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THE WHITE HOUSE

Status of Review of the Executive Residence

Statement of Robert P. Murphy, General Counsel

GAO/T-OGC/AIMD-98-12

Mr. Chairman, Mr. Hoyer, and Members of the Subcommittee:

We are pleased to be here to discuss the status of our work on the number of overnight guests and stays in the Executive Residence at the White House. On March 20, 1997, the Subcommittee asked us to conduct three assignments: (1) an audit of certain fiscal year 1996 expenditures, including those to operate the Executive Residence, that are accounted for solely on the certificate of the President or the Vice President and referred to as "unvouchered activities"; (2) a review of certain processes and procedures relating to reimbursable expenditures of the Executive Residence, such as those for political events; and (3) a review of the number and cost of overnight stays in the Executive Residence since January 1993.

The first assignment is proceeding on schedule. We are auditing the unvouchered expenditures as provided in sections 105(d) and 106(b) of title 3, United States Code. These provisions authorize GAO to examine all necessary books, documents, papers, and records related to certain unvouchered expenditures of the President and Vice President. Under these sections, GAO verifies that the unvouchered expenditures were for authorized purposes and reports any unauthorized expenditures to the Congress. Since the enactment of these provisions in 1978, we have conducted audits of presidential and vice presidential unvouchered expenditures for six fiscal years: 1979, 1980, 1982, 1986, 1988, and 1991. In each case, we reported to the Congress that the expenditures reviewed were made for authorized purposes.

As in prior years, we are auditing presidential and vice presidential unvouchered expenditures for fiscal year 1996 at the Executive Residence, the White House Office, the National Park Service, and the Vice President's Residence. We expect to complete this work and issue our audit report early next spring, which is generally consistent with the timeframe for our previous unvouchered expenditure audits.

The second assignment also is proceeding on schedule. The review of reimbursable expenditures of the Executive Residence involves official and nonofficial events, as well as personal expenses of the First Family. Because they are initially treated as unvouchered expenditures financed from the Executive Residence at the White House, Operating Expenses appropriation, we are reviewing the reimbursement processes and procedures as part of our unvouchered audit. For example, work is underway to assess whether fiscal year 1996 White House events were

properly classified as reimbursable and nonreimbursable, whether the amounts billed for reimbursable activities were properly authorized and adequately supported, and whether the collections were promptly received.

GAO Review of the Number of Overnight Guests and Stays at the Executive Residence

As you know, in connection with requests that we determine the average cost of an overnight stay at the Executive Residence and provide information on related overtime compensation for domestic staff within the Executive Residence, the Subcommittee asked us to determine the number of persons who were overnight guests in the Executive Residence and the total number of overnight stays since January 1993. The White House has publicly stated that there were 938 overnight guests and 831 of their names have been reported in the media. The White House told us that the names of the remaining people were not provided in order to preserve the privacy of the First Family. We understand that White House staff or other government employees who stayed overnight in the Executive Residence are not included in the total of 938 overnight guests. The White House has not stated how many nights the listed guests stayed. We have made no progress in confirming the aggregate number of overnight guests and determining the number of stays within the Executive Residence because we have obtained no records from the White House.

To respond to the Subcommittee's request, we simply require access to documents or systems that will establish the aggregate number of guests and stays. If such documents or systems do not exist, we need to ascertain the overnight guests at the Executive Residence during the period indicated from source documents or systems maintained by the White House or others. Once the number of overnight guests is established, we need to determine the number of nights each overnight guest stayed at the Executive Residence. We can then determine and report the total number of overnight guests and stays since January 1993.

We have discussed this review with White House Counsel staff and others, but have made no progress in obtaining the information needed to do the work requested. On April 24, 1997, we met with officials from several White House offices to advise them of the Subcommittee's request, including the request for information on overnight stays at the Executive Residence. On June 17, 1997, we provided the Associate Counsel to the President with an informal list of four areas related to the overnight stays that we wanted to discuss, including the nature, location, and people responsible for source documents and systems showing overnight stays at

the Executive Residence. On July 11, 1997, we met with the Deputy Counsel and Associate Counsel to the President, at which time we discussed a number of areas, including the sources and methods used to compile the list of overnight guests that was previously made public. On July 28, 1997, the Associate Counsel sent us a list of names of those who were overnight guests at the Executive Residence and advised us that the list had been released to the public. We made several subsequent requests to the Associate Counsel for a follow-up meeting, and on September 19, 1997, we again met with the Deputy Counsel and Associate Counsel to discuss information relating to our review, but made no progress in obtaining any records.

Written Request of the White House

On October 16, 1997, we wrote to the Deputy Counsel to the President to insist on our access, by November 1, 1997, to all books, documents, papers, or other records related to the number of overnight guests at the Executive Residence and the beginning and ending dates of each guest stay since January 1993. We made that request to achieve our objective of counting and reporting the number of overnight guests and stays. The letter did not request the identity of the overnight guests or the reasons for their stay, although we recognize that the records that allow us to determine the number and duration of overnight stays may identify the guests by name.

The Associate Counsel to the President replied by letter of October 23, 1997, that she and others had compiled the previously published list of overnight guests from documentation that included materials belonging to the First Family, including "personal and private correspondence." The letter characterized our request as one to "gain access to private and personal papers of the First Family." In expressing concern about GAO inspecting these materials, the Associate Counsel expressed a willingness to continue discussing the matter, but as of today we have received no records that would enable us to provide the Subcommittee with the requested information on overnight guests and stays at the Executive Residence.

We are not unmindful of the sensitivity of using materials of the First Family in performing our review. Accordingly, we have been and continue to be open to reviewing other materials to determine the number and duration of overnight guests and stays at the Executive Residence. In this connection, our letter did not request the "private and personal papers of the First Family" or any other specific papers of the White House. We only

requested documents "related to the number of overnight guests at the Executive Residence and the beginning and ending dates of each guest stay since January 1993."

At the invitation of the Associate Counsel, we met yesterday with White House staff, including the Deputy Counsel and the Associate Counsel, to discuss our request. At that meeting, we presented a letter proposing that we discuss the possibility of alternative sources of information with the Executive Residence's Chief Usher, Administrative Assistant, Head Housekeeper, and others.

During our discussions, the Deputy Counsel made clear that she was not representing that there were no other sources of the number of guests and stays, only that the list of guests released by the White House was compiled from private materials. She also stated that there was no concern about GAO determining the aggregate number of guests and stays from non-private materials. The White House is considering our formal request to discuss alternative sources of information with the Chief Usher and others.

There were two legal issues raised in passing in the Associate Counsel's October 23 letter. She first argues that a privacy interest protects the First Family's notes and correspondence. Second, she reminded us that our statutory right of access encompasses "agency records" and advised that this right of access does not reach records of the First Family. I will briefly discuss each of these issues in turn.

The President's Privacy Interest

The Associate Counsel argues that GAO is seeking access to the "private and personal papers of the First Family," suggesting that Presidential privacy interests shield these documents from scrutiny. The Supreme Court has recognized that, while the President has voluntarily surrendered the privacy accorded non-public figures, the President and other public officials "are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity." Nixon v. Administrator of General Services, 433 U.S. 425, 455, 457 (1977). This privacy interest is qualified—any intrusion must be weighed against the congressional, public, or other interest in reviewing the private materials. Id. at 458–465 (President's privacy interest in private documents and tape recorded conversations outweighed by limited intrusion by archivists to separate private from non-private materials, the lack of an alternative for separating private from other materials, the

public interest in preserving historical materials mixed with private materials, and other factors); Nixon v. Freeman, 670 F.2d 346, 354, 362-3 (D.C. Cir. 1982), cert. denied, 459 U.S. 1035 (1982) (President's privacy interest in tape recorded conversations and in tape recorded diaries outweighed by limitations on proposed intrusions and other factors); Dellums v. Powell, 642 F.2d 1351, 1354, 1362-3 (D.C. Cir. 1980) (President's common law privacy interests entitled to considerable measure of deference by courts, but may be outweighed by competing interests).

The power of Congress to investigate and obtain records in aid of its investigation is as broad as its power to legislate. McGrain v. Daugherty, 273 U.S. 173 (1926). When the executive branch withholds information from Congress based on an assertion of Presidential privacy or other protected interest, the courts have balanced this interest against the congressional need for the information. See, e.g., United States v. AT&T, 567 F.2d 121 (D.C. Cir. 1977), in which the court sought to balance the Congress' interest in assuring the proper expenditure of appropriated funds and the executive branch's interest in protecting the national security (requests from FBI to AT&T for warrantless wiretaps).

Seeking workload information—how many people are staying overnight—for a taxpayer funded establishment, the Executive Residence, by the relevant Subcommittee of the House Committee on Appropriations is clearly a suitable congressional inquiry. See United States v. AT&T, 551 F.2d 384, 393 (D.C. Cir. 1976). There is no allegation that Congress is seeking to "expose for the sake of exposure," id.; in fact, the request is tailored to include aggregate numbers of Executive Residence guests and stays—not the identification of personal visitors or other private information.

It is also significant that the intrusion here is at most minimal. GAO has proposed that it would not remove copies or original documents from the White House premises, but would merely use the materials to determine aggregate numbers. GAO's record of protecting confidential information is exemplary; careful observation of confidentiality restrictions is necessary for GAO to do its work. Finally, access to what the White House considers "private" materials is only necessary if they are the only source for the requested information.

GAO's Access Authority

It is important to make clear the authority under which GAO is performing the review of overnight guests and stays at the Executive Residence. As

previously stated, your request asked GAO to conduct several assignments. The first—an audit of five categories of unvouchered expenditures of the President and the Vice President—is conducted pursuant to sections 105(d) and 106(b) of title 3, United States Code. The statute specifically addresses unvouchered expenditures, describes the scope of our audit, establishes our right of access to records relating to the unvouchered expenditures, and limits our reporting responsibilities.

In contrast, our review of the number of overnight guests and stays in the Executive Residence falls under section 712 of title 31, United States Code. Paragraph (1) of section 712 authorizes GAO to investigate all matters related to the use of public money. Paragraphs (4) and (5) of section 712 direct GAO to investigate and report matters ordered by a congressional committee having jurisdiction over appropriations and to give the help and information the committee requests.

Access to records for reviews performed under section 712 is authorized by section 716 of title 31, United States Code. Section 716 provides that each agency shall give GAO the information it requires concerning the duties, powers, activities, organization, and financial transactions of the agency. GAO may inspect agency records to get the information.

As a result of the 1982 codification of title 31 of the United States Code, sections 101 and 701 define the term "agency" for purposes of sections 712 and 716 to mean a "department, agency, or instrumentality" of the United States Government, but not the legislative branch or the Supreme Court. As broad as the term "agency" is now defined, the statutory language before the codification emphasizes its expansiveness. Before the codification, the relevant term was "department or establishment," defined in 31 U.S.C. 2 (1976) to include "any executive department, independent commission, board, bureau, office, agency, or other establishment of the Government." The 1982 codification of title 31 restated, without substantive change, the laws enacted before April 16, 1982, that were replaced by the codification. See Public Law 97-258, § 4(a), 96 Stat. 1067 (1982).

Similarly, the language of the access provision before codification illustrates how encompassing the term "records" is as used in section 716. The predecessor to section 716, 31 U.S.C. 54 (1976), used not just the term "records" but also such terms as "correspondence," "papers," and "written information" to describe the reach of our access authority.

In analyzing the scope of our authority under sections 712 and 716, we are aware that the Executive Residence is not considered an "agency" for purposes of the Freedom of Information Act (FOIA). Sweetland v. Walters, 60 F.3d 852 (D.C. Cir. 1995). The FOIA definition of "agency" as interpreted by the courts has no relevance to the definition of "agency" in title 31. The FOIA controls public access to government information for the purpose of furthering the public's understanding of government operations. In light of that purpose, the Congress has explicitly ratified an interpretation of the term "agency" that excludes units of the Executive Office of the President with no substantial independent authority to direct executive branch officials. Armstrong v. Executive Office of the President, 90 F.3d 553, 557–8 (D.C. Cir. 1996).

Here, disclosure to GAO is solely in aid of the congressional power to oversee, investigate, and legislate. Over the last century, the Supreme Court has characterized the scope of congressional power to investigate as penetrating and far-reaching as the potential power to enact legislation, oversee the operation of government, and appropriate funds under the Constitution. Barenblatt v. United States, 360 U.S. 109, 111 (1959); McGrain v. Daugherty, 273 U.S. 173 (1926). The Court presumes a valid legislative purpose for congressional inquiries, In re Chapman, 166 U.S. 661, 670 (1897), and will consider such sources as a committee chairman's opening statement to support the existence of a legislative purpose, Wilkinson v. United States, 365 U.S. 399, 410 (1961). This has been true even when the witness at a congressional investigation objected to the committee's questions on the grounds that they related to private affairs. Sinclair v. United States, 279 U.S. 263, 295 (1929).

The Executive Residence is a government facility staffed by federal employees and funded with appropriated tax dollars. This Subcommittee considers budget requests by the President for the operation and maintenance of the Executive Residence. In so doing, it desires to have information relating to the operation of the Executive Residence and the workload of the government employees responsible for maintaining it, including overtime and duties associated with overnight guests, as well as the number of overnight guests and stays. Accordingly, for purposes of our audit and access authority, we believe the Executive Residence is an "establishment" of the United States and that papers, correspondence, and other written materials documenting its use, created by the President or First Lady or received by them from private parties, and used by government employees to compile statistics released to the public, are "records" as that term is used in 31 U.S.C. 716.

Mr. Chairman, that concludes my statement. I will be pleased to answer questions you or other members of the Subcommittee may have.

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