

**Subject:** Night Note 8/8  
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[Pending Issue 8-8.doc](#)

Attached is the Pending Issues document for August 8, 2005. During August the Night Note will be sent on Mondays and Thursdays.

August 8, 2005

MEMORANDUM FOR ANDY CARD, KARL ROVE, JOE HAGIN, and MIKE GERSON

FROM: KRISTEN SILVERBERG, BRIAN HOOK and JEREMY KATZ

RE: NIGHT NOTE

**Avian Flu.** The State Department had a meeting last Friday to discuss facilitating a group of donor countries to provide resources to effected Asian nations in the event of a pandemic outbreak. General consensus was that in order to keep this manageable we would need to keep the number of donor countries low – somewhere between 6 and 8.

**NASA.** This afternoon's Shuttle Mission Management meeting concluded with a decision to schedule the landing for tomorrow. The weather at Kennedy Space Center tomorrow morning is expected to be similar to that seen this morning -- with some moving rainstorms that will have to be monitored closely in deciding whether Discovery can land at Kennedy. The most sensitive period of the landing is the time during which the Shuttle is coming down through the atmosphere and conducting maneuvers to lose speed before landing. The entire reentry/landing process takes a little more than one hour. A decision to switch landing sites usually can be made up to 90 minutes prior to landing at a given site.

**Native Hawaiian.** The Hawaii delegation has submitted its revised, proposed draft language to the Justice Department, which is reviewing it. The Department will continue working with delegation staff over recess on bill language to resolve our policy concerns. The Senate is expected to vote on the bill in September.

**Mercury Rule.** On Friday two judges on the DC Court of Appeals (Sentelle and Brown) rejected an appeal by environmental groups and 14 states to block EPA from implementing the mercury regulations it adopted in March.

## Other Issues

- Airlines/Northwest Strike (Sharp/DPC; Hook) – DOT believes that Northwest’s contingency plan is safe and adequate to ensure continuity of service. Therefore a PEB is not necessary.
- Airlines/US Airways/America West Merger (Sharp/DPC; Hook) -- On 7/22, the Air Transportation Stabilization Board (ATSB) approved the merger deal. The ATSB reviewed the merger application because both airlines have outstanding loans with the ATSB. Recently the Department of Justice cleared the merger as well. US Airways’ bankruptcy judge and the Department of Transportation must now sign off for the merger to go through.
- Amtrak (Sharp/DPC; Hook) – Senator Commerce passed out of committee its Amtrak bill on 7/28. The six-year bill would authorize \$11 billion in capital/operating spending and debt restructuring and make modest reforms designed to improve efficiency and service. Overall the bill falls far short of the Administration's vision for comprehensive Amtrak reform, but does incorporate small elements of DOT's proposal including limited introduction of competition, Federal/state capital grants, and performance standards for long-distance routes. Senator McCain is our best Amtrak critic on the committee.
- Asbestos (Ho/DPC; Hook)
- *Aviation system challenges (Sharp/DPC; Hook) – On Thursday, DPC convened a working group (DOT, CEA, OMB, OVP) to discuss proposals for revamping the tax and fee structure that pays for airport improvements and our air traffic control system, rationalizing the process for allocating take off and landing slots at the most congested airports, and increasing U.S. airlines' access to global capital. DOT is developing both legislative and regulatory changes in these areas changes in preparation for the FY 2007 budget and for reauthorization of the FAA.*
- *BSE (Sommers/NEC; Katz) - The 12-year old animal that died in Oklahoma in April did not die of BES. The veterinarian who treated the cow sent a sample to the Ames, IA lab after a considerable delay. The test was inconclusive. They re-tested it at Ames as well as a lab in Weybridge, England and the results came back negative.*
- CAFE (Sharp/DPC; Hook) -- On Monday July 25, OMB formally received DOT's draft CAFE reform regulation. OMB will likely clear it in mid-late August for notice and public comment. The final rule must be published by April 2006, to allow 18 months before the beginning of Model Year 2008.
- Charitable Choice (Towey/OFBI; Silverberg)
- Clear Skies (CEQ; Hook) -- EPA modeling is underway. CEQ plans to brief Senate EPW staff on the modeling details very soon. The outputs are expected in eight to ten weeks.
- Climate (CEQ; Hook)
- Community College Initiative (Sharp/DPC; Hook) – The Senate Labor HHS Appropriations Subcommittee passed its bill last week and included \$125 million for CCS, which is equal to the House number (we requested \$250 million).
- Cooperative Conservation Event (Pinero/DPC; Hook) -- CEQ expects 1,200 participants (1000 have already accepted). The conference agenda is essentially finalized. CEQ is working with the departments on their planned remarks.
- Drug Reimportation (Leggitt/DPC; Katz)

- Economic and Community Development (DPC; Hook) – Senate Commerce-Justice-Science Appropriations Subcommittee did not adopt on 6/21 the Strengthening America’s Communities Initiative, as we expected.
- Education (DPC; Hook) – On 7/22, the House Education Committee approved the College Access & Opportunity Act, to reform and strengthen federal student aid and higher education programs, adding new options for student loan borrowers, greater accountability to empower consumers, and refocusing the law back to its original mission by expanding college access for low- and middle-income students.
- EEO-1 (Sharp/DPC; Hook) – DPC has received cost estimates from EEOC. DPC, OMB, and Barry met recently with EEOC officials to discuss policy options given the revised cost estimates.
- Endangered Species Act (CEQ; Silverberg) – It is being reported that Chairman Pombo is negotiating with Democrats to introduce a rewrite of the Endangered Species Act by the end of this month. Senator Chafee held a hearing on ESA on 7/13.
- EEO-1 (Sharp/DPC; Hook) -- DPC, OMB, and OPA agree that the high implementation costs associated with expanding race and ethnicity reporting requirements for Hispanics and Latinos are not offset by any increased enforcement benefits. Therefore, the group agrees that EEOC should proceed with its proposed changes to the EEO-1 form that comply with OMB's standards without requiring these additional costly data points for Hispanics and Latinos.
- EEOC Definition of “Applicant” (Sharp/DPC; Hook) -- Currently, EEOC requires companies to keep records all job applicants. In the Internet age, companies like Monster.com can flood a company with resumes, making compliance very burdensome. DOL formally submitted on 6/5 a draft final rule to OMB that modifies job applicant recordkeeping requirements. DOL's rule would narrow the definition of an “applicant” to filter out applications from individuals that do not meet minimal qualifications for the job.
- FAA Contract Negotiations (Sharp/DPC; Hook) –
- Faith Based Initiative (Towey/OFBCI; Hook) - JCT published a report in January proposing twelve measures designed to eliminate fraud and abuse related to charities. OFBCI has concerns that a number of the provisions are unnecessary and would burden charities unfairly. Grassley’s staff may mark up late July.
- FDIC (Warsh/NEC; Katz) – We expect to get word in August from Oxley and Shelby on their negotiation regarding FDIC and coverage limits.
- *Federal Sentencing Guidelines (Ho/DPC; Hook) – The Washington Post ran an editorial today stating that “giving judges more discretion is desirable” and called on the AG and Congress to “withhold judgment until a clearer picture emerges” of the effect that the Supreme Court’s decision has had on Federal sentencing. OLP is drafting an op-ed and will contact former AG Ed Meese about him submitting one as well.*
- Fiduciary Duties of Union Officials (Sharp/DPC; Hook) -- DOL has formally submitted to OMB clearance a request for information regarding the fiduciary duties of union officials under the Labor Management Reporting and Disclosure Act.
- *FMLA (Sharp/DPC; Hook) – Barry met with Secretary Chao today. She made the case for moving the FMLA rule. Barry told her he didn't think there was a policy disagreement, only tactical on timing and up front support from the Hill and business community. Additionally Barry told her we've asked the coalition to round up signatures calling on DOL to issue the rule, focusing on labor Republicans, to set the table for the rule and more importantly, to ID members who will stand with us on another approps rider fight. Barry recommends we hold on the rule until we see what names the coalition is able to come up*

*with in a public fashion and then make sure OLA feels those names demonstrate the right amount of assistance from the Hill to charge into this fight. Assuming we get satisfactory info, DPC plans to tee up a principals' meeting for September.*

- The Global Fund (Thompson/DPC; Silverberg) - By law, the United States cannot contribute more than 33 percent of total contributions to the Fund at any one time. Each year, on July 31, the United States calculates the amount of contributions received by the Fund from other donors in order to determine the amount the U.S. is legally allowed to contribute. For FY 2005, the Global Fund has received enough contributions from non-U.S. donors for the U.S. to contribute the full \$435 million appropriated by Congress. However, the Global Fund must meet other requirements to be eligible for the full U.S. contribution. Twenty-five percent of the appropriation must be withheld until the Secretary of State certifies that the Global Fund has made progress in operational areas including support for country-level bodies, coordination of technical assistance, and the establishment of an independent Inspector General. The Office of the Global AIDS Coordinator conducted an initial assessment of the Global Fund's compliance with these provisions in July and has said that it expects to make a final judgment later this month.
- GSEs (Warsh/NEC; Katz) – The panel approved Banking Chairman Shelby's legislation on an 11-9 party-line vote after rejecting, along party lines, a Democratic-sponsored substitute that had portfolio provisions closer to those in the House bill.
- Head Start (DPC; Hook) – The bill was marked up by Enzi's committee on 5/25. DPC and OLA have serious concerns that the policy does not contain enough reform, and the authorization levels are far above what was in our budget. The committee does plan to continue working and will offer another manager's amendment on the floor, but OLA doesn't hold much hope that we will get what we want.
- *Health IT (Leggitt/DPC; Katz) – The nomination period for the AHIC closed on Friday. HHS will brief the WH on their recommendations tomorrow but no decisions will be made at that meeting.*
- Helping America's Youth Initiative (Medina/DPC; Hook)
- Identity Theft (Warsh/NEC; Katz)
- *Immigration (Ho/DPC; Hook) -- Barry gave a presentation today on immigration to the American Conservative Union. On Thursday DeLay announced his support for Tancredo's bill that would withhold federal funding from cities that fail to enforce immigration laws.*
- Impotence Drugs (Ramthun/NEC; Katz) - NEC convened an initial meeting with HHS, OMB, CMS, WHL and Communications to discuss our position regarding Medicare and Medicaid coverage of impotence drugs. Congress is taking steps to prohibit Medicare/Medicaid funds from paying for such drugs through the appropriations process. We continue to take the position that we should not revisit the Medicare bill, but Congress will likely pass some form of prohibition.
- Indian Trust/Cobell (Ho/DPC; Hook) – OMB recently met with the Interior Department to discuss their testimony at the hearing next Tuesday on Senator McCain's bill. Both OMB and Interior's preliminary assessment of the bill is that it is a great improvement over past legislative efforts, a good starting point, and something that the Administration can work with to achieve final resolution of the Cobell litigation problems. Interior's testimony will not break new ground but will express appreciation for the bill sponsor's efforts and convey the need for a reasonable legislative solution to the litigation.
- Job Training Reform (Sharp/DPC; Katz) – The Senate is hoping to schedule floor time on WIA. The bill does not include our reforms and has bad religious hiring language.

- *Judicial Security (Ho/DPC; Hook) – The Justice Department on Friday forwarded to OMB a spending plan for the \$12 million appropriation provided for off-site judicial security enhancement and for the installation of home alarm systems. The Attorney General is scheduled to be briefed on the report of the OLP working group, including recommendations for enhancing judicial security, on August 15.*
- MCC (Shirzad/NSC; Silverberg) – NSC circulated a draft memo with proposed steps to accelerate the program.
- Medicaid Clawback (Ramthun/NEC; Katz) - Secretary Leavitt, Josh, and Mark McClellan have called Governors from TX, NY, OH, IN, CA, AR, AZ and GA to ask them to identify a high level contact to work with CMS and HHS to get all the facts and determine whether or not there is, in fact, a problem. Gov Perry identified someone in his office to work with us on the clawback. NEC, IGA, HHS and CMS will have a conference call with Gov Perry's point person Friday at 11:00 AM.
- Medicaid Commission (Ramthun/NEC; Katz) – The Medicaid Commission held its first meeting. [REDACTED] b(6)  
[REDACTED] b(6) Presentations addressed the mechanics of Medicaid financing, and longer-term budget projections and financial instability. The second meeting is tentatively scheduled for Aug. 16-18 and will have a presentation from NGA, among others. NEC has repeatedly communicated to the Secretary's senior staff that Leavitt needs to call Karl to discuss the two remaining openings on the commission reserved for current Governors.
- Medical Liability (Ho/DPC; Hook) -- The House on 7/28 passed by 230-194 medical malpractice legislation that would cap pain and suffering awards at \$250,000.
- Mercury (Stolpe/CEQ; Hook) – OMB has circulated a draft SAP strongly opposing SJ Res 20, which would disapprove the EPA rule delisting Coal and Oil-directed Units from the CAA Source Category List. The resolution is now on the Senate calendar and can be brought up at any time. The resolution must also be enacted by the House and the President must sign it. The resolution was introduced in the House this week and sponsors are now circulating a discharge petition. House rules require signature by a majority of members on the petition.
- *Methamphetamine (Leggitt/DPC; Katz) – The AG, Sec Leavitt and Director Walters will participate in a meth event on August 18<sup>th</sup> in Tennessee. The venue chosen is a drug court/rehab center. Principals have agreed to participate and to discuss legislative talking points which include blister pack exemption, 3.6 gram per purchase limitation on pseudo and better wholesale spot market controls. They will not discuss behind the counter or preemption issues.*
- NCLB (Medina/DPC; Hook)
- “Open Loop” Technology (Hannegan/CEQ; Katz)
- Patriot Act (Mitnick/HSC; Hook)
- Pensions (Hennessey/NEC; Katz) –The Senate Finance Committee passed the bill by voice vote and it was sent to the Senate floor. Chairman Grassley said the bill is not likely to be taken up until late September and might be rolled into a budget reconciliation package to account in part for probable premium increases charged to companies sponsoring pension plans.
- Personal Stockpiles (Rapuano; HSC; Silverberg)
- Postal Reform (Sharp/DPC; Hook) – On 7/27 the House passed the Postal Accountability and Enhancement Act 410-20.

- Project Safe Neighborhoods (Ho/DPC; Hook) -- DPC was briefed on 7/7 by DOJ on internal discussions about retooling Project Safe Neighborhoods (PSN) to focus more on gang prosecution efforts. The change is being considered as a result of both funding problems in Congress, which appears more interested in addressing the gang problem, and (2) internal concern about the continuing viability of the program's metrics, which are now gun-possession prosecutions. Although PSN has posted high increases in such prosecutions every year, DOJ is concerned that the number will naturally begin to fall before too long (as a result of the program's success) and subject PSN to criticism. DPC will convene a larger meeting next week to begin a policy process on the issue.
- Real Estate Settlement Procedures Act (DPC; Katz) – Following Hill outreach, Secretary Jackson on 6/27 outlined HUD's plan to have listening sessions and town halls with the industry and the public. Following extensive outreach, HUD will propose a new rule.
- Ryan White (Thompson/DPC; Katz) – Secretary Leavitt hosted a meeting with AIDS stakeholder groups to announce the Administration's Ryan White Reauthorization Principles. The Secretary's announcement was followed by a question and answer session with HHS officials. After the meeting, HHS issued a press release and hosted a conference call with the press corps. Several groups have issued positive/supportive statements about the principles and the announcement. On the legislative front, DPC has learned that while not certain, it's likely that Senator Coburn will be introducing a reauthorization bill tomorrow. The bill is likely to track closely with the Administration's priorities for Ryan White reauthorization.
- Secure Flight (Sharp/DPC; Hook) – DHS is planning on issuing an interim final rule this September. DHS will proceed with enrolling initial carriers over the summer and developing the pilot system. The air carriers asked DHS to delay the issuance of the IFR until after the Labor Day weekend since it is such a heavy travel period.
- Stem Cells (Levin/DPC; Silverberg) – OMB will respond to a FOIA request from Ceci Connolly for documents relating to “the 60 or more human embryonic stem cell lines that NIH has deemed to be extent and suitable for study by federally funded scientists in this country” and to the development of the August 9, 2001 announcement. OMB will decline to turn over the documents on the ground that they are pre-decisional.
- Steroids (Ho/DPC; Hook) – House Leadership will not move a bill before the recess. The Senate Commerce Committee has indicated they would like to do a steroids hearing in the Fall.
- *Tax Reform (NEC; Katz) – Al and Keith will be prepared to discuss timing on tax reform at tomorrow's meeting with the President on the economy. In preparation for the briefing, Al spoke to both Senator Grassley and Chairman Thomas. There is no mention of it in the slides. Al will discuss his plans on briefing the President with Secretary Snow on the plane ride down to the ranch.*
- *Telecom (Russell/NEC; Katz) - Spitzer conducted an investigation and entered a consent decree with Sony regarding the issue of payola. Chairman Martin issued a statement to the press today that the FCC does take payola (when you give a disk jockey or a radio station money in exchange for a song being played) seriously and will send staff to NY to make sure laws were not broken. The review will take time.*
- TRIA (Warsh/NEC; Katz)
- Tricare Rx (Leggitt/DPC; Katz) – The petitioner has not filed a brief that was due on July 8<sup>th</sup> and instead has filed a request for an extension. The court has not ruled on the request for the extension, but DOJ believes that the Court will grant an additional 40 day extension.

- Union Financial Transparency (Sharp/DPC; Hook) -- DOL will formally submit its revised LM-30 form for OMB clearance.
- *Veterans (Leggitt/DPC; Katz) – The VA received a request from ranking House Veterans Affairs Committee Democrat Lane Evans for copies of internal slide presentations prepared by the Veteran Health Administration’s National Leadership Board (the board consists of the 21 veteran service network directors and is chaired by the VA Under Secretary for Health). Congressman Evans specifically asked for all slides prepared from October 2004 through July 2005. The slides represent monthly internal management discussions. One of the briefing slides from December 2004 suggests the potential for a \$1.5 billion shortfall. DPC convened a meeting today with VA, OMB, WHC and WHL to discuss the status of the Evans request and asked VA to gather follow-up information on the nature and extent of the request and the legal implications regarding access to these documents. OMB has asked that no further action be taken until Josh and Joel return to Washington on Wednesday.*
- Voting Rights Act (Ho/DPC; Hook) – Tomorrow, the Attorney General will give a speech at the LBJ Library on the upcoming anniversary of the VRA. He will speak generally about the importance of the Act and specifically about its provisions that assist minority-language voters. The AG will also reference the Administration's support for reauthorizing the provisions of the Act that are set to expire in August 2007.
- Vouchers (Pardue/CEA; Hook) -- DPC, OFBCI, OMB and General Counsel met on 7/15 to discuss the expansion and implementation of vouchers in programs across agencies. OFBCI worked with OMB to develop an initial analysis, and DPC will follow up with a secondary analysis and recommendations for specific programs.