

THE WHITE HOUSE

WASHINGTON

December 9, 1977

MEMORANDUM FOR: WAYNE GRANQUIST
FROM: SI LAZARUS S
SUBJECT: Applicability of Executive Order to Independent Agencies

In its opinion memorandum of 22 July 1977, concerning the President's authority to set procedural guidelines for the independent agencies, the Department of Justice referred to an earlier memorandum dated June 9, 1977. In order to assure that interested persons who have reviewed the July 22 memorandum have access to the whole of the Department's analysis provided to the White House, I have excerpted the pertinent portion of the June 9 memorandum. This excerpt plus the July 22 memorandum from the Department provides a complete description of the advice we have received from the Department on the applicability of the proposed Executive Order to independent agency procedures. The excerpt follows.

The question then arises whether the President is authorized to issue an Executive order of this sort which includes independent regulatory agencies. Our research has uncovered no judicial decision on this question. However, the President would appear to be empowered to issue an order applicable to such agencies, first, by virtue of his constitutional responsibility to "take care that the Laws be faithfully executed." Art. II, section 3. Even though the agencies may be independent, their failure to perform their duties under law is said to be a legitimate part of the President's concern. See Landis, Report on Regulatory Agencies to the President-Elect 32-33 (1960); Redford, The President and the Regulatory Commissions, 44 Tex. L. Rev. 238, 307-8 (1965); Cary, Politics and the Regulatory Agencies 18-23 (1967).

Of course, the President may not attempt to control the agencies' determination of particular adjudicatory matters. But his constitutional obligation and authority would appear to enable him to establish policies concerning the efficiency and fairness of agency procedures and determinations. Previous Executive orders concerning such matters have in fact been made applicable to the independent agencies. See, e.g., E.O. 10939, May 5, 1961, 26 F.R. 3951 (ethical standards of government officials) (now revoked); E.O. 11222, May 8, 1965, 30 F.R. 6469 (standards of conduct).

Presidential authority to control the conduct of agency personnel might also be found in various statutes of general or particular applicability. The President is vested with the authority to "prescribe regulations for the conduct of employees in the executive branch." 5 U.S.C. Section 7301. See also 5 U.S.C. 3301. If the agencies' officials are considered within the Executive branch for administrative purposes, this provision would allow for the regulation of their conduct. The statutes granting the President the power of removal of agency officials, see, e.g., 15 U.S.C. Section 41 (power of removal over FTC Commissioners), may also give him this authority. Even though such statutes generally allow removal only for cause, the refusal to obey an Executive order of general applicability may constitute sufficient cause. See Cushman, *The Independent Regulatory Commissions* 464-65 (1941).*

* Certain communications with the officials of independent regulatory agencies, and with other officials in the Executive branch, are, of course, already regulated by the provisions of the Government in the Sunshine Act, 5 U.S.C. Section 557(d).