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United States Senate

COMMITTEE ON
GOVERNMENTAL AFFAIRS
WASHINGTON, D.C. 20510

RICHARD A. WEGMAN
CHIEF COUNSEL AND STAFF DIRECTOR

December 16, 1977

The President
The White House
Washington, D. C.

Dear Mr. President:

We welcome the opportunity to comment on your draft Executive Order designed to improve government regulations. We applaud your decision to make this Order available in draft form to give the public a full opportunity to review and comment on it.

In asking for comments on the Order, you have specifically requested that comments respond to the question: "Should the procedures outlined in the Executive Order apply to the independent regulatory agencies?" Other issues are raised as well, but our comments will be restricted to this particular question.

It is our unqualified view that the answer is No. The Executive Order cannot lawfully be applied to the independent regulatory commissions. To do so would violate the intent of Congress that the Executive Branch not control the rules these agencies issue.

Essentially, the draft Executive Order is designed to do three things. First, it requires agencies to prepare a "regulatory analysis" for any regulation having a significant economic effect, analyzing all of the economic consequences of the proposed regulation and assessing all potential alternative approaches. Second, it requires agencies to undertake a periodic review of their existing regulations, to determine whether these regulations are meeting certain basic goals. Third, it requires agencies to prepare work plans and regulatory agendas for their significant regulatory activities and to provide additional notice to the public.

Under the Order, the OMB is assigned responsibility for reviewing agency compliance with these requirements. Agencies will be required to submit their new procedures

to OMB by February 15, 1978, for OMB's approval. Regulations which have been prepared in violation of the Order's procedures could not be issued.

Mr. President, we agree completely with the basic objectives of the proposed Executive Order. Regulatory reform is a major goal of this Congress, and we would very much like to see these objectives achieved.

However, we have serious difficulty with the means used to accomplish these ends. In our opinion, the proposed Order cannot lawfully be applied to the independent regulatory commissions without an express statutory basis. At present no such basis exists.

Our opinion is based on a review of the judicial precedents and statutory law governing the independent regulatory agencies. We have also reviewed the opinion of the Justice Department dated July 22, 1977, which purports to support the Executive Order. A brief summary of our review may be helpful.

For the President to promulgate an Executive Order without a new Congressional statute, he must do so either (1) pursuant to an implied power derived from the Constitution, or (2) pursuant to a previous grant of statutory authority. In this case, we can find neither.

1. The only implied power upon which the President could conceivably rely--and in fact, the Attorney General's opinion does rely on it--is the responsibility of the President set forth in Article II, Section 3, of the Constitution: "to take care that the laws be faithfully executed." But there are a long line of Supreme Court cases, beginning with the 1838 decision in Kendall v. United States, and culminating in the famous steel seizure case (Youngstown Steel), which hold that the President cannot use this clause to impose new requirements where an express or implied Congressional authorization is lacking. The Youngstown Steel case in particular found that in situations where Congress has insulated an area from Presidential domination, the President has no such implied authority.

The history of the regulatory commissions is replete with efforts by Congress to insulate the commissions from Presidential domination. From the creation of the ICC in 1887, continuing through the creation of the FTC and

the independent agencies of the New Deal, down to the new independent regulatory commissions created during the past few years, Congress has made it abundantly clear that these commissions are not subject to Presidential direction or control. Congress, and not the Executive, controls the guidelines for the independent regulatory agencies. Congress created these agencies. Congress provided for their organization. Congress adopted their statutory mandates. Congress controls their budgets and oversees their performance. Congress specifies agency procedures.

Congress has also determined that, in exercising the quasi-judicial and quasi-legislative authority which Congress had delegated to the agencies, agency actions shall not be subject to review or modification by either Congress or the Executive; only the courts may review final agency actions. And to ensure that the agencies will be able to act in a fully independent fashion, without fear of control or domination from the Executive, Congress has given agency members a set term, and provided that commissioners may be removed from office only for "inefficiency, malfeasance, or neglect of duty."

The Humphrey's Executor case, decided by the Supreme Court in 1935, established beyond question the constitutional ability of Congress to create agencies independent of Executive control. The Humphrey's Executor case dealt with a Presidential attempt to remove an FTC commissioner. The Court pointed out that aside from the appointment of commissioners, which Congress had given to the President, Congress had provided that the FTC was to be completely free of any Presidentially-imposed obligations. The Court said that the FTC is --

"a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government."

Then the Court went on to say:

"The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies. . . . Such a body

cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in contemplation of the statute, must be free from executive control."

Thus, both law and tradition clearly demonstrate that the President is not free to act on his own initiative in setting procedures and requirements for the independent regulatory agencies. On the contrary, Congress by its actions has treated the independent agencies as "arms of Congress." Accordingly, this is an area which falls completely outside any implied Presidential authority under the Constitution (Youngstown Steel).

2. If there is no implied Constitutional authority, can Presidential power to act in this instance be derived from some express statutory authority? Again, we can find none.

As the foregoing has demonstrated, the statutory powers which Congress has granted the Executive in connection with the independent regulatory agencies are extremely limited. We know of only three Executive prerogatives which apply across-the-board to the independent regulatory commissions--(i) the power to make appointments to the commissions and to designate agency chairmen; (ii) the power to appraise agency budgets prior to submission to Congress (31 U.S.C. 2); and (iii) the power to subject commission staff to Federal civil service rules on hiring, ethics, and related personnel matters (5 U.S.C. 2102, 3101; 18 U.S.C. 208).

There is no way the proposed Executive Order, which governs agency procedures for developing and issuing regulations, can be said to fall within any of the three categories above. The Order does not concern budget preparation; nor does it concern the appointment authority; nor does it concern personnel standards and procedures.

We have reviewed previous Executive Orders to determine their applicability to the independent regulatory commissions. That review discloses only a single order with such coverage--the May 8, 1965, Order of President Johnson which sets ethical standards of conduct for all

government employees, including employees of the regulatory agencies. That Order, however, was based on explicit statutory authority--namely, the statutes in the third category above, as well as the President's general power to delegate to Executive Branch officials (3 U.S.C. 301).

All of the other Executive Orders which we reviewed exempt independent regulatory commissions from their coverage. Executive Orders 11821 and 11949, issued by former President Ford two years ago, illustrate that pattern. Those Orders were designed to do the same thing which this proposed Order is designed to do--namely, require agencies to consider the costs and benefits of proposed regulatory agencies. The Executive Branch, however, never sought to require compliance by the independent agencies. And the independent agencies did not implement the Orders. Executive Orders 11821 and 11949 thus constitute an important acknowledgement that the President's power does not extend to these agencies.

Absent either statutory authority or implied Constitutional authority, we conclude that the President would be acting without basis in law if the proposed Executive Order were applied to the independent regulatory commissions.

One final point merits emphasis. The opinion of the Attorney General suggests that the independent agencies are off limits as far as substantive requirements are concerned, but that the President can impose strictly procedural obligations on the agencies. We reject this view for two reasons.

First, there is nothing in either the statutes or the judicial precedents which makes such a distinction. Aside from the areas in which specific statutory authority is granted, the courts have refused to allow Presidential control of the independent regulatory commissions. The courts make no distinction between substantive control and procedural control.

Second, such a distinction is almost impossible to draw. Procedures inevitably affect the substance of agency action; they cannot be divorced from substantive policies.

A reading of the proposed Executive Order makes this evident. The proposed Order on its face establishes

substantive standards the independent regulatory agencies must meet when they issue any rule. For example --

The Order states that no independent regulatory agency may adopt regulations unless "the least burdensome of the acceptable alternatives has been chosen" (Sec. 3(d));

The Order requires that agencies consider the economic impact and costs and benefits of proposed regulations before they are issued, and that OMB review the criteria used by the agencies (Secs. 4 and 6);

The Order requires that agencies review existing regulations so that those that no longer meet statutory goals may be eliminated (Sec. 5).

This desire to influence the substantive content of the regulations clearly violates the intent of Congress. When Congress created the independent regulatory agencies, it prohibited Executive Branch influence. The proposed Order undermines this. OMB would inevitably become involved in substantive questions. OMB could influence which regulations the independent regulatory agencies review and which they repeal or amend. OMB could influence the nature of the economic regulatory analysis and thus the content of the rules issued by the independent regulatory agencies. OMB could prohibit an independent regulatory agency from adopting the most effective regulation if there are other "acceptable alternatives" which would impose less burdens. OMB could assure action on some proposed regulations and reject all others by influencing the semi-annual agendas each agency must adopt.

In short, we can find no basis for making the distinction between an Executive Order which affects commission procedures and an Executive Order which affects substantive mandates. To do either, the Executive must come to Congress for a statute.

Mr. President, we hope these views will be helpful to you.

Sincerely,

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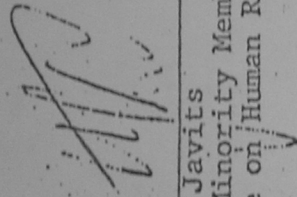
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cc: Mr. Wayne Granquist