

AMERICAN BAR ASSOCIATION  
REPORT TO THE HOUSE OF DELEGATES  
BY THE  
COMMISSION ON LAW AND THE ECONOMY

RECOMMENDATION:  
SUPPORT FOR LIMITED PRESIDENTIAL AUTHORITY  
OVER MAJOR REGULATORY DECISIONS

NOTE: This resolution represents the views of the Committee on Accountability of the Commission on Law and the Economy and has not been endorsed by the Commission or the Association.

BE IT RESOLVED that the American Bar Association supports enactment of a statute authorizing the President to accelerate the resolution by federal regulatory agencies of issues of major economic significance, and to modify or reverse agency rulings, in order to reconcile conflicting policies of different agencies and to assure the achievement of important statutory goals. The Association believes that any such statute should contain adequate procedural safeguards before presidential orders are issued, provide time for congressional reaction before presidential orders become effective, and allow expedited judicial review of presidential actions. The principal features of the proposed statute are set forth below.

(1) Authority. The President would be authorized to direct any regulatory agency (a) to take up and decide a regulatory issue within a specified period of time, or (b) to modify or reverse an agency policy, rule, regulation, or decision (subject to exceptions noted in paragraph (6) below).

(2) Findings Required. The President could take such action only by Executive Order published in the Federal Register, setting forth presidential findings that the action or inaction of any agency (or a conflict in the actions of various agencies) was of major economic significance and threatened to delay or interfere with the achievement of an important statutory objective, and stating the reasons for such findings.

(3) Publication and Comments. No such Order could be issued until 30 days after publication of a notice in the Federal Register stating the President's intention to issue such an Order. No public hearing would be required, but any such notice would invite written comments from interested members of the public and all such comments would be maintained in a public docket file.

(4) Record. In exercising this authority, the President and his staff would be required to comply with applicable statutes or regulations governing the affected agency as to ex parte contacts or limiting consideration to the public record (supplemented by materials or comments received pursuant to paragraph (3) above). The President and his staff would not be barred from receiving oral presentations from interested private persons (except where the affected agency would be prohibited from doing so), but a public record of those making such presentations and a summary of the proceedings would have to be kept.

(5) Congressional Response. No such Order would take effect until 60 legislative days following its issuance. The statute would provide one of two alternative mechanisms for congressional reaction: (a) a "safeguarded" legislative veto provision, providing that any such Executive Order would not take effect if within the 60-day period either House of Congress adopted a constitutionally valid legislative veto; or (b) a provision that, until the end of the 60-day period, the President would retain discretion to modify or withdraw the Order in light of further public comments and any legislative action that may have been taken by Congress or either House.

(6) Agency Actions Covered. No Order of the type described in section 1(b) above could be issued with respect to any agency adjudication subject to sections 556 and 557 of the Administrative Procedure Act, except that such an Order could apply to the grant, renewal, or revocation of a license or privilege. In such cases, no presidential Order could modify or reverse an agency's selection among competing applicants for a particular license or privilege.

(7) Agencies and Issues Covered. The enabling statute would define the agencies, and types of regulatory issues, governed by this authority. The statute would exempt the Federal Reserve Board, the Federal Election Commission, and non-economic regulatory issues considered by various independent agencies (e.g., the FCC's Fairness Doctrine).

(8) Judicial Review. Any agency action resulting from such an Executive Order would be subject to judicial review to assure that it was in conformity with the statutory powers of the agency. Such judicial review would be expedited in accordance with a statutory timetable not exceeding 180 days for all proceedings up to and including the filing of appeals or other petitions for review in the Supreme Court.

(9) Sunset Provision. The enabling statute would expire at the end of a limited period of years, unless extended by further legislation.

## REPORT

### Purpose of the Proposal

The purposes of the proposal are (a) to recognize that many decisions now entrusted to regulatory agencies involve political choices between competing objectives, (b) to make the President and Congress accountable for the actions and inactions of the regulatory agencies they have created, and (c) to confer upon the President, as the Executive responsible for managing the national economy pursuant to statutory goals mandated by Congress, the power to correct and reconcile the actions or inactions of single-mission agencies and to assure the achievement of important statutory goals, subject to a constitutional form of congressional review.

In our pluralistic and increasingly complex society, we have many worthwhile goals to pursue. We need to recognize that many of these goals conflict with one another, and all of them compete for the same resources. We cannot achieve all of them in full measure at one time. We cannot afford to entrust their pursuit entirely to separate, single-mission agencies that prefer their own limited goals to the exclusion of all others. We cannot afford to entrust the resolution of these conflicts to "independent experts" unaccountable to the political process.

For many public policy decisions, the existing regulatory process represents a healthy, decentralized way for a large federal government to take effective action. However, as we now realize, some agency decisions have major economic significance, seriously affect the achievement of other important statutory objectives, and involve political choices among a wide range of competing interests. As presently constituted,

single-mission agencies may not be capable of adequately considering and accommodating statutory goals in conflict with those to which they are accustomed to give primary significance, and different single-mission agencies may (and often do) arrive at conflicting results. Furthermore, the delegation of important policy decisions to "independent" agencies is in conflict with our basic constitutional principle that government should be accountable to the people.

For major decisions, only elected officials can provide the requisite overview and coordination, make practical political judgments to weigh competing claims, and stand accountable at the polls for the necessary ultimate decisions. Congress cannot do this on a case-by-case basis. The President alone is capable of acting quickly to resolve such conflicts. But under the statutes that presently govern the structure and operation of regulatory agencies, even those within the Executive Branch, his legal and political power to do so before an agency takes final action is not clear and his power to change an agency order after the fact is even more dubious.

The purpose of the proposal is to allow more rapid and accountable agency action with respect to discrete issues of national importance. The proposal is premised on the view that the officials we elect to run the government should be entitled to accelerate the decision-making process, and to strike a balance among desirable but competing goals so that they may be held accountable for the results of government policy viewed as a whole. The proposal is designed to give appropriate roles to the President and Congress, to preserve adequate safeguards for public comment and protection of the rights of affected parties, and to allow appropriate and expedited judicial review.

#### Procedural Safeguards

The proposed statute would subject presidential action to procedural safeguards designed to assure basic fairness. It would provide an appropriate role for Congress in formulating national policy. And it would preserve judicial review, to assure that the limitations of existing statutory law are observed.

The statute would provide for public notice and public participation, with a public record kept of all ex parte contacts with interested private persons. Where an affected

agency's governing statutes or regulations prohibit such contacts, or limit the agency's consideration of an issue to materials contained in the record before it, the President would be subject to identical restrictions. The President would be required to receive written comments. He would be free to schedule public hearings, upon giving appropriate notice thereof, in his discretion. The statute would make clear that these procedural limitations only govern action pursuant to this authority, and neither expand nor limit procedural constraints on other existing forms of presidential intervention in the regulatory process.

The statute would provide for a delay of 60 legislative days in the effectiveness of any Executive Order, to provide an opportunity for congressional reaction. The form and effect of such congressional reaction would depend on resolution of the current debate concerning the desirability and effectiveness of legislative vetoes. The Committee believes that a "safeguarded" legislative veto would be constitutional and desirable, in this limited context. Its position on this matter is set forth in Attachment A. [To be added later.] If an express legislative veto is thought to be unconstitutional or otherwise undesirable, a 60-day waiting period is proposed within which the President could modify or withdraw an Order in the light of further public comments and any legislative action taken by either House during that period. Since the enabling statute would expire at the end of a limited period of years, unless extended by further legislation, Congress would have an additional check on any abuse of presidential power.

Agency actions resulting from such an Executive Order would be subject to expedited judicial review. The courts would determine whether resulting agency actions conformed with all applicable statutory provisions. Accordingly, the President could not use his power to issue such Orders to articulate entirely new national policies, or to take any action beyond the powers that have already been delegated to regulatory agencies. On the other hand, within the confines of existing statutory goals, the President could act expeditiously to set national priorities.

#### Scope of the President's Authority

The statute would contain provisions specifying which agencies, types of agency action, and kinds of issues would be subject to presidential intervention. In light of the need for a coordinated national policy adopted by politically

accountable officials, exemptions from the statute should be kept to a minimum. The proposed exemptions would be designed to prevent intervention in matters lacking major economic significance, involving only selection among competing applicants for particular licenses or privileges, or otherwise properly removed from the political process.

The President's authority would not cover agency adjudications, except those involving the grant, renewal, or revocation of a license or privilege posing issues of major economic significance and involving the achievement of important statutory objectives. In no event would the President be allowed to affect an agency selection among competing applicants for a particular license or privilege. In addition, the statute would exempt particular agencies (such as the Federal Reserve Board and the Federal Election Commission) and particular sorts of regulatory issues (such as interpretation and application of the FCC's Fairness Doctrine).

While it may be that some agencies or issues should remain free of presidential review, it is urged that the exemptions be kept to a minimum. No clear or principled decision underlies the current distinctions between "independent" agencies, executive branch agencies, and "independent agencies within the executive branch." Agencies of all kinds consider basic economic and social policy decisions that elected officials can and should be capable of addressing.

The essence of the proposal is to make elected officials accountable for such policies, and to enable the resolution of conflicts that span all types of regulatory agencies. At the very least, the statute should authorize the President to accelerate the decision making process of all agencies, and to modify or reverse the actions of all departments and agencies within the executive branch. As between President and Congress, the President is in a better position than the Congress to perform this essential balancing function on a case-by-case basis. Congress would exercise its appropriate review function during the 60-day waiting period, and would have the ultimate sanction of declining to review the President's power.

The proposal would allow the President to intervene in discrete, but important, matters of national concern. It is anticipated that the presidential intervention would be an infrequent event, probably exercised no more than 8 or 10 times each year. If thought necessary, such a limitation could be written into the statute. The requirement of specific threshold findings (paragraph (2)), the check imposed by the sunset provision (paragraph (9)), limitations on presidential

time and political capital, and the visibility of such decisions, should all help to assure that this authority is used sparingly. Precisely because this authority would be focused on important matters, it could provide an important tool for effective and acountable government.