Department of Justice
Washington, D.C. 20530

22 JUL 1977

MEMORANDUM FOR SIMON LAZARUS
Associate Director, Domestic Council

Re: President's Authority to impose procedural reforms on the Independent Regulatory Agencies

I am responding to your memorandum of June 6, inquiring (a) whether the President by Executive order has the authority to extend to the independent regulatory agencies proposals designed to improve administrative processes within the Executive branch; and (b) whether individual work plans contemplated by the proposals would be subject to compulsory disclosure under the Freedom of Information Act.

I

The President's Authority Regarding the Independent Regulatory Agencies Procedures

Our memorandum to you of June 9 entitled "Executive order on the logging of outside contacts," a copy of which is enclosed, discussed the scope and nature of the President's authority regarding the procedures of the independent regulatory agencies. The memorandum points out that while there are no pertinent judicial decisions, the matter had been the subject of scholarly discussion. 1/ The general consensus of the authors is that the President cannot influence the outcome of a particular administrative proceeding except through this Department acting for the United States where it is a party, and even there the United States has merely the position of any other party.

1/ See, e.g., Cushman, The Independent Regulatory Agencies (1941) 464-465; Landis, Report on Regulatory Agencies to the President-Elect [John F. Kennedy] 30-33 (1960), reprinted in Separation of Powers and the Independent Agencies, S. Doc. 91-49, pp. 1301, 1336-1339; Redford, The President and the Regulatory Commissions, 44 Texas Law Review 288, 299-300, 307 (1965); Cary, Politics and the Regulatory Agencies, 5-26 (1967).

This, however, does not mean that the President has no authority whatsoever over the regulatory agencies. Under Article II, section 3 of the Constitution he is charged with the duty to take care that the laws be faithfully executed. Thus it is his responsibility to make certain that the agencies, although independent with respect to their quasi-legislative and judicial functions, perform those functions efficiently and without undue delay; similarly he has the legal authority to guide their fiscal and personnel policies. This seems to be recognized by the statutory provision applicable to many of these agencies that the President may remove a member for inefficiency, neglect of duty, or malfeasance.

A representative formulation of this view is found in Dean Landis' 1960 report, fn. 1, supra, at p. 33:

> "The congestion of the dockets of the agencies, the delays incident to the disposition of cases, the failure to evolve policies pursuant to basic statutory requirements are all a part of the President's constitutional concern to see that the laws are faithfully executed. The outcome of any particular adjudicatory matter is, however, as much beyond his concern, except where he has a statutory responsibility to intervene, as the outcome of any cause pending in the courts and his approach to such matters before the agencies should be exactly the same as his approach to matters pending before the courts."

This office stated in a memorandum to Presidential Assistant Flanigan of January 15, 1970:

> "The President also has the ultimate responsibility, under the Constitution and various statutes, to assure efficient operation of all government agencies. He may in appropriate cases undertake management studies, be concerned with agency budgets, etc."

Measured against these considerations, it would appear that the proposals contained in Part I of your memorandum can

be extended by the President to the independent regulatory agencies. The purpose of the proposals is to improve procedure, set up work schedules and plans for the more efficient discharge of the agencies' duties, and improve the proficiency of personnel by appropriate training programs directed to the drafting of regulations. In the light of the President's overall fiscal responsibilities it also appears appropriate for him to require that the agencies take into account the economic impact of their decisions, although he probably cannot dictate the precise effect the agencies are to give to that impact.

Whether the President has the power to require general or periodic reviews of existing regulations would seem to depend on the type of regulation involved. In the case of procedural or internal regulations the President probably has that power. But the legal situation is somewhat different where regulations of a substantive (i.e., of a truly quasi-legislative) nature are involved. It could be said that regulations of this type may be modified or reviewed only to the extent that the governing statute requires or permits. A Presidential requirement that the independent regulatory agencies engage in a general review of their substantive rules therefore could well be considered to constitute an invasion of the agencies' quasi-legislative autonomy, a matter that does not come within the purview of the President's constitutional authority to take care that the laws be faithfully executed.

II

The Impact of the Freedom of Information Act

The proposal involved envisages (Part I, 2) a work plan for the development of major regulations which would include the following elements:

> "(1) Specification of authority for and aims of contemplated regulatory action;
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> "(2) Rough preliminary specification and comparison of alternative approaches;

"(3) Identification of project team and team leader with direct responsibility for development of proposed regulation;

"(4) Means by which project team will involve interest groups, concerned federal agencies, and the public in development of the regulation;

"(5) Target-dates for various stages in development of the regulation."

If the agency head approves the plan, he would publish a notice in the Federal Register providing at least the following information:

"(1) Aims and authority for contemplated action;

"(2) Project team leader and telephone number;

"(3) Target-dates for those stages in the process in which public would be able to participate."

The question you pose is whether under the Freedom of Information Act an agency must disclose the individual work plan. We conclude that, although it is a novel and close question, a work plan approved by the agency head is subject to disclosure.

The basis for our conclusion is as follows: The Federal Register notice would not include item 2 of the work plan, "rough preliminary specification and comparison of alternative approaches." Although that kind of material is in the nature of internal advice and normally is exempt from disclosure as deliberative in nature, the remaining non-deliberative parts of the work plan would have to be disclosed, because non-exempt portions of documents must be released if "reasonably segregable" from the exempt portions.

The most serious complication is caused by the ambiguous status of the work plan. Since the plan has been approved by the agency head, it can be viewed as a statement of policy or interpretation which has been "adopted" by the agency but not

published in the Federal Register. See 5 U.S.C. 552(a)(2)(B). Even if not so viewed, it could well be regarded as an agency action-type document, a characterization inconsistent with deliberative material. And while the courts have not as yet passed on the issue in circumstances like those here involved, there are strong indications that such a document, once approved by an agency head, must be disclosed in its entirety, including those portions that would otherwise come within the fifth exemption. Although a respectable argument could be made that the work plan is of a hybrid nature, namely, that it does not constitute a final agency determination but is merely an interlocutory decision which will set in motion a deliberative process leading to a final agency decision, we doubt it would prevail. One weakness of this argument is that it would be relatively easy to say that an approved plan is not part of the deliberative process but rather an order to conduct such a process.

Moreover, not only is there a widespread feeling that Exemption 5 has been over-used, but the deliberative privilege under that exemption is much more compatible with expressions moving up the organizational ladder, or among peers, than with those moving down, such as an approved plan.

In addition we should draw to your attention the Attorney General's letter of May 5, 1977, addressed to the heads of all federal departments and agencies concerning the Freedom of Information Act. In that letter the Attorney General announced the policy that the "Government should not withhold documents unless it is important to the public interest to do so, even if there is some arguable legal basis for the withholding." In the abstract it is difficult for us to determine whether the withholding of the work plans would be in the public interest, even if withholding should be supportable as a matter of law.

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Enclosure