, we recommend against an inflexible rule on announcements of intentions to nominate.

Recommendation number four on page 43 is one with which we absolutely disagree. As we have discussed previously, we do not believe that it is in the best interest of this Administration or any President to attempt to reach a formal agreement with the Senate through which all SPIN material necessary for the exercise of the Senate's advice and consent responsibilities would be provided to it by the FBI. We believe that providing any SPIN information to the Senate is wholly at the prerogative of the President and should be governed by past practices and traditions as well as the facts of each particular nomination. We do not believe that a formal agreement would in any way advance the President's interests.

With respect to recommendation five on page 44, we note merely that we do not wish to foreclose the possibility that the FBI may be called upon to testify for Senate confirmation committees.

Finally, with respect to the recommendation on page 44 for a SPIN Czar, we cannot really comment until the proposal is better explained.

CONCLUSIONS AND RECOMMENDATIONS

Based on the foregoing, we recommend you discuss this matter privately with Ed Schmults at your earliest convenience, and secure an agreement from Schmults that certain changes will be made in this report prior to its finalization. Additionally, we seriously question whether this report should be made public at any time. Finally, we recommend that you advise Schmults, if necessary, that we are prepared to disavow this report if it is not changed and is released in its current form, and that, if the Attorney General sends this report in its current form to us, we will not adopt its recommendations.

SECTION IV

THE RELATIONSHIP BETWEEN THE WHITE HOUSE AND THE FBI, AND THE WHITE HOUSE AND THE SENATE

At the core of a reexamination of the conduct of Special Inquiry background investigations lies the need to better understand the relationships between the White House and the FBI, and between the White House and the U.S. Senate. The purpose of this chapter is to review both of these relationships.

Relationship Between the White House and the FBI

With two major exceptions, the President has delegated to his Counsel's Office the responsibility for reviewing FBI background reports and making recommendations concerning the background and qualifications of potential nominees. The exceptions involve nominations for ambassadorships, which have been delegated to the Secretary of State, and for judgeships, U.S. Attorneys and U.S. Marshals, which have been delegated to the Attorney General. Yet, even with these exceptions, the final recommendations of each Department are subject to de novo review, when appropriate, by the Counsel to the President. The Attorney General, however, except in unusual circumstances, plays no role in the SPIN process; rather, there is a direct relationship between the White House Counsel and the FBI.

The FBI's objective in SPIN inquiries is to conduct a thorough investigation of the background of prospective senior Executive Branch officials, and to provide the results to the White House Counsel in a form that can be easily but effectively reviewed. The investigation focuses principally upon the character, associations, reputation, and loyalty of the nominees. In essence, the report should identify any potential problem areas in the candidate's background so that they may be considered as part of the total evaluation of the individual's qualifications to hold high public office.

Notwithstanding the FBI's experience of more than three decades in conducting background investigations on Presidential nominees, certain misunderstandings concerning SPIN inquiries can occur between the White House and the FBI. Inasmuch as Executive Branch routines and relationships with respect to the SPIN process largely take shape during a Presidential transition and in the first months of a Presidency, this period must be the focal point of any effort to clarify or improve the process.

The members of each President-elect's Transition Team and the White House staff of a newly inaugurated President are often new to the Washington environment, and unfamiliar with the details of the appointments process. They are faced with enormous pressures to process a large volume of applications, identify nominees, and put the new Administration in place as rapidly as possible. Moreover, they are constrained to avoid or minimize premature publicity about potential nominees.

The pressures of a Presidential transition are shared by those in the FBI responsible for conducting SPIN inquiries. They must conduct hundreds of background investigations on high-level nominees during the first year of the

new Administration. This is a tremendous burden, and the burden is made even greater by the short deadlines often imposed. When the Transition Team and White House officials settle on a nominee for an important or controversial position, they usually want the background investigation completed promptly so that the President can begin his term with his own team in place. When a nomination must be confirmed by the Senate, a date for a Committee hearing may be set even before the background investigation has begun. Sometimes, short deadlines are set by the Transition Team and White House staff to lessen the risk that news of the appointment will leak before it is announced or that erroneous rumors will gain currency.

The imposition of short deadlines inevitably has an impact upon the conduct of a background investigation. When the Transition Team imposes such deadlines on the FBI, it must recognize that it is getting a "best efforts" investigation. Perhaps most troubling, this effect may not be observable to those unfamiliar with background investigations, because it may result from subtle shortcuts rather than glaring omissions. For instance, interviews that would generally be conducted in person may be handled by telephone; where an individual may be less likely to be candid and open. Leads that are not likely to be productive, but conceivably may open new avenues of investigation, are less likely to be pursued.

The problem of short deadlines points to a more fundamental issue in the SPIN process--the different institutional interests of the FBI and the Transition Team. The FBI's interest is to conduct a high-quality SPIN investigation and provide the results in a clear, complete, and timely manner to the Transition Team. It is not interested in whether or not the report is favorable to the nominee, as long as it is accurate and fair. The Transition Team, of course, is deeply interested in the content of the report; it does not want to nominate an individual who will embarrass the President or not serve him with integrity. However, before an individual's name is provided to the FBI for background investigation, his credentials and talents have already been carefully examined by the Transition Team and found worthy of consideration for an appointment. Once this decision is made, the background investigation may be treated as a procedural hurdle to be overcome without complications, particularly if they result in delay and controversy. Ideally, the Transition Team should view the background investigation as an opportunity for a more informed selection and not merely as a necessary formality in the selection process.

This difference in institutional interests is most pronounced when a background investigation is requested after public announcement of the nominee's name. A Common Cause critique of the nomination process in the Carter Administration addressed this phenomenon. It cited a Senate staff member's criticism that, once a decision to nominate someone had been made by the President, the Counsel's Office was placed in a defensive posture and became an advocate for the nominee, a process that did not lead to meaningful scrutiny.^{1/} Moreover, individuals may be more reluctant to provide the FBI with information adverse to the nominee if the President has already formally

declared his selection. For these reasons, premature public announcement is discouraged by the White House Counsel's Office, but it can sometimes not be helped, such as when an official is removed and his replacement must be immediately named or when false rumors of an appointment create a political problem for the Administration.

Another major problem faced during transition is that the Transition Team handling this onslaught of appointments generally has little or no benefit of the experience gained by earlier White House staffs in reviewing SPIN reports and making applicant determinations. As a result, each new Transition Team and White House staff must be told anew about the scope and depth of a SPIN investigation, so that they understand what it is--a series of interviews and record checks--and what it is not--a certification that the nominee is fit to hold office. They must be advised how to assess the reliability and knowledge of confidential sources providing derogatory information, and they must be informed that the FBI can seek to resolve their questions either by providing them access to more detailed investigative reports or by conducting additional investigation. Moreover, they should understand their prerogative to request the FBI to broaden its SPIN investigation beyond its usual confines to focus on certain areas of concern for a particular nominee, such as potential conflicts of interest.

The FBI in the past has briefed relevant Transition Team members concerning the SPIN process, but the briefings do not appear always to have achieved the necessary degree of understanding. It would be helpful if the FBI prepared a detailed briefing book describing the SPIN process and the relationship between the Transition Team and the FBI. The oral briefing provided by the Bureau could then correct misunderstandings, answer questions, and build the personal rapport that will be essential during this critical time. The Section Chief and Unit Chief in charge of SPINs must continue to be available to the Transition Team on a daily basis.

There is an additional change that ought to be considered. At the present time, senior officials of different offices within the Department of Justice have separate responsibility for the review of individual categories of DAPLI reports, that is, U.S. Attorneys, U.S. Marshals, and Federal judges. No one official in the Department has an overall review role or central coordinating responsibility. If one official were selected to provide a central point of control within the Department for DAPLI reports, this could aid the FBI in setting priorities. This experience and insight would also be available to the White House Counsel's Office if it sought such advice.

The problems of short deadlines and misunderstandings grow less serious after the early months of an Administration; by then, the pace of new appointments slackens and the Counsel to the President becomes more accustomed to the SPIN process. However, one problem that does not face the Transition Team emerges once the new President takes office--the absence of a formal document governing the authorization of a SPIN investigation, the steps taken to protect the privacy of SPIN reports, and the safeguards provided for those interviewed who requested confidentiality.

Each of these areas was covered during the transition periods of both Presidents-elect Carter and Reagan by a Memorandum of Understanding signed by the President-elect and the Attorney General. The Memorandum of Understanding protects against background investigations being requested for improper purposes by requiring the request to be in writing from the President-elect or his designee, and to be accompanied by the written consent of the person to be investigated. It protects against the unnecessary dissemination of SPIN reports by restricting access to the material to the President-elect, his designated representatives, and others directly involved in deciding the individual's suitability for the position. To give teeth to the need-to-know requirement, it prohibits copies to be made of the reports, mandates that records be kept of who is given access, and requires the reports to be returned to the FBI if a decision is made not to employ the candidate. Finally, the Memorandum of Understanding recognizes the interest of those interviewed in confidentiality and the importance of such confidentiality to the success of a background investigation by promising to keep identifying information confidential to the extent permitted by law.

However, the Memorandum of Understanding does not apply beyond the transition, and efforts to replace it with an Executive Order have not been pursued. Guidelines were formulated under Attorney General Levi, but they were never enacted by Executive Order. Fortunately, the absence of an Executive Order has not yet created significant problems, because both the White House and the FBI informally follow the procedures embodied in the Memorandum of Understanding. Yet, there remains a need for such a document to serve as a safeguard against possible misuse and as a formal statement of the role and responsibilities of each participant in the SPIN process.

Relationship Between the White House and the Senate

As described in Section I, the appointment of such high Government officials as Cabinet Secretaries, Ambassadors, and Judges requires the President to nominate and the Senate to confirm. To perform these separate constitutional roles, the President and the Senate each need accurate and candid information about the character and integrity of the nominee. It is the FBI's task to investigate the background of the nominee and provide this essential information.

The need of the President and the Senate for the results of the FBI's investigation, however, must be balanced with two other important considerations--the nominee's interest in not having his reputation damaged by unsubstantiated allegations which may arise during the background investigation and the interest of those interviewed in not having their identities revealed. These latter interests are consistent with the larger institutional interests of the White House and the Senate. Leaks of information that unfairly challenge the integrity and reputation of nominees harm the innocent and discourage individuals of ability from accepting positions in Government. Breaches of promises of confidentiality injure those individuals who often were most candid in discussing the nominee and make future background investigations less effective by discouraging that candor in others.

Unfortunately, individuals in both the White House and the Senate may sometimes lose sight of these larger interests in focusing upon transient political or personal interests, and publicly reveal information that should best remain private. The Transition Team, in its Memorandum of Understanding with the Attorney General, has sought to limit this danger by imposing the restrictions cited above.

The safeguards of limited access and accountability provided in the Memorandum of Understanding should be adopted by the White House and the Senate in a formal agreement governing the consideration of all advise-and-consent nominations. These matters are too important to be left to informal understandings or ad-hoc agreements with different Committee Chairmen. Moreover, for many nominations, time is of the essence, and an agency should not be left without leadership while the White House and the confirming Senate Committee hammer out their differences concerning access to background material. A single agreement, such as an Executive Order, a resolution of the Senate, or a written understanding, signed by the President and approved by the Senate, should govern the manner in which every Committee receives and protects information regarding the background of an advise-and-consent nominee.

Currently, the FBI provides the Office of the Counsel to the President with a summary memorandum reporting the results of the SPIN investigation and with the full text of interviews containing derogatory information. Once this information is provided to the White House Counsel, the FBI's role in the nomination ends, unless, of course, additional information or investigation is requested. The FBI plays no part in providing the necessary information to the Senate; that task is handled by the White House Counsel. If the full text of derogatory interviews is provided to the Senate, the FBI is provided an opportunity to excise the text to protect the confidentiality of the individuals interviewed.

It is essential to preserve the FBI's role as an impartial, nonpartisan investigator providing background information to the President concerning a political nominee for high office. First, it is only fair that the President have the benefit of this information before it reaches the Senate. He enjoys the constitutional prerogative to nominate, and he deserves the opportunity to study the SPIN report and decide whether to pursue the nomination or withdraw it. Only if he decides to pursue it need the information be provided to the Senate. Second, the FBI should not be asked to provide SPIN information directly to the Senate. The appointment of an advise-and-consent nominee requires the interplay and ultimate agreement of the White House and the Senate. If the Senate believes it needs additional information to carry out its advise-and-consent function, it should request such information from the White House. If the White House concurs, it can request the FBI to provide it with additional information and pass on this information to the Senate. If it demurs, it can negotiate a satisfactory arrangement with the Senate, recognizing that the fate of the nomination may lie in the balance. The FBI should not be drawn into this essentially political dispute. The FBI has no stake in the appointment and placing it in this position will only endanger the independence and objectivity upon which both the White House and the Senate must necessarily rely.

Similarly, the FBI should not be requested by the Senate Committee considering confirmation to testify regarding the background investigation of the nominee. Such testimony almost inevitably places the FBI in the uncomfortable and untenable position of being asked to characterize the fitness of the nominee. The FBI investigates the background of a nominee; it is neither its role nor does it have the special expertise to determine his fitness for office. Such a determination must be left to White House officials and the Senate on the basis of information provided by the FBI. Moreover, it is extremely difficult for an FBI official during Senate testimony to answer questions candidly and completely, and, at the same time, protect the identity of confidential sources. This delicate task is best performed in writing, where words can be chosen more carefully and agents involved in the background investigation can examine the work product to ensure that the identities of sources cannot be determined from the information provided. Putting all information in writing also means that the White House can effectively serve as the conduit for both the questions and the answers, thereby giving the President the benefit of the information before it goes to the Senate and protecting the FBI from being caught in the middle of a political dispute.

FOOTNOTES

- 1/ Bruce Adams and Kathryn Kavanaugh-Baran, Common Cause, Promise and Performance: Carter Builds a New Administration (Lexington, Massachusetts; Toronto: Lexington Books, D.C. Heath and Company, 1979), p. 94.

SECTION V

SUMMARY AND RECOMMENDATIONS

Summary

The FBI and the White House have developed a workable arrangement for investigating the backgrounds of Presidential nominees.

A request for a background investigation is made in writing by the Office of the Counsel to the President, accompanied by appropriate waivers from the prospective nominee. This request specifies whether or not the position is subject to Senate confirmation. The scope of the basic SPIN investigation is firmly established, but the White House has the opportunity to state more precisely its requirements or priorities in particular cases.

The FBI imposes a usual deadline of 10 workdays on its field offices to complete the SPIN investigation and attempts to provide the White House Counsel's Office with the results of the investigation in 25 calendar days.

The results of SPIN inquiries are furnished in a summary memorandum supplemented with the complete text of interviews containing derogatory information. The names of those who requested that their identity not be disclosed outside the FBI are not furnished to the White House. The White House Counsel's Office may request the FBI to conduct additional investigation if deemed necessary, or may ask to review the investigative reports, albeit with appropriate safeguards to preserve the confidentiality of sources. The FBI provides assistance to the White House in assessing the weight to be given to information furnished by persons afforded confidentiality.

When the President decides to present the nomination to the Senate for advice and consent, the White House Counsel provides the appropriate Senate Committee with the relevant FBI background information necessary to make an informed decision about confirmation.

These procedures are sensible and should be continued. However, some shortcomings remain in the SPIN process which need to be addressed as recommended below.

Recommendations

1. Formalization of Procedures

There have been a number of attempts over the years to formalize SPIN procedures, including the preparation of guidelines and the drafting of an Executive Order, but none have been formally implemented. The only exceptions have been pre-inaugural Memoranda of Understanding between the President-elect and the Attorney General, which have no formal application beyond the transition period.

The absence of an Executive Order or other formal agreement has not yet created significant problems, because both the White House and the FBI informally follow the procedures embodied in the Memorandum of Understanding. Yet, there remains a need for such a document to serve as a safeguard against possible misuse and as a formal statement of the role and responsibilities of each participant in the SPIN process. Formalization of mutually agreed-upon procedures, which could either be modified or adopted in whole by each incoming Administration, would help in resolving misunderstandings which have arisen over the use and interpretation of SPIN inquiries, as well as permit a degree of flexibility over time.

Recommendation: Procedures governing the initiation of background investigations of White House nominees and dissemination of the results should be established by Executive Order, or other formal agreement, and appropriate Attorney General Guidelines.

2. Investigative Deadlines

The Transition Team and the staff of a newly inaugurated President are faced with enormous pressures to process a large volume of applications, identify nominees, and put the new Administration in place as rapidly as possible. These pressures are shared by those in the FBI responsible for conducting SPIN inquiries. Hundreds of background investigations on high-level nominees are conducted during the first year of a new Administration. This is a tremendous burden, one that is made even greater by the short deadlines often imposed.

When the Transition Team and White House officials settle on a nominee for an important or controversial position, they usually want the background investigation completed promptly. When a nomination must be confirmed by the Senate, a date for a Committee hearing may be set even before the background investigation has begun. Sometimes, short deadlines are set by the Transition Team and White House staff to lessen the risk that news of the appointment will leak before it is announced or that erroneous rumors will gain currency.

The imposition of short deadlines inevitably has an impact upon the conduct of a background investigation. When that happens, the Transition Team must recognize that it is getting a "best efforts" investigation.

Recommendation: To the extent possible, the White House Counsel's Office should avoid the imposition of short investigative deadlines and allow adequate time for complete and comprehensive background investigations of all nominees.

3. Scheduling of Confirmation Hearings

The White House Counsel's Office comes under particular pressure when a background investigation is requested after public announcement of the intended nomination or when confirmation hearings on the nominee have been scheduled prior to completion of the background investigation. Reviewing officials in the White House may be forced prematurely into a defensive posture or an advocacy position on behalf of the nominee. From the FBI's perspective, an individual being interviewed may be more reluctant to provide information potentially adverse to the nominee if the President has already formally declared his selection.

Recommendation: As a general rule, the name of a nominee should not be formally announced nor should confirmation hearings be scheduled until the White House Counsel's Office has had an opportunity to review the results of the background investigation.

4. Formal White House-Senate Agreement

The constitutional arrangement regarding Presidential appointments clearly contemplates a spirit of accommodation and cooperation between the Executive and Legislative Branches. Therefore, the policies governing the President's submission of nominations to the Senate, and the scope of the background information which is provided, must take into account the sharing of power which governs the appointment process.

To perform their respective constitutional roles, the President and the Senate must have accurate information about the character and integrity of a nominee. These needs, however, must be balanced both with the nominee's concern that his reputation not be damaged by unsubstantiated allegations and with the sensitivity of those interviewed to not having their identities revealed.

The safeguards of limited access and accountability are too important to be left to informal understandings or ad hoc agreements with Committee chairmen. An agreement, such as an Executive Order, a resolution of the Senate, or a written understanding, signed by the President and approved by the Senate should govern the manner in which every Committee receives and protects information regarding the background of a Presidential nominee.

Recommendation: Each Administration should reach a formal agreement with the Senate through which all SPIN material necessary for the fulfillment of the "advise and consent" function would be provided under conditions which secure the confidentiality of all sensitive information, sources, and methods.

5. Role of the FBI

The Donovan matter resulted in the unprecedented occurrence of FBI officials testifying at the Senate confirmation hearing as to the conduct and results of a background investigation. This case was also unique in two other respects. It was the first time that the FBI has furnished such information directly to the Senate, rather than by way of the White House, and it was the first occurrence of Senate committee staff members being permitted to interview an FBI source in a background investigation.

It is essential to preserve the FBI's role as an impartial, nonpartisan investigator providing background information to the President concerning a political nominee for high office. This is best accomplished when the FBI provides information concerning a potential nominee to the White House Counsel's Office, which would then forward this information to the appropriate Senate Committee. The appointment of an advise-and-consent nominee requires the interplay and ultimate agreement of the White House and the Senate. The FBI should not be drawn into this essentially political dialogue. The FBI has no stake in the appointment and placing it in this position will only endanger the independence and objectivity upon which both the White House and the Senate must necessarily rely.

Nor should the FBI be requested by the Senate Committee considering confirmation to testify regarding the background investigation of the nominee. Such testimony almost inevitably places the FBI in the uncomfortable and untenable position of being asked to characterize the fitness of the nominee. The FBI investigates the background of a nominee; it is not its role, nor does it have the special expertise, to determine the nominee's fitness for office. Such a determination must be left to White House officials and the Senate on the basis of information provided by the FBI.

Recommendation: The FBI should be neither expected nor requested to provide background information from SPIN investigations directly to the Senate. The Senate should obtain the information it requires directly from the White House in accordance with mutually satisfactory agreements.

THE WHITE HOUSE

WASHINGTON

December 6, 1984

MEMORANDUM FOR FRED F. FIELDING
RICHARD A. HAUSER

FROM: SHERRIE M. COOKSEY *SMC*
SUBJECT: Comments to the Justice Department
on the Draft SPIN Report

Attached, per your request, is a proposed memorandum to the Deputy Attorney General detailing our concerns on the draft SPIN Report. That memorandum is based on the critique Peter, John and I did on this some time ago. Although the proposed memorandum to Dinkins may seem harsh, it is, in my opinion, an accurate reflection of our previously discussed concerns on this matter.

The draft report on which we are commenting is attached at Tabs A and B. (Unfortunately, my files contained only a marked-up version of that report.) For your background, you may want Dianna to pull Fred's copy of the earlier critique of this report, as it contained Fred's marginal notes and assessments.

cc: Peter J. Rusthoven
John G. Roberts ←

THE WHITE HOUSE

WASHINGTON

December 6, 1984

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Draft SPIN Report for the Attorney General

This will respond to your request for comments on the draft SPIN Report to the Attorney General. As we have discussed, this Office continues to have serious reservations about the language, conclusions and recommendations contained in that Report, particularly in Sections IV and V. Given our continuing reservations and the various adjustments that have been made in the SPIN process over the past few years, we seriously question the need for this Report. If, however, you determine that it is necessary to proceed with this matter, we would hope that this draft would be carefully revised to reflect our comments before it is deemed final, and would also want to be apprised fully of any further actions by the Department on this matter.

GENERAL COMMENTS ON DRAFT SPIN REPORT

As a general matter, we candidly believe that much of this Report is self-serving and unfair in its characterizations of the knowledge and awareness of White House officials, in this and previous Administrations, with respect to the conduct and sensitivity of SPIN investigations.

We also disagree with the report's recommendations of obtaining a Senate Resolution establishing a uniform procedure for the confidential treatment of SPIN investigative reports, and issuing of an Executive Order formalizing all aspects of the SPIN process. In our view, these actions would serve only to frustrate Presidential needs for flexibility in the SPIN process. Indeed, it seems that many of the comments and recommendations of this Report have been made without adequate consideration of the fact that SPIN reports are done for the President's use in evaluating the individuals he may wish to appoint to high-ranking Federal positions, and are not meant to supercede or replace any reviews by other Governmental entities of the background, qualifications or activities of Presidential nominees.

COMMENTS ON SECTION IV

Paragraph 5 of page 34 implicitly suggests that members of the 1980 Presidential transition and of previous transitions were ignorant of the standard requirements of the Presidential appointments process. To our knowledge, these suggestions are inaccurate; as best we can establish, each Republican President since Eisenhower has had experienced Washington hands helping him with his transition. Accordingly, we recommend that this paragraph be revised to eliminate the suggestions that Presidential transitions lack appointments process expertise.

On page 35, the first full paragraph states that short SPIN investigation deadlines are difficult for the FBI to meet and contains the sentence: "When the transition team requests the FBI to do in in five days what generally takes 14, it must recognize that it is getting a 'best efforts' investigation." This sentence introduces a new term, the "best efforts" investigation. We disagree with this term, and strongly object to the concept that the FBI is not responsible for providing to the President a full and complete SPIN investigation on each of his nominees. If the FBI cannot complete an investigation in the time requested, it should so advise the White House; under no circumstances should it provide the President an incomplete and potentially inaccurate and misleading SPIN Report which may subsequently be characterized as only a "best efforts" product.

The remaining paragraphs on page 35 discuss the supposed "different objectives" of the FBI and the transition team for SPIN investigations. The FBI's interest is to "conduct a high quality SPIN investigation and provide the results in a clear and complete and timely manner to the transition team". The transition team is described, however, as requiring the SPIN investigation merely to ratify the President's decision to nominate an individual: "the background investigation may be treated [by the transition team] as a procedural hurdle to be overcome without complications, particularly if they result in delay and controversy."

These paragraphs suggest that the President's Counsel will not have the integrity or intestinal fortitude to act upon derogatory information provided by the FBI on a candidate after a public announcement of that candidate's pending appointment has been made. We find this suggestion both inaccurate and offensive; accordingly, we recommend deletion of the provisions of these paragraphs describing the "different institutional interests" of the FBI and the transition team in the SPIN process. (Perhaps it bears repeating at this juncture that the purpose of a SPIN report is to ensure that the President

is as fully informed as possible of the character and background of the individual he is considering for appointment to a Federal position of trust and responsibility.)

The first full paragraph on page 36 suggests that it is a difficult burden for the FBI to explain the SPIN process to the transition team so that it can understand the scope and depth of SPIN investigations. This is unnecessary, and, in the case of the last transition, incorrect. Also, the last sentence in this paragraph states that the White House should understand that it is its "prerogative" to request the FBI "to broaden" a SPIN investigation beyond its usual confines. Such comment appears to be an attempt to shift the burden for the investigative process and the integrity of the SPIN investigation from the FBI, the Federal agency responsible for such investigations, to the transition team and the White House. Accordingly, this sentence should be deleted, as it is based on false assumptions -- the FBI must be responsible for the scope and quality of a SPIN investigation.

The next three paragraphs on page 36 recommend the creation of an FBI briefing book describing the SPIN process and the relationship between the transition team and the FBI. While such a briefing book could be helpful to a transition team, we are concerned that it could formalize the SPIN investigation process to the point where all flexibility for addressing the unique problems of specific individual investigations would be eliminated. Clearly, if such briefing book were created, it must be understood by all parties that its existence would not preclude the President from asking for additional information in a particular investigation where he deems it necessary. Additionally, given our concerns about the quality of this draft SPIN Report, we would want to review and comment upon such a briefing book before it is put into use.

Another element introduced in these three paragraphs on page 36 is the concept of a "SPIN Czar". The FBI notes that there should be one individual responsible for the coordination of all SPIN reports and responses to any transition team requests. We are not convinced of the need for such a person and are uncertain what that person would do.

The relationship between the White House and the United States Senate is discussed on pages 37-38. Implicit in the opening discussions of this relationship is the idea that the FBI has a co-equal obligation to the Senate with respect to SPIN investigations. We strongly disagree with this concept, as it is the primary responsibility of the FBI, as an agency of an Executive Department, to provide to the President full, complete and accurate information in a SPIN investigation. Any information subsequently provided to the Senate should be

provided by the President, and should not be viewed as fulfilling a responsibility of the FBI to the Senate.

In the first paragraph on page 38, it is suggested that the White House transition team leaked confidential information developed in SPIN investigations to the Senate and to the public. We are unaware of any such leaks by this Office and believe that any suggestion to the contrary should be deleted from this report.

Paragraph two on page 38 recommends that a single agreement signed by the President and approved by the Senate should govern the manner in which every Senate Committee receives, reviews and protects information regarding the background of Presidential nominees. Although there may be some theoretical merit to this idea, we believe it is naive as a practical matter. As you may be aware, there are separate agreements between the White House and various Senate committees with respect to Senate review of SPIN reports. For example, the Senate Judiciary Committee receives the complete background report on judicial and other nominees, and the Committee staff are allowed to review these reports. This procedure is unique to the Judiciary Committee, and it would be unwise to extend it to any other Senate Committee. Moreover, if one were to attempt to negotiate a single agreement with the Senate, the most liberal aspects of any individual agreements previously entered into with separate Senate committees (e.g., permitting staff to review the report and allowing review of the entire background memoranda, rather than just the summary) would be the end result of any Senate approved resolution. Accordingly, we strongly recommend against the inclusion of this paragraph and recommendation in this report.

The third paragraph on page 38 states that the FBI plays no part in providing the necessary SPIN information to the Senate. Recent history, however, directly contradicts that statement, as the FBI responded directly to Senate inquiries on the Donovan SPIN investigation; indeed, that was part of the problem in that investigation. Accordingly, we strongly recommend revision of the third paragraph on page 38 to reflect that the FBI should have no role in independently supplying information to the Senate, but may do so at the direction of the President.

On page 39, the SPIN Report states that the FBI should not be requested by the Senate committees considering confirmation of a Presidential nominee to testify regarding the background investigations of that nominee. While we agree that the FBI should not, as a general matter, be required to testify before the Senate on its findings in a SPIN investigation, we do not

agree that the FBI should absolutely be precluded from testifying before such committees. There may be times where it is appropriate for the FBI so to testify before the Senate, either in open or closed session.

COMMENTS ON SECTION V

We disagree with the recommendation set forth at the top of page 42 that an Executive Order and Attorney General guidelines should establish the procedures governing the initiation of SPIN investigations and dissemination of the results of such investigations. In our opinion, there should be no formalization of the Memorandum of Understanding (MOU) executed between the transition and the FBI other than to include within the MOU a clause that such memorandum will continue throughout the tenure of the President-elect's term in office. Obviously, MOU's are much more flexible (and less public) documents, whereas any change in an Executive Order to meet the problems of a particular case could invite public and media scrutiny and criticism.

The second recommendation on page 42 is not objectionable to the extent that it recommends that short investigative deadlines should be avoided wherever possible; however, we do disagree with the paragraph in that recommendation that refers to "best efforts" investigations. As stated previously, we strongly recommend against the creation or recognition of this new "category" of investigations.

We do not disagree with the recommendation at the top of page 43 that, as a general rule, the name of a nominee should not be formally announced, and confirmation hearings should not be scheduled, until the White House Counsel's Office has had an opportunity to review the results of the background investigation. We recommend, however, that the fact that this is the current practice in the White House be included in discussion of this recommendation. Furthermore, the process has to remain flexible to accommodate the occasional need of the President to announce immediately his intention to nominate an individual to fill a vacant position; thus, we recommend against an inflexible rule on announcements of intentions to nominate.

Recommendation number four on page 43 is one with which we absolutely disagree. As discussed above, we do not consider it to be in the best interest of this or any President to attempt to reach a formal agreement with the Senate through which all SPIN material necessary for the exercise of the Senate's advice and consent responsibilities would be provided it by the FBI. It is our position that providing any SPIN information to the Senate is wholly at the prerogative of the

President and should be governed by past practices and traditions as well as the facts of each particular nomination. Hence, we do not believe that a formal agreement would in any way advance the President's interests.

With respect to recommendation five on page 44, we note merely that we do not wish to foreclose the possibility that the FBI may be called upon to testify during a Senate confirmation proceeding.

Finally, with respect to the recommendation on page 44 for a "SPIN Czar," we would simply reiterate that neither the need for this position nor precisely what it would entail have been adequately explained.