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THE WHITE HOUSE

WASHINGTON

February 13, 1986

MEMORANDUM FOR HILDA SCHREIBER
LEGISLATIVE ANALYST
OFFICE OF MANAGEMENT AND BUDGET

FROM: JOHN G. ROBERTS 
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: OPM's Testimony on H.R. 4033, "The
Whistleblower Protection Act of 1986"

Counsel's Office has reviewed the above-referenced testimony and finds no objection to it from a legal perspective.

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☐ 0 - OUTGOING☐ 11 - INTERNAL☐ 1 - INCOMINGDate Correspondence
Received (YY/MM/DD) 1 1Name of Correspondent: Thom Sweet☐ MI Mail Report

User Codes: (A) _____ (B) _____ (C) _____

Subject: OPM's testimony on H.R. 4033, "The
Whistleblower Protection Act of 1986"

ROUTE TO:

ACTION

DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
<u>CUNHOLL</u>	ORIGINATOR	<u>86.02.13</u>			<u>1 1</u>
<u>Chat 18</u>	Referral Note: <u>B</u>	<u>86.02.13</u>		<u>S</u>	<u>86.02.18</u>
	Referral Note:	<u>1 1</u>			<u>1 1</u>
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ACTION CODES:

A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet
to be used as Enclosure

I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:

A - Answered
B - Non-Special Referral
C - Completed
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

February 12, 1986

SPECIAL

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer
Department of Justice - J. Perkins 633-2113
Merit Systems Protection Board - Paul Trayers
Office of Special Counsel, MSPB - Alma Hepner

SUBJECT: OPM's testimony for 2/20/86 on H.R. 4033, "The Whistleblower Protection Act of 1986."

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than COB, TUESDAY, FEBRUARY 18, 1986.

Questions should be referred to Hilda Schreiber (395-7362) the legislative analyst in this office.

Naomi R. Sweeney for
Assistant Director for
Legislative Reference

Enclosures

cc: F. Seidl
J. Cooney, OGC
White House Counsel
N. Sweeney

SPECIAL

STATEMENT OF
HONORABLE CONSTANCE HORNER, DIRECTOR
OFFICE OF PERSONNEL MANAGEMENT

for the

SUBCOMMITTEE ON CIVIL SERVICE
COMMITTEE ON POST OFFICE AND CIVIL SERVICE
U.S. HOUSE OF REPRESENTATIVES

on

H.R. 4033

THE WHISTLEBLOWER PROTECTION ACT OF 1986

MADAM CHAIRWOMAN AND MEMBERS OF THE SUBCOMMITTEE:

THANK YOU FOR INVITING ME TO PRESENT THE VIEWS OF THE OFFICE OF PERSONNEL MANAGEMENT ON H.R. 4033, THE "WHISTLEBLOWER PROTECTION ACT OF 1986."

DESPITE ITS TITLE, THE BILL IS NOT LIMITED TO WHISTLEBLOWER PROTECTION. IN FACT, IT PROPOSES A MAJOR RESTRUCTURING OF THE FUNCTIONS AND RELATIONSHIPS OF THE OFFICE OF THE SPECIAL COUNSEL AND THE MERIT SYSTEMS PROTECTION BOARD. WE RECOGNIZE THAT THE BILL IS THEREFORE OF PRIME INTEREST TO THOSE AGENCIES. HOWEVER, AS THE CENTRAL PERSONNEL MANAGEMENT AGENCY FOR THE FEDERAL GOVERNMENT, WE ARE CONCERNED THAT THE BILL WOULD CREATE A PROLIFERATION OF MECHANISMS WHICH WOULD NOT HELP THE CAUSE OF LEGITIMATE WHISTLEBLOWERS, BUT WOULD GREATLY ENDANGER THE EFFICIENT OPERATION OF AGENCIES.

THERE IS NO QUESTION OF THIS ADMINISTRATION'S COMMITMENT TO THE WHISTLEBLOWER. IN 1980, THE PRESIDENT PROMISED SUPPORT AND PROTECTION FOR THOSE WHO DISCLOSE FRAUD, WASTE, AND ABUSE IN GOVERNMENT. LEGITIMATE WHISTLEBLOWERS NOT ONLY SAVE THE TAXPAYERS VALUABLE TAX DOLLARS, THEY STRENGTHEN THE MERIT SYSTEM BY HELPING TO ENSURE HONESTY IN GOVERNMENT. THE ONLY QUESTION IS, HOW CAN WE BEST MAKE SURE THAT WHISTLEBLOWERS ARE PROTECTED?

WE AGREE WITH THE SPECIAL COUNSEL THAT THE BEST PROTECTION AGAINST RETALIATION IS VIGOROUS PROSECUTION OF THOSE WHO COMMIT PROHIBITED PERSONNEL PRACTICES AGAINST THOSE WHO DISCLOSE FRAUD, WASTE, OR ABUSE. THE RECENT SUCCESSES OF THE OFFICE OF THE SPECIAL COUNSEL HAVE RECEIVED WIDESPREAD PUBLICITY AND ARE DRAMATIC EXAMPLES OF THE INTANGIBLE, BUT REAL, PREVENTIVE VALUE OF VIGOROUS ENFORCEMENT. WHILE MUCH HAS BEEN MADE OF THE LOW PERCENTAGE OF WHISTLEBLOWER CASES THAT ARE ACTUALLY PROSECUTED, THERE IS A SIMPLE EXPLANATION. ACCORDING TO THE GENERAL ACCOUNTING OFFICE, THE FACT IS THAT FEW OF THE CASES RECEIVED BY THE OFFICE OF THE SPECIAL COUNSEL HAVE SUFFICIENT MERIT TO WARRANT PROSECUTION. BY SCREENING OUT FRIVOLOUS CASES, WORKING TO RESOLVE CASES INFORMALLY, AND VIGOROUSLY PURSUING LEGITIMATE WHISTLEBLOWER CASES, THE SPECIAL COUNSEL HAS MADE GREAT PROGRESS IN PROTECTING WHISTLEBLOWERS AND PROMOTING EFFICIENCY IN GOVERNMENT.

ALTHOUGH THE FACTS DO NOT SUPPORT A CONCLUSION THAT THERE IS A PROBLEM, THE BILL WOULD RADICALLY ALTER THE SYSTEM FOR HANDLING WHISTLEBLOWER COMPLAINTS, AND RESTRUCTURE THE RELATIONSHIP BETWEEN THE BOARD AND THE SPECIAL COUNSEL. I WILL DEFER TO THE OFFICE OF THE SPECIAL COUNSEL, THE MERIT SYSTEMS PROTECTION BOARD, AND THE DEPARTMENT OF JUSTICE TO DISCUSS IN DETAIL THE PROCEDURAL CHANGES AND THE EXPANSION OF LITIGATION AUTHORITIES PROPOSED BY THE BILL. BUT I DO WANT TO POINT OUT THE GENERAL CONCERN WE HAVE ABOUT THE BILL'S IMPACT ON PERSONNEL MANAGEMENT IN THE FEDERAL GOVERNMENT.

THERE IS A BALANCE THAT MUST BE STRUCK BETWEEN PROVIDING GREATER PROTECTION FOR WHISTLEBLOWERS AND THE NECESSITY FOR EFFICIENT AND ORDERLY OPERATION OF AGENCIES. AS GAO HAS TESTIFIED, "UNRESTRAINED WHISTLEBLOWING COULD RAISE LEVELS OF DISSIDENCE AND INSUBORDINATION TO THE POINT WHERE EFFICIENCY COULD BE AFFECTED." BECAUSE OF THE PROLIFERATION OF REMEDIES PROVIDED BY THE BILL, DISGRUNTLED EMPLOYEES COULD FLOOD THE OFFICE OF THE SPECIAL COUNSEL AND THE MERIT SYSTEMS PROTECTION BOARD WITH SPURIOUS COMPLAINTS. THE OFFICE OF THE SPECIAL COUNSEL WOULD BE REQUIRED TO ESTABLISH AN ATTORNEY-CLIENT RELATIONSHIP WITH EVERY COMPLAINANT WHO COMES THROUGH THE DOOR. THAT OFFICE WOULD BE DEPRIVED OF ANY OPPORTUNITY TO SCREEN OUT FRIVOLOUS CASES AND WOULD NOT BE ABLE TO CONCENTRATE ATTENTION AND RESOURCES

ON LEGITIMATE WHISTLEBLOWERS. TO COMPOUND THE PROBLEM, THE BILL PROVIDES FOR DE NOVO REVIEWS IN THE COURTS FOR EMPLOYEES WHO ARE DISSATISFIED WITH THE ACTIONS OF THE SPECIAL COUNSEL OR MSPB. THIS PROVISION WOULD WEAKEN THE AUTHORITY OF BOTH AGENCIES AND PLACE A FURTHER STRAIN ON THE ALREADY OVERBURDENED FEDERAL COURT SYSTEM, WHEN WE HAVE IN PLACE A FUNCTIONING ADMINISTRATIVE PROCEDURE FOR RESOLVING WHISTLEBLOWER COMPLAINTS.

I THINK THAT THE MAJOR FLAW OF THIS BILL IS THAT IT DOES NOT RECOGNIZE THAT THE OFFICE OF SPECIAL COUNSEL IS BUT ONE LINK IN THE PROCESS FOR RESOLVING WHISTLEBLOWER COMPLAINTS. AS GAO CONCLUDED, "OTHER INSTITUTIONS, INCLUDING THE PRESIDENT, THE CONGRESS, THE MEDIA, THE COURTS, AGENCY LEADERSHIP AND APPEALS SYSTEMS, THE MERIT SYSTEMS PROTECTION BOARD, AND INSPECTORS GENERAL ARE ALSO INVOLVED IN SUPPORT FOR THE ROLE OF WHISTLEBLOWERS IN GOVERNMENT." IT MAY BE, AS GAO SUGGESTS, THAT THE REASON THE OFFICE OF THE SPECIAL COUNSEL RECEIVES SO FEW LEGITIMATE WHISTLEBLOWER CASES IS THAT MOST OF THESE ARE RESOLVED THROUGH OTHER MEANS. FROM OUR PERSPECTIVE, THAT IS AS IT SHOULD BE. CERTAINLY, THE PRESIDENT HAS EXPRESSED HIS SUPPORT FOR WHISTLEBLOWERS. IF THERE ARE PROBLEMS IN THE CURRENT SYSTEM, WE MUST ALL WORK TOGETHER TO INSURE THAT WHISTLEBLOWERS CAN STEP FORWARD WITHOUT FEAR OF REPRISAL. THEIR CAUSE WILL NOT BE HELPED, HOWEVER, BY MAKING THE OFFICE OF THE SPECIAL COUNSEL THE

FIRST RESORT FOR ALL THOSE EMPLOYEES WHO ARE ALREADY INUNDATING THE SPECIAL COUNSEL WITH GRIEVANCES NOT RELATED TO THE NECESSITY FOR PROTECTION OF LEGITIMATE WHISTLE-BLOWERS. H.R. 4033 WOULD LESSEN THE LIKELIHOOD THAT THE LEGITIMATE WHISTELEBLOWER'S CASE WOULD RECEIVE THE PROPER ATTENTION, AND INCREASE THE PROBABILITY OF DISRUPTION TO AGENCIES AT A TIME WHEN EVERYONE IS BEING ASKED TO DO MORE WITH LESS.

FOR THESE REASONS WE ARE STRONGLY OPPOSED TO THIS BILL.

THANK YOU.