

19

23928283

FE065

THE WHITE HOUSE
WASHINGTON

May 17, 1991

THE PRESIDENT HAS SEEN

Good letter
CB

91 MAY 17 Pii 4:06

5-20

MEMORANDUM FOR THE PRESIDENT

FROM: C. BOYDEN GRAY *cmh*

SUBJECT: White House Control Over Independent Agencies

You have asked me to recount why we, and the Reagan Administration generally, decided in 1981 not to be more aggressive in bringing the so-called "independent" agencies under greater Presidential control.

This was a political decision, not a legal one. To be sure, most lawyers (including the Justice Department's Office of Legal Counsel) believed at the time that the status of the President's constitutional authority over independent agencies was more uncertain than his authority over non-independent agencies. However, the driving force behind the decision was a belief that it would require a great deal of work simply to bring the executive agencies under effective Presidential control, and that an attempt to do the same for "independent" agencies was not worth the political cost. Remember that, in 1981, we had not yet firmly established Presidential control over rulemaking by executive agencies. We therefore focused our energies where the benefit was greatest -- i.e., EPA, Agriculture, Labor and other executive departments and agencies with large regulatory dockets.

Today, the situation is different in four respects. First, we have firmly established the principle of White House review of regulatory decisionmaking by executive departments and agencies. Much work remains, to be sure. For example, the absence of a political head of OIRA has made effective review more difficult. But the basic principle has been established within the Executive Branch.

Second, exerting greater control over independent agencies has become more important in at least four important areas: energy, banking, transportation, and telecommunications. It is now obvious that the independent agencies have a tremendous impact on these sectors of the economy, and can no longer be ignored by any Administration wishing to pursue rational and effective regulatory policies. For example, the policies of the Federal Energy Regulatory Commission have an enormous effect on the price of natural gas and (to a lesser extent) electricity as compared with oil. Those policies therefore exert a powerful influence on petroleum usage and imports. Similarly, through their influence over financial instruments, financial markets and regulatory standards, the SEC and the FDIC have a pervasive impact on Administration efforts to ensure the safety and soundness of

Bush Presidential Library Photocopy

banks and thrifts. The Interstate Commerce Commission has a tremendous impact on the transportation sector of the economy, from rail transportation to trucking to barge and bus service. And the Federal Communications Commission exerts an equally if not more powerful influence over the development of the communications sector of the economy, as well as the costs of services provided by that sector.¹

In short, it is now clear that many independent agencies control important pieces of the overall economic and regulatory puzzle. The absence of effective White House review therefore means that our attempts to create and implement national policy have major gaps, ranging from merely bothersome to debilitating.

Third, there now appears to be greater political support for increased Administration control over independent regulatory agencies. For example, the American Bar Association has urged that one of the principal reforms put in place at the recommendation of your Regulatory Relief Task Force -- the OMB review process for regulations proposed by Executive agencies -- be extended to independent agencies as well. Similarly, our own banking regulators, echoing the views of many within the financial institutions industry, have urged that all regulation of federally insured financial institutions be brought firmly within the control of the Administration. Congress, moreover, seems less inclined to give independent agencies jurisdiction over important economic issues than it once was.

Fourth, intervening judicial decisions appear to open the way for greater Presidential control over independent agencies. In particular, the Supreme Court's decision in the so-called "independent counsel" case (Morrison v. Olsen) is interpreted by many lawyers as having rejected the notion that there is any constitutionally significant difference between "independent" and "executive" agencies.

I therefore believe the time is right for a major Administration effort to eliminate the gaps in our energy, banking, transportation, and telecommunications policies by bringing the relevant independent agencies more firmly under the President's control. The arguments against doing so in 1981 no longer apply.

¹ As you are aware, I have disqualified myself from matters involving the FCC. I will therefore not participate in the formulation of specific Administration proposals for regulatory reform in the telecommunications sector.