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DATE: 09 JAN 79

FOR ACTION:

INFO ONLY: THE VICE PRESIDENT	STU EIZENSTAT
FRANK MOORE (LES FRANCIS)	JERRY RAFSHOON
JACK WATSON	ANNE WEXLER

Richard Pethgrew

SUBJECT: MCINTYRE LIPSHUTZ MEMO RE BETTER MANAGING THE FEDERAL GOVERNMENT'S LAWYERS

+++++

+ RESPONSE DUE TO RICK HUTCHESON STAFF SECRETARY (456-7052) +

+ BY: +

+++++

ACTION REQUESTED: YOUR COMMENTS

STAFF RESPONSE: () I CONCUR. () NO COMMENT. () HOLD.

PLEASE NOTE OTHER COMMENTS BELOW:

call Fred DAVIS when it comes out

<input checked="" type="checkbox"/>	FOR STAFFING
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<input checked="" type="checkbox"/>	LIPSHUTZ
<input checked="" type="checkbox"/>	MOORE
<input type="checkbox"/>	POWELL
<input checked="" type="checkbox"/>	WATSON
<input checked="" type="checkbox"/>	WEXLER
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THE WHITE HOUSE
WASHINGTON

check to see if

RJL/MCI memo

also incl SE

8
ID 85898

THE WHITE HOUSE
WASHINGTON

DATE: 17 NOV 78

FOR ACTION: STU EIZENSTAT

FRANK MOORE *nc*

ANNE WEXLER *attached*

RICHARD PETTIGREW - ~~attached~~

INFO ONLY: THE VICE PRESIDENT

JODY POWELL

BOB LIPSHUTZ *attached*

JACK WATSON *nc*

RICHARD HARDEN - *attached*

JERRY RAFSHOON

HAMILTON JORDAN

*11/27 2:00 pm by [unclear] at [unclear] - way
let [unclear]*
McK [unclear] (jd - memo)
**RLJ + DOJ mtg
12/19**

SUBJECT: MCINTYRE MEMO RE OVERVIEW OF THE ATTACHED PROPOSAL FOR
BETTER MANAGING THE GOVERNMENT'S LAWYERS

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+ RESPONSE DUE TO RICK HUTCHESON. STAFF SECRETARY (456-7052) +
+ BY: 1200 PM MONDAY 20 NOV 78. +
+++++

ACTION REQUESTED: YOUR COMMENTS

STAFF RESPONSE: () I CONCUR. () NO COMMENT. () HOLD.

PLEASE NOTE OTHER COMMENTS BELOW:

DF, pulled per [unclear]

WASHINGTON

DATE: 17 NOV 78

FOR ACTION: STU EIZENSTAT

BOB LIPSHUTZ

FRANK MOORE

JACK WATSON

ANNE WEXLER

RICHARD HARDEN

RICHARD PETTIGREW

JERRY RAFSHOON

INFO ONLY: THE VICE PRESIDENT

HAMILTON JORDAN

JODY POWELL

SUBJECT: MCINTYRE MEMO RE OVERVIEW OF THE ATTACHED PROPOSAL FOR
BETTER MANAGING THE GOVERNMENT'S LAWYERS

+++++

+ RESPONSE DUE TO RICK HUTCHESON STAFF SECRETARY (456-7052) +

+ BY: 1200 PM MONDAY 20 NOV 78 +

+++++

ACTION REQUESTED: YOUR COMMENTS

STAFF RESPONSE: () I CONCUR. () NO COMMENT. () HOLD.

PLEASE NOTE OTHER COMMENTS BELOW:

While I agree with the idea of combining the legal research systems currently maintained by the Departments of Justice and Defense, you might want to have the study-team look into the possibility of having Mead Data Systems, which currently operates LEXIS, or some other private firm perform this function. This approach would also ensure that the contents of the file are based on the actual needs of the user, as opposed to what Justice thinks they need.

THE WHITE HOUSE

WASHINGTON

November 28, 1978

MEMORANDUM TO: THE PRESIDENT
FROM: DICK PETTIGREW *Dick*
SUBJECT: McIntyre Memo re Management of
Government Lawyers

I concur in OMB's management improvement recommendations. I believe, however, that both the cost benefits of the proposed reforms and public perception of their importance could be dramatically enhanced by simultaneously announcing a reduction in the overall number of government lawyers, or a ceiling on their growth rate along with a mandatory increase in the use of paralegals. Moreover, I believe the OMB recommendations under-emphasize the importance of requiring government attorneys to account for their time by maintaining daily timesheets.

I. REDUCTION IN LAWYERS/INCREASED USE OF PARALEGALS

Controls on the proliferation of government lawyers would be a welcome and visible addition to the OMB plan. The increased use of paralegals would allow for a reduction in government lawyers without jeopardizing the legal capabilities of any agency. Most have agreed that private law firms, which employ approximately one paralegal for every seven attorneys, could make greater use of paralegals. OMB believes that the work done in many government law offices is even more amenable to delegation to paralegals than that done by private law offices. Yet the government employs only half the percentage of paralegals as does the private sector. According to OMB figures, the average agency general counsel's office hires one paralegal for every 57 attorneys. This results in an extremely inefficient use of time and talent, with the government employing an inordinate number of overqualified lawyers to perform routine tasks.

OMB has expressed the concern that a limit on the number of government attorneys may stymie agency legal action. It is true that certain agencies and departments have been given additional responsibility by Congress or have inherited backlogs of legal work. Exceptions to the staffing limitations could be made for agencies who could show OMB that special circumstances require present or enhanced staff. All other agencies could be required to reduce their hiring of lawyers and increase their reliance on paralegals.

By combining a limit on the number of government attorneys with a directive requiring the increased use of paralegals, you can actually make more legal firepower available for agency litigation against large, well-organized private firms. Government attorneys would be freed from tedious and repetitive work, becoming more available for the kind of work for which they were trained.

II. MANDATORY USE OF TIMESHEETS

My own experience heading a law firm has been that the keeping of timesheets by our attorneys is an invaluable tool, not only for the purpose of billing, but for use in pinpointing inefficient use of time for planning and management improvement purposes. There are few, if any, major law firms in the country that do not depend on timesheets for these purposes. I believe the government should not hesitate to employ this important planning and control device. While an expanded timesheet system is recommended by OMB as a possible project of the proposed Federal Legal Council, the potential of such a system to aid in the allocation of legal resources is strong enough to merit quicker and more certain implementation. A Presidential directive to the Attorney General to develop a system to require government lawyers to account for their time would be an important and extremely visible reform.

The OMB study has yielded excellent results and recommendations. The additions suggested herein would accelerate the cost effectiveness of the proposed reforms and would provide the public with more tangible evidence of your commitment to reform in this area. I suggest the study team be directed to work with the budget staff to develop a plan for a reduction or cap on the number of government attorneys and for the swift implementation of a timesheet system. These changes should be announced in conjunction with the reforms outlined in the OMB memo. My staff and I are available to help.

THE WHITE HOUSE

WASHINGTON

January 20, 1979

MEMORANDUM FOR: THE PRESIDENT
FROM: STU EIZENSTAT *Stu*
SUBJECT: Jim McIntyre's Legal Representation Study

OMB's legal representation study had 3 parts:

1. legal management reforms
2. delegation of litigation authority from the Justice Department to executive branch agencies
3. delegation of litigation authority from the Justice Department to independent agencies.

You are being asked for a decision on part one only. I concur with Jim McIntyre and Bob Lipshutz that you should approve these reforms.

Judge Bell is working with executive agencies to resolve the issues in part two; OMB is still analyzing part three.

It is not necessary for you to read the large study attached to their cover memo.

THE WHITE HOUSE
WASHINGTON

Anne / Chanin :

Concern w/ OMB except for
decision #2, pg 4. He does
NOT like any of the options
but leans towards Option 1.
He thinks it not necessary
to do anything beyond
expressing concern re regulatory
authority; anything else
might create too much controversy.



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

17 NOV 1978

MEMORANDUM FOR THE PRESIDENT

FROM: James T. McIntyre, Jr. *Jim*
SUBJECT: Better Managing the Federal Government's
Lawyers

In August, 1977, you approved a reorganization study of the Federal Government's legal representation system. This memorandum reports on the results of that study, and presents seven issues for your decision.

- Litigation (3 decisions)
- Coordination of Other Legal Activities and Personnel (3 decisions)
- Implementation of Reforms (1 decision)

The majority of our recommendations can be accomplished this fall through administrative action. The two that alter statutory grants of authority to litigate, however, will require either legislation or reorganization plan to implement, and therefore cannot be introduced until the next Congressional session.

If you approve, we will work with the Attorney General, Jody Powell, and others to plan appropriate announcements of the reforms. We will report back to you concerning submitting any statutory changes to Congress.

Four appendices, amplifying the information in this memorandum, discuss:

1. Background Information About the Present Federal Legal Representation system;
2. Additional Budget Information;
3. Comments of Departments, Agencies and Others; and
4. Review of the Staff and Methodology of the Study.

EXECUTIVE SUMMARY

Last August you authorized the President's Reorganization Project (PRP) to conduct a comprehensive study of the Federal Government's legal representation system. A study staff was assembled with detailees from the legal offices of five cabinet departments, two Executive agencies and three independent commissions, as well as representatives of the private sector. This was the first comprehensive study of the Federal legal system in more than 20 years. The primary findings of PRP's study are that the present system is largely uncoordinated and sometimes poorly managed. Twenty-seven departments and agencies currently can take their own cases directly into court without notifying the Attorney General or each other. More than forty percent of the Federal legal offices do not keep track of how their lawyers' time is spent. Most have not established litigation priorities for screening out less important cases. Lawyers in many instances are doing work that could be handled by paralegals at a much lower cost. There are also problems in the Justice Department. Agencies report that some lawyers in the Justice Department who represent them in court are inexperienced and lack specialized knowledge of the area of law involved in the litigation. Too often, low priority has been given by Justice to litigation to enforce the regulatory programs of agencies.

The need to better manage government lawyers is clear, and should produce sizable savings through increased efficiencies in operation, a reduction in the rate of growth of Federal lawyers, and an increase in the quality of our legal services. An announcement of significant reform of the government's legal system would also be a timely follow-up to your Justice speech to the Los Angeles Bar Association. Because government lawyers are paid to promote the public interest, making them more accountable and effective would emphasize your commitment to having lawyers - and the law - serve all the people. Significantly, it is not only the public who would applaud action to better manage the government's lawyers. The Federal agencies involved, the private bar, the ABA and the Federal Bar Association have also expressed support for the management

reforms recommended in this memorandum. In addition, the reforms should enhance your efforts to reduce the regulatory burden, and to keep unnecessary cases out of court.

Issue 1. Establishment of a Litigation Notice System.

Because twenty-seven departments and agencies can take their own cases into Federal court without notifying anyone else, different Federal agencies may be arguing opposite positions in different courts on the same day -- and not even know it. We therefore strongly recommend the establishment of a notice system under which all departments and agencies would notify the Attorney General whenever an issue arose in any case that could have a substantial impact on any other agency.

By monitoring the system, the Department of Justice would be able to intervene in such cases when necessary to promote consistent government positions.

While initially agency input to the system would be manual (with computer indexing and retrieval) the entire system should be computerized as soon as resources permit. Department of Justice (and U. S. Attorney) cases should also be included.

The system would cost an estimated \$413,000 annually to operate. Its benefits, including the ability to identify litigation that is inconsistent with administration positions and to reduce duplicative legal work, should more than offset its costs.

DECISION 1.

_____ Approve the establishment of a government-wide litigation notice system under the direction of the Attorney General, and direct the Attorney General to establish such a system promptly. (OMB, Justice, and all other major departments and agencies support).

_____ Disapprove.

Issue 2. Litigation Authority of the Independent Regulatory Commissions.

At present, the amount of litigation authority granted to the independent commissions and boards varies widely. All SEC litigation, for example, is conducted by SEC lawyers

(except for Supreme Court cases). The CAB, on the other hand, has no authority to litigate. All of its litigation, therefore, is conducted by the Justice Department. Most of the independent agencies fall in between these two extremes.

The trend, especially in recent years, has been for Congress to grant more and more litigation authority to the independents. On June 23, 1978, Senators Glenn, Percy and Ribicoff introduced a bill (S. 3240) to grant total litigation authority (except for Supreme Court cases) to 12 independent commissions. The bill also proposes to grant these agencies the authority to submit their budgets and legislation concurrently to Congress.

At the other extreme, the Justice Department has indicated that it would like to control all of the litigation of the independent commissions, at least from the court of appeals level on. PRP believes the best resolution lies between the extreme positions of S. 3240 on the one hand and the Justice Department on the other.

First, PRP recommends that the independent commissions (such as the SEC and the NLRB) should keep the authority they already have to conduct regulatory litigation -- that is, litigation directly related to their enforcement missions. For one thing, lawyers in those agencies have developed expertise in such matters. A switch would also require training Justice lawyers in new legal areas.

We do not agree with Senators Ribicoff and Glenn, however, that additional litigation authority should be granted at this time. Such a change would be expensive because it would require establishing litigation staffs at agencies (such as the CAB) that do not now litigate, both in Washington and in the field. The change would also reduce the accountability of the independents by further limiting Executive Branch oversight of their litigation.

Nonregulatory litigation is a different matter. It constitutes only a small part of the litigation work of the independent commissions. It also normally involves statutes with government-wide impact, making a consistent position particularly important. For example, there is no reason that the Sunshine Act should be interpreted one way by one agency and a different way by another. For those reasons, PRP recommends centralizing control of nonregulatory litigation in the Justice Department. This does not preclude Justice from delegating case work back to the

agencies, but should ensure more consistent positions on government-wide issues.

We also are presenting a variation on this option because several independents have argued that Freedom of Information Act (FOIA), Privacy Act and Sunshine Act litigation is so related to their regulatory mission that these types of nonregulatory litigation should not be controlled by Justice. Justice on the other hand argues that it is more likely to support open government in applying these statutes than are the agencies.

Because the litigation authority of the independents will be a hotly contested issue, we are seeking only direction from you in principle at this time. We will then be able to conduct more detailed consultations with the Congress and others.

DECISION 2. (In principle only.)

_____ I prefer option 1. Make no change in the regulatory authority of the independents. Authorize Justice to control their nonregulatory litigation. (OMB, Justice, Civil Service Commission and Federal Home Loan Bank Board support.)

_____ I prefer option 2. Make no change in the regulatory authority of the independents. Authorize Justice to control their nonregulatory litigation except FOIA, Privacy and Sunshine Act cases. (Federal Trade Commission and Pension Benefit Guaranty Corporation support.)

_____ I prefer the status quo. (Permit the 18 independent commissions to retain their regulatory and nonregulatory litigation authority. (All other independent agencies prefer; indeed most want more litigation authority as proposed in the Glenn-Percy-Ribicoff Bill.)

Issue 3. Litigation Authority of the Executive Branch Departments and Agencies.

At present, the Justice Department is authorized to control most Executive Branch litigation. The only significant exception is the authority of the Equal

Employment Opportunity Commission (EEOC). (See list in Appendix 1.)

The Justice Department feels strongly that the few exceptions should be eliminated, except for the EEOC's. The majority of Executive departments and agencies have indicated that, like the independent commissions, they would like to conduct more litigation. Unlike the independents, however, they are not requesting (and we do not recommend) that they be granted statutory litigation authority. On the contrary, we believe that you should firmly assert your control over the Executive Branch by placing control of its litigation in the Justice Department. The departments and agencies do want the Justice Department to delegate to them the right to litigate some cases, however, particularly cases of interest to only one agency. We agree.

There is precedent for delegation. The Department of Labor, for example, has conducted much of its own litigation for more than 30 years pursuant to an agreement with the Attorney General. Some informal delegation of cases by Justice to departments occurs now. Memoranda of understanding to govern more formal delegation have been developed with EPA and the Energy Department, moreover.

The Justice Department supports delegation in principle, but has resisted it in practice. The Attorney General strongly opposes being directed to delegate additional authority, moreover, and cautions that many agencies will in the future ask for more legal resources if they are delegated more litigation responsibility.

In our view, delegation to qualified departments and agencies is a wise use of resources as long as it is done with the understanding that departments and agencies are to use existing personnel and resources to assume this responsibility. At present, effort is wasted in even some routine cases. First, an agency lawyer who knows the particular statute prepares the case. Then a main Justice lawyer learns the case and decides to send it to a U. S. Attorney. Finally, a U. S. Attorney learns the case and argues it in court. The Justice Department, by establishing reasonable limits on the kinds of cases that are delegated and procedures for resolving disputes about the application of those delegation limits, would still be in a position to provide the oversight necessary to ensure that consistent positions are taken in key cases. Justice could still litigate any unusually important cases, or cases of government-wide significance.

At the same time, we recognize that not all departments and agencies have the capacity to litigate their own cases. Developing litigating staffs in every agency would be very expensive and would probably increase the amount of duplicative legal work done and inconsistent legal positions taken by the Executive Branch. Decisions need to be made on an agency by agency basis as to whether any delegation is appropriate, and if so, in what types of cases. In our view, if you accept our recommendation to direct the Attorney General to grant more delegation, the burden should be placed on any interested department or agency to justify why their own claims for delegation should be granted, and the Attorney General empowered to review these claims.

We also recognize that delegation is not the only answer to the dissatisfaction expressed by many departments and agencies with the way Justice handles some of their cases. Ultimately, the solution to improving both the quality of work performed by Justice attorneys (including the U.S. Attorneys) and the relationship between Justice and its client agencies is in the hands of the Attorney General.

DECISION 3

Approve Option 1. Direct the Attorney General to work with qualified departments and agencies to arrange to delegate additional litigation work to them and report back to you and the Director of OMB in six months on the nature and extent of the delegation arranged. Delegation should be undertaken for cases that concern only one agency unless they involve major constitutional or novel statutory issues. Centralize in the Justice Department by reorganization plan or legislation the limited litigation authority now granted to some Executive Branch agencies (except for the authority to prosecute or defend equal employment opportunity cases now granted to the EEOC). (OMB supports; other departments including USDA, Energy, HEW, State, Transportation, EPA and VA have indicated they will accept if there is, in fact, adequate delegation.)

Approve Option 2. Do nothing about delegation. Centralize in the Justice Department the limited litigation authority now granted to some Executive Branch agencies (except for the EEOC as described in Option 1). (Justice supports.)

Make no change in the present distribution of litigation authority in the Executive Branch.

Issue 4. Computerizing Legal Research, Support, and Management

In many ways, the Federal legal system is, in the words of one agency, "still in the horse and buggy age, while our brethren in private law firms are to a large degree soaring into court on high-powered, computerized rockets." The public interest will clearly suffer if this imbalance is not corrected.

One problem is that presently there are two computer-based legal research systems: JURIS in the Department of Justice, and FLITE in Defense. Not only should they be combined, modified or replaced, at least to the extent that economies can be effected, but the new system should be made available to any Federal legal office willing to pay its share of the costs. The system should be expanded to include Federal regulations so that it will be possible for government lawyers to find out quickly when a new regulation will overlap or conflict with an existing regulation. This action would also enhance your efforts to simplify and clarify government regulations. More work products of Federal lawyers (including case briefs) should also be included.

It is estimated that the described changes in JURIS will produce only minimal costs in first year start up expenses with minimal maintenance costs thereafter.

Estimating the savings brought about by an expanded legal research system is extremely difficult. Swifter and more accurate research by government lawyers are direct benefits. Private sector experience indicates an approximate 3% increase in productivity is likely when such computer assisted legal research systems are employed. When applied against the government's annual expense of \$760 million for lawyers and support services, this productivity increase far outweighs the accompanying costs.

Additional savings will result from the modification or outright elimination of Defense's FLITE system (which currently costs some \$1.5 million) when it is combined with JURIS.

DECISION 4.

_____ Direct the Attorney General and the Secretary of Defense to improve the computerized Federal legal research system as described. Direct the Attorney General to plan as well for improved support and management of the Federal legal system through the use of word processing and automated data processing systems. Direct them to deliver a specific implementation plan to the Director of the Office of Management and Budget in six months. (OMB, Justice, Defense and all other major departments and agencies support.)

_____ Take no action.

Issue 5. Other Management Reforms.

There are a number of less dramatic but significant management reforms needed in the Federal legal system. In brief, they are:

1. Reduce interagency court disputes by directing Executive agencies to use the Office of Legal Counsel in the Department of Justice to resolve disputes short of litigation. Invite the independents that have their own litigation authority to use the same service on a voluntary basis.
2. Direct each agency to make the opinions of their general counsel available to the public and other government lawyers except when prohibited by law or the agency head.
3. Increase agency cooperation in legal field offices and encourage the sharing of such things as libraries and hearing rooms.
4. Increase use of paralegals, establish a classification for legal secretaries and direct that positions at GS-15 and above be made available to outstanding litigators or legal counselors.
5. Improve training by moving the Legal Education Institute from the Civil Service Commission to the Department of Justice.

DECISION 5.

_____ Approve the management reform package and direct OMB to take appropriate action. (OMB, Justice and all other major departments and agencies support.)

_____ Disapprove the package.

ISSUE 6. Coordination of the Federal Legal System

All major departments and agencies support the establishment of a 15-member Federal Legal Council, chaired by the Attorney General. Representative general counsels from all departments and agencies would serve on a rotating basis. The Council would be charged to:

- improve coordination and communication in the Federal legal system as outlined in the memorandum;
- improve management of the Federal lawyers as described in the memorandum.
- increase the amount of pro bono legal work donated by Federal attorneys.

The first year costs of a small (6 person) staff in Justice to help not only the Council, but to assist the Attorney General in his duties of managing the Federal lawyer resources would be less than \$200,000 per year (plus an estimated one-time \$50,000 start-up cost). The benefits of improved legal capability and coordination far outweigh these costs.

DECISION 6.

_____ Establish a Federal Legal Council as described to work with the Attorney General in improving the Federal legal system. (OMB, Justice and all other major departments and agencies support.)

_____ Take no action.

Issue 7. Implementation.

All decisions in this memorandum other than those requiring transfer of statutory litigation authority can and will be implemented this fall by appropriate Executive

Orders if you approve. Any transfers of current statutory grants of litigation authority would require a reorganization plan or new legislation for implementation. Because Senator Ribicoff, Chairman of the Senate Governmental Affairs Committee, has endorsed the Glenn-Percy Bill of June 23, 1978, to increase the litigation authority of 12 independent commissions, we will meet during the fall with Senator Ribicoff and other congressional leaders and interest groups to develop an appropriate reorganization package, to assess its chances for passage, and to identify the shifts in legal personnel, if any, required by statutory shifts in litigation authority.

DECISION 7.

_____ Implement all decisions in this memorandum this fall (except those altering statutory authority to litigate) by announcing them and issuing appropriate Executive Orders. Report back to me on congressional views on statutory changes before submitting them to Congress. (OMB supports.)

_____ Other. (Justice indicated a preference for delaying implementation of the management reforms until 1979.)

Introduction

The work of Federal lawyers has not been examined on a government-wide basis since the Hoover Commission in 1955. Then there were roughly 7000 nonmilitary lawyers working in legal positions in the Executive Branch. Today there are almost 16,000. The amount of litigation involving the government has also grown rapidly, having doubled in the last seven years alone. By 1977, there were more than 40,000 civil cases involving the Federal Government in court.

The Federal legal representation study was designed (1) to improve the way the government uses its legal resources; (2) to prevent unnecessary litigation; and (3) to improve the way litigation is conducted in order to ensure more uniform application of the law. The study staff included representatives of five cabinet departments, two Executive agencies, three independent commissions and the private sector. Data was collected on the activities of all major Federal legal offices both by questionnaire and through personal interviews in Washington and in the field. Preliminary and final recommendations were circulated for comment by all affected departments and agencies, and appropriate changes were made in this decision memorandum.

The primary findings of the President's Reorganization Project (PRP) are that the present Federal system of legal representation is largely uncoordinated and sometimes poorly managed. Twenty-seven departments and agencies currently can take their own cases directly into court without notifying the Attorney General or each other. No accurate statistics are kept in the Executive Branch on the number or types of cases involving the Federal government that are handled each year. More than forty percent of the Federal legal offices do not keep track of how their lawyers' time is spent. Most have not established litigation priorities for screening out less important cases or allocating scarce resources. Lawyers in many instances are doing work that could be handled by paralegals at a much lower cost. There are also problems in the Justice Department. Agencies report that some lawyers in the Justice Department who represent them in court are inexperienced and lack specialized knowledge of the area of law involved in the litigation. Too often, low priority has been given by Justice to litigation to enforce the regulatory programs of agencies.

In the end, of course, it is the taxpayers who lose when their money is wasted because of unnecessary duplication of effort, delay or poor legal counseling for their government. The stakes are not small. The Civil Division of the Justice

Department, for example, reports that last year over \$61 billion* was at issue in cases that its 280 lawyers handled.

The need to better manage government lawyers is clear. Improved management should produce sizeable savings through increased efficiencies in operation, a reduction in the rate of growth of Federal lawyers, and an increase in the quality of our legal services. In fiscal year 1976, the last year for which actual data is available, more than \$760 million was spent on salary and support for government lawyers. A 4% increase in efficiency, which seems a reasonable target in light of private sector experience, could generate savings of over \$90 million in the next 3 years.

An announcement of significant reform in the government's legal system would also be a timely follow-up to your Justice speech to the Los Angeles Bar Association. Because government lawyers are paid to promote the public interest, making them more accountable and more efficient would emphasize your commitment to having lawyers -- and the law -- serve all the people. Significantly, it is not only the public who would applaud action to better manage the government's lawyers. The Federal agencies involved, the private bar, the ABA and the Federal Bar Association have all expressed strong support for the management reforms recommended in this memorandum. Also, as indicated in your speech, good lawyers can do much to make the system of justice and our government less complex and more understandable. These reforms therefore should also enhance your efforts to reduce the regulatory burden, and to keep unnecessary cases out of court.

Comments on your speech reflect the importance of the issue of government lawyers:

"What Mr. Carter said about the legal profession in general applies at least as well, if not more so, to the government's army of attorneys. If he really wants to do something about the problem, perhaps he should begin by reducing the legal fat

*This estimate is somewhat inflated as plaintiffs typically claim higher damages than they expect to win. But even if it is cut to one third, \$20 billion is still a substantial sum to be at risk. Moreover, the amounts at stake in litigation conducted by other divisions, departments and agencies, are not included.

and featherbedding in Washington." (Boston Herald American, 5/11/78)

"In flaying lawyers, the President was no doubt picking up on a broad public exasperation over the whole subject of justice, the courts and the law. But it should be remembered that Washington itself has become the fountainhead of unnecessary laws and litigation. Mr. Carter...would be well advised to spend less time lashing out at lawyers in general and more time asking the government's lawyers just what it is they are trying to do." (Wall Street Journal, 5/10/78)

"The maze of federal regulation constantly demands more and more legal service, with costs being passed on to the people.... Perhaps it would be best if Mr. Carter would take the Presidency that he holds and show the Nation how well he can handle that, giving us all a model of efficiency and economy." (Chattanooga News - Free Press, 5/8/78)

I. LITIGATION

Nowhere is the need for better coordination clearer than in the courtroom. Because twenty-seven departments and agencies can take their own cases into Federal court without notifying anyone else, different Federal agencies may be arguing opposite positions in different courts on the same day -- and not even know it. Even more troublesome is the fact that because of this lack of coordination, the law is not always uniformly enforced. The way a statute is applied to an individual or activity should not vary from one Federal agency to another. In addition, any one of the agencies with its own litigation authority can argue a position in court, obtain a court ruling on the point, and thereby set a court precedent that binds the rest of the government, before any other agency even knows about the litigation. The result in one recent case was that the Federal Power Commission litigated a case in the Second Circuit Court of Appeals that established policy for the entire Executive Branch on the subject of paying legal fees in public interest lawsuits, without coordinating with the other affected agencies.

Several important benefits for the agencies and the public would result from better coordination of all Federal litigation. First, duplicative legal work could be minimized. Current efforts to reform government regulations

could also be greatly enhanced, since regulations often are enforced and tested through litigation. Finally, it would be possible to reduce the number of inconsistent government legal actions, thereby making government fairer and more understandable.

One extreme solution to the problem of coordinating litigation would be to authorize the Justice Department to conduct all civil litigation. But total centralization seems unwise. Although in national emergencies both Presidents Wilson and Franklin Roosevelt centralized litigating authority in Justice for a short time, in normal times the benefits of uniformity and objectivity obtained by centralization seem overshadowed by the costs, including loss of technical specialization and understanding of agency policy goals, as well as strong Congressional committee objections to Executive Branch control of the litigation of independent regulatory commissions. In any case, total centralization is not likely even if all litigation were performed by Justice. As one agency stated in our study, there are now in the Department of Justice "95 U.S. Attorney offices operating largely independently of one another." While the Department of Justice is strengthening internal management, taking all authority away from other agencies will not solve these internal Justice problems, and could exacerbate them, at least in the short run.

The other extreme solution to the litigating issue, total decentralization, also seems unwise. Authorizing every department and agency to litigate would increase both the number of conflicting interpretations of law within the Federal government, and the amount of duplicative legal work performed. Proliferation of separate litigation authority for every agency would not only make Presidential policy harder to implement, but would mean that the agencies themselves would be subject to the vagaries of litigation strategies of the other agencies. It would also cost more money if litigation staffs had to be developed and maintained in every agency. For one thing, such staffs would need to be developed not only for Washington, D.C., but also to handle the cases that arise in Federal courts around the country.

Because neither total centralization nor total decentralization of litigation authority is feasible, we propose a three-part approach to coordinating the present crazy-quilt pattern of conducting Government litigation:

Issue 1 discusses a proposed notice system that would provide an early warning system for inconsistent cases;

Issue 2 deals with the litigating authority of the independent regulatory commissions; and

Issue 3 then deals with Executive Branch litigation.

Issue 1. Establishment of a Litigation Notice System

PRP strongly recommends the immediate establishment of a litigation notice system. This step has broad support and little opposition. Through such a system, any agency that litigates cases would notify the Attorney General whenever any issue arose in any case that could have a substantial impact on any other agency of the Federal Government.

To carry out this proposal, we recommend that the President direct the Attorney General to establish a litigation notice system with appropriate guidelines as to the form the notice should take so as to avoid inundating Justice with useless paper. While initially agency input to the system would be manual (with computer indexing and retrieval), the entire system should be computerized as soon as resources permit. Department of Justice (and U.S. Attorney) cases should also be included. Under such a system, all affected agencies could instantaneously learn about litigation by other agencies (including the Department of Justice) that might affect them. By carefully monitoring the notice system, the Department of Justice would be able to learn of key cases early enough to intervene in the proceedings when necessary in order to promote consistent government positions.

The proposed notice system will cost an estimated \$413,000 annually to operate. Its benefits are estimated to outweigh the cost, and would include the benefit of identifying litigating positions that are inconsistent with administration positions and reducing duplicative legal work.

DECISION 1.

_____ Approve the establishment of a government-wide litigation notice system under the direction of the Attorney General, and direct the Attorney General to establish such a system promptly. (OMB, Justice and all other major departments and agencies support.)

_____ Disapprove.

Issue 2. Litigation Authority of the Independent Regulatory Commissions and Government Corporations

At present, the amount of litigation authority granted to the independent commissions and boards varies widely from commission to commission. All SEC litigation, for example, is conducted by SEC lawyers (except at the Supreme Court level when the SEC does rely on the Solicitor General). At the other extreme, the CAB has no authority to litigate its own cases; rather, CAB litigation now is conducted entirely by the Justice Department. Most of the other agencies fall in between these two extremes. (A complete list of agencies that have their own litigation authority is part of Appendix 1 to this memorandum.)

The trend, especially in recent years, has been for Congress to grant more and more litigation authority to the independent commissions. On June 23, 1978, Senators Glenn, Percy, and Ribicoff introduced a bill (S.3240) that would grant 12 independent commissions full litigation authority (except in the Supreme Court). The bill also proposes to allow these agencies to send their budgets to Congress concurrently with transmittal to OMB. The bill did not pass in the last Congress, but it is symptomatic of the strong efforts in some congressional circles to remove the litigation authority of the regulatory agencies from the Executive Branch entirely.

At the other extreme, the Justice Department has indicated it would like to control all of the litigation of the independent commissions, at least from the court of appeals level on. PRP believes the best resolution lies between the extreme positions of S. 3240 on the one hand and the Justice Department on the other.

A. Regulatory Litigation.

First, it is necessary to distinguish between regulatory and non-regulatory litigation. Regulatory litigation is used here to mean all litigation pertaining to an agency's enforcement mission. (An example would be an NLRB suit to enforce a bargaining order.) Non-regulatory litigation, by contrast, means litigation that does not grow out of an agency's regulatory statutes. Most non-regulatory litigation involves statutes that apply government-wide, (such as the Freedom of Information Act, Sunshine Act or Federal Tort Claims Act). The case for centralizing all regulatory litigation authority of the independent commissions in the Justice Department, is not very strong.

In addition to the substantive arguments against centralization set out earlier, any move to centralize all litigation authority of the independent commissions in the Justice Department would be most strongly resisted not only by the affected commissions, but also by key members of Congress. The Senate Committee on Governmental Affairs recently stated:

"Regulatory responsibility is necessarily diminished if any agency cannot, on its own initiative, seek court enforcement of its orders or injunctions against violations of its statutes and rules. The same is true if a commission is precluded from full participation in judicial proceedings challenging agency actions or authority. In these situations ... lawyers beyond its control manage the litigation -- deciding what to do and when to do it."

Centralization of regulatory litigation also might not take full advantage of the considerable expertise that has been developed by litigators in agencies such as the SEC, NLRB and FTC. Lawyers from these agencies appear for the most part to handle their litigation responsibilities well.

PRP concludes, for these reasons, that the independent regulatory commissions should maintain their present authority to conduct regulatory litigation.

Additional decentralization, as proposed by S. 3240, that would give total litigating authority to all the independent commissions, would be expensive. For example, it would require establishing a litigating staff at the CAB (that now does no litigation), both in Washington and around the

country. Such a change would also reduce the accountability of the independents by further limiting Executive Branch oversight of their litigation.

B. Non-regulatory Litigation.

Non-regulatory litigation is a different matter. It constitutes only a small part of the litigation work of the independent commissions. No specific authority is granted to them to litigate nonregulatory matters moreover. Rather, several of the independent agencies have broad general litigation authority that they have interpreted to include non-regulatory cases. Non-regulatory litigation normally involves statutes with government-wide impact, making a consistent position particularly important. For example, there is no reason the Sunshine Act should be interpreted one way by one agency and a different way by another in identical circumstances. Agency claims of expertise, moreover, are not very persuasive. While an SEC lawyer may have great experience in SEC matters, he or she is not likely to be as experienced in tort cases as is a lawyer in the Civil Division of the Justice Department who routinely handles only tort cases. Finally, from a practical standpoint, "open government" will be hard to achieve if the independent agencies themselves carve out separate interpretations of the laws on Freedom of Information or Sunshine. For these reasons, PRP recommends centralizing control of non-regulatory litigation authority in the Justice Department. This does not preclude Justice from delegating back to the agencies in appropriate cases, but should ensure more consistent positions on government-wide issues.

Because the litigation authority of the independent agencies will be hotly contested, we are seeking only Presidential guidance at this time rather than a final decision. With guidance, PRP and others will be able to seek more detailed consultation on the matter and the political feasibility of various implementation and timing options.

Option 1. Make no change in the regulatory authority now granted to independent commissions and government corporations. Authorize the Justice Department to control all their non-regulatory litigation.

Advantages

- Recognizes the special status of independent commissions and government corporations by preserving their regulatory litigation authority.
- Promotes uniform application of the law by centralizing authority to oversee non-regulatory litigation, (personnel and tort cases and such areas important to "open government" as Freedom of Information Act and Sunshine Act cases).
- Takes advantage of the litigation expertise already developed by these independents.

Disadvantages

- Some independent agencies object strongly to losing their authority to control their Freedom of Information Act, Sunshine Act and Privacy Act litigation.
- Giving Justice a monopoly over government-wide litigation could result in less responsiveness to the needs of "client" agencies.

The Department of Justice, while preferring to control even the regulatory litigation of independent commissions supports, at a minimum, controlling their non-regulatory litigation. It points out:

"There may be some justification for allowing independent regulatory agencies to enforce their own programs independently of the Justice Department. There is no reason, however, why the government, including the independent agencies, should not have a consistent legal position in areas such as equal employment and freedom of information. An employee or citizen should be treated the same way in these areas by every agency. This uniformity can only be ensured by centralizing non-regulatory litigating authority in the Justice Department."

The Securities and Exchange Commission on the other hand, contends:

"In light of the significant differences between the executive departments and agencies and the independent regulatory agencies, we believe action [should be limited] to executive departments and agencies, leaving those independent regulatory agencies with adequate litigating capacity to perform the role Congress wisely confided to them."

Option 2. Make no change in the regulatory authority granted to independent commissions and government corporations. Authorize the Department of Justice to control all their non-regulatory litigation authority except for the authority to conduct Freedom of Information Act, Privacy Act and Sunshine Act litigation, now assumed by some independent regulatory commissions and government corporations.

Those independent commissions (including SEC and NLRB) that now claim the right to conduct their own Freedom of Information Act, Privacy Act and Sunshine Act litigation, have objected strongly to centralization of this one particular type of nonregulatory authority, but have less strenuous objections to centralization of other non-regulatory litigation. For this reason, a variation on Option 1 is presented for your consideration.

Advantage

- Recognizes strong agency interest in retaining Freedom of Information, Privacy and Sunshine Acts litigation, which is often a prelude to regulatory litigation.

Disadvantage

- May handicap efforts to achieve a uniform, government-wide policy on these subjects vital to an "open government."

The NLRB argues, for example, that:

"The FOIA has been used extensively as a tactical weapon by parties to NLRB enforcement proceedings. These law suits have threatened to disrupt agency processes and frustrate enforcement of the NLRB on a broad scale.... [T]he NLRB considers it vitally

important that this litigation continue to be conducted exclusively by NLRB attorneys."

The Department of Justice responds:

"We oppose [having any agencies control their FOIA litigation]. Since the [FOIA] applies to all agencies, interpretations of its language in a case against one agency will most likely have an impact on other agencies. Moreover, the policy underlying the Act should be interpreted and applied equally by all agencies. There is a clear need for effective government-wide control to avoid conflicting interpretations.... An agency which does not have an overview of cases in other agencies and which is necessarily less objective when its own interests are at stake is clearly not in the best position to make choices with respect to litigation for the government as a whole."

Because intensive congressional consultation is desirable prior to a final Presidential decision in these controversial litigation authority areas, we seek only a decision "in principle" on these options now, with a final decision to await more congressional input.

DECISION 2. (This is a decision in principle only.)

_____ I prefer Option 1. Make no change in the regulatory authority of the independents. Authorize Justice to control their non-regulatory litigation. (OMB, Justice, Civil Service Commission and Federal Home Loan Bank Board support.)

_____ Approve Option 2. Make no change in the regulatory authority of the independents. Authorize Justice to control their non-regulatory litigation except FOIA, Privacy and Sunshine Act cases. (Federal Trade Commission and Pension Benefit Guaranty Corporation support.)

_____ I prefer the status quo. Permit the 18 independent commissions to retain both their regulatory and non-regulatory litigation authority. (All other independent agencies prefer; indeed most want even more litigation authority as proposed in the Glenn-Percy-Ribicoff bill.)

Issue 3. Litigation Authority of the Executive Departments and Agencies.

At present, the Justice Department is statutorially authorized to control most Executive Branch litigation. The only significant exception is the Equal Employment Opportunity Commission. (A list of the other exceptions is contained in Appendix I.)

The Justice Department feels strongly that the few exceptions should be eliminated, except for the EEOC's. In its words:

"We see no justification for any Executive Branch department or agency [except the EEOC^o to have independent litigating authority. Executive agencies are directly responsible to the President, who has ultimate authority to control their activities, including their legal activities. Giving authority to litigate on behalf of agencies to the Attorney General, the President's chief legal officer, who is also answerable to the President, cannot interfere with the supposed independence of the executive agencies. Given this

fact, the benefits of centralization ... including increased efficiency, far outweigh any drawbacks."

The majority of Executive departments and agencies have indicated that, like the independent commissions, they would like to conduct more litigation. HEW put the matter this way:

"There is no real attorney-client relationship between the Department of Justice and its client agencies and departments. Therefore, there is neither incentive nor a mechanism for assuring appropriate deference to the views of client agencies about substantive legal issues during the conduct of litigation.... There is no substitute for day-to-day experience as an agency lawyer as a means of gaining in depth knowledge and understanding of a specialized area of law, including the policy considerations and the context in which policy decisions and legal interpretations are made.... For all these reasons, it makes a great deal of sense to give to departments and agencies a greater role in handling their own litigation, at least with respect to programs which generate a substantial amount of litigation."

These departments and agencies are not requesting (and we do not recommend) that they be granted statutory litigation authority. On the contrary, you should firmly assert your control over the Executive Branch by placing control of all its litigation in the Justice Department. The departments and agencies do want the Justice Department to delegate to them the right to litigate some cases, particularly cases of interest to only one agency. We agree.

There is precedent for such delegation arrangements. The Department of Labor, for example, has conducted much of its own litigation for more than 30 years pursuant to an agreement with the Attorney General. Some informal delegation of cases by Justice to departments does occur now. Memoranda of understanding to govern more formal delegation have been developed with EPA and the Energy Department, moreover, as well as with Labor.

The Justice Department supports delegation in principle, but has historically resisted it in practice. The Attorney General strongly opposes being directed to delegate additional work, and cautions that many agencies will in

the future ask for more legal resources if they are delegated more litigation responsibility.

In our view, delegation to qualified departments and agencies is a wise use of resources as long as it is done with the understanding that the departments and agencies have to use existing personnel and resources to assume this responsibility. At present, effort is wasted in even some routine cases. First, an agency lawyer who knows the particular statute prepares the case. Then a main Justice lawyer learns the case and decides to send it to a U.S. Attorney. Finally, a U.S. Attorney learns the case and argues it in court. Delegation could reduce some of this duplication. The Justice Department, by establishing reasonable limits on the kinds of cases that are delegated and the procedures for resolving disputes about the application of those delegation limits, would still be in a position to provide the oversight necessary to ensure that consistent positions are taken in key cases. Justice could still litigate any unusually important cases, or cases of government-wide significance.

At the same time we recognize that not all departments and agencies have the capacity to litigate their own cases. Developing litigating staffs in every agency would be very expensive and would probably increase the amount of duplicative legal work done and inconsistent legal positions taken by the Executive Branch. Decisions need to be made on an agency by agency basis as to whether any delegation is appropriate, and if so, in what types of cases. In our view, if you accept our recommendation to direct the Attorney General to grant more delegation, the burden should be placed on any interested department or agency to justify why its own claim for delegation should be granted, and the Attorney General empowered to review these claims.

We also recognize that delegation is not the only answer to the dissatisfaction expressed by many departments and agencies with the way Justice handles their cases. Ultimately, the solution to improving both the quality of work performed by Justice attorneys (including the U.S. Attorneys) and the relationship between Justice and its client agencies is in the hands of the Attorney General. While Justice has taken important steps in recent months to solve these problems, there is evidence that Justice should:

- hire more experienced attorneys

- develop litigation priorities in consultation with its client agencies in order to end the inefficient process of trying to litigate all cases itself, regardless of importance
- develop better internal mechanisms to ensure that United States attorneys are taking consistent positions, and are operating according to the established litigation priorities.

Option 1. Direct the Attorney General to work with qualified departments and agencies to arrange to delegate additional litigation work to them and report back to you and the Director of OMB in six months on the nature and extent of the delegation arranged. Delegation should be undertaken for cases that concern only one agency unless they involve major constitutional or novel statutory issues. Centralize in the Justice Department by reorganization plan or legislation the limited litigation authority now granted to some Executive Branch agencies (except for the authority to prosecute or defend equal employment opportunity cases now granted to the EEOC). (OMB supports; other departments including USDA, Energy, HEW, HUD, State, Transportation, EPA and VA have indicated they will accept if there is, in fact, adequate delegation.)

Advantages

- Centralized oversight will help the Executive Branch to develop a consistent position on legal issues.
- Delegation of litigation work will help agencies to attract and retain good lawyers.
- Delegation can reduce duplication by allowing the same lawyer who prepares a case to take it to court.
- Delegation will permit the Justice Department to concentrate more of its limited resources on matters of government-wide importance.

Disadvantages

- There may be less uniformity of position when more agencies do some of their own case work.
- Agencies may continue to press for more litigation authority in the Congress if they do not obtain sufficient delegation from Justice.

Option 2. Do nothing about delegation, but centralize in the Justice Department the limited litigation authority now granted to a few Executive Branch agencies (except for the authority to prosecute or defend equal employment cases now granted to the EEOC). (Justice supports.)

Advantages

- Promotes uniform application of the law.
- Increases the likelihood that litigation will be screened from the perspective of government-wide interests rather than of individual agency interests.

Disadvantages

- Often results in duplication of effort -- an agency lawyer prepares the case, then a Justice lawyer must learn the case and try it in court.
- Fails to respond to widespread dissatisfaction expressed by departments and agencies with their relationship to Justice Department and their requests to do more of their own litigation.
- Gives Justice a monopoly over all Executive Branch litigation and might result in less responsiveness to the needs of "client" agencies.

DECISION 3. Executive Branch Litigation Authority

Approve Option 1. Direct the Attorney General to work with qualified departments and agencies to arrange to delegate additional litigation work to them and report back to you and the Director of OMB in six months on the nature and extent of the delegation arranged. Delegation should be undertaken for cases that concern only one agency unless they involve major constitutional or novel statutory issues. Centralize in the Justice Department by reorganization plan or legislation the limited litigation authority now granted to some Executive Branch agencies (except for the authority to prosecute or defend equal employment opportunity cases now granted to the EEOC). (OMB supports; other departments including USDA, Energy, HEW, HUD, State, Transportation, EPA and VA have indicated they will accept if there is, in fact, adequate delegation.)

Approve Option 2. Do nothing about delegation. Centralize Executive Branch litigation authority in Justice, except for EEOC's. (Justice supports)

Make no change in the present distribution of litigation authority in the Executive Branch.

II. COORDINATION OF OTHER LEGAL ACTIVITIES AND PERSONNEL

Issue 4. Computerizing Legal Research Support and Management

The quality of any legal system ultimately depends in large part on the support services available. Unfortunately, in many ways the Federal legal system is, in the words of the GSA, still "in the horse and buggy age, while our brethren in private law firms are to a large degree soaring into court on high powered, computerized rockets." The public interest will clearly suffer in court if this imbalance is not corrected.

Presently, for example, two separate computer-based research systems have been developed, one in the Department of Justice (JURIS) and another in Defense (FLITE). Each offers some benefits the other lacks. For this reason the Attorney General and the Secretary of Defense are developing appropriate plans for combining, modifying, or replacing the two systems, at least to the extent that economies can be effected. We recommend that you direct the Attorney General

and the Secretary of Defense to include in the new system two elements:

(a) Access for all Federal legal offices that have (or are willing to invest in) the necessary equipment. The Department of Justice supports this recommendation as do other agencies that could be recipients. The Department of Defense cautions that the system should not be expanded so rapidly that its utility to present users could be decreased substantially because of computer down-time.

(b) Expansion of the scope of the system beyond court opinions. The systems are now limited for the most part to court opinions. At a minimum, Federal regulations should be added so that it will be possible for government lawyers to find out quickly when a new regulation will overlap or conflict with an existing regulation. This action would create for the first time an information system to provide rapid assessments of regulations on a government-wide basis. It could, therefore, significantly help to reduce some of the burdens on industry by identifying contradictory or burdensome regulations and enhance your efforts to simplify and clarify government regulations. More of the work products of Federal lawyers (case briefs and general counsel opinions) should also be added to the data base so that duplication of legal work could be significantly reduced.

All affected agencies agree that additions to the data base could make the system more useful. To avoid disputes, authority to decide which additions will be made, and when, should be vested in the Attorney General.

It is estimated that including Federal regulations and other lawyer work products in the JURIS system will produce only minimal costs in first year start-up expenses with minimal maintenance costs thereafter.

Estimating the savings brought about by an expanded legal research system is extremely difficult. Swifter and more accurate research by government lawyers are direct benefits. Private sector experience indicates an approximate 3% increase in productivity is likely when such computer assisted legal research systems are employed. When applied against the government's annual expenses of \$760 million for lawyers and support services, this productivity increase far outweighs the accompanying costs.

Additional savings will result from the modification or outright elimination of Defense's FLITE system (which

currently costs some \$1.5 million) when it is combined with JURIS.

DECISION 4.

_____ Direct the Attorney General and the Secretary of Defense to improve the computerized Federal legal research system as described. Direct the Attorney General to plan as well for improved support and management of the Federal legal system through the use of word processing and automated data processing systems. Direct both to deliver a specific implementation plan to the Director of the Office of Management and Budget in six months. (OMB, Justice, Defense and all major departments and agencies support.)

_____ Take no action.

Issue 5. Other Management Reforms

There are a number of less dramatic, but significant management reforms needed in the Federal legal system. The reforms are widely supported by the affected departments and agencies. We recommend that you approve a reform "package" containing the following items:

1. Reduction of Inter-Agency Court Disputes.

Direct Executive departments and agencies to use the Office of Legal Counsel of the Department of Justice to attempt to resolve inter-agency legal disputes when they arise. This would include, among other things, determining which of two agencies has jurisdiction to administer a program or regulate a particular activity, or what is required for one Federal agency to comply with a law administered by another Federal agency. Invite the independent regulatory commissions that have their own litigation authority to use the same service on a voluntary basis.

Rationale: It is a waste of taxpayers' money to pay to litigate both sides of such disputes in the courts. It also gives the appearance of a disorganized Executive Branch that cannot keep its own house in order. Justice recognizes that many disputes involve mixed questions of law and policy. The Department has stated that the Attorney

General's role would be limited to resolving the legal issues. Any remaining disagreements on policy would be referred to the appropriate unit within the Executive Office of the President.

2. Improved Access to Opinions of General Counsels in Departments and Agencies.

Direct the general counsels of all departments and agencies to make their opinions more readily available to the public and to other government attorneys except when prohibited by law or the department or agency head.

Rationale: Most departments and agencies already make such opinions available to the public. This proposal will make that practice government-wide. In addition to making the government more open and understandable, it should increase uniformity in the interpretations of law provided to agencies and reduce duplicative legal work by alerting lawyers in one agency to legal issues already researched in another.

Not all opinions should be made available, of course. In general, the standards of the Freedom of Information Act should guide release. The head of an agency, moreover, should be able to bar release of internal opinions in order to avoid discouraging the agency head from seeking advice from his or her counsel on sensitive matters.

3. Field Office Coordination.

Direct the heads of all departments and agencies to increase their use of joint or shared legal facilities by new or existing field offices where practicable.

Rationale: In some areas, field legal offices all maintain separate law libraries, even when they are all located in one building. The individual libraries, as a result, are often both inadequate and duplicative. Similarly, legal office resources temporarily not being used by one agency are rarely shared. As a result, copy machines and Telefax equipment experience costly "down time," and hearing rooms go unused.

4. Personnel Reforms.

Direct all Federal legal offices to increase their use of paralegal personnel. The Department of Justice has made great strides in this area, but most agency legal offices have not. Use of paralegals should result in a substantial savings over time in legal personnel costs as it frees higher priced attorneys from routine legal matters. At the same time, direct the Civil Service Commission to ensure that

- More paralegals are hired (by taking such steps as placing them in Schedule A with lawyers).
- A separate job classification series is established that recognizes the special skills necessary to be a legal secretary.
- Positions at GS-15 and above are available for lawyers who demonstrate superior litigating or counseling skills (rather than being restricted as they sometimes are now to lawyers who are administrators).

5. Improve Training of Federal Lawyers.

Direct all departments and agencies to place more emphasis on ensuring that their lawyers have adequate initial and career development training. Transfer the Legal Education Institute from the Civil Service Commission to the Department of Justice, and direct the Attorney General, in consultation with other Federal legal offices, to expand the Institute's offerings. We estimate the Institute's budget will be \$1,136,000 the first year. This can be offset by reductions in the training budgets of other departments and agencies that now pay the Civil Service Commission for its assistance.

DECISION 5.

_____ Approve the management reform package and direct OMB to take appropriate action. (OMB, Justice and all other major departments and agencies support.)

_____ Disapprove the package.

Issue 6. Coordination of the Federal Legal System

It became clear during the course of our study that the Attorney General has neither the authority nor adequate resources to improve the performance of all Federal attorneys - and the Federal legal system - even though the President and the country look to the Attorney General as the nation's chief lawyer. In addition, some more formal ongoing means of communication among departments and agencies must be established if the Federal legal system is ever to operate as a coherent system. We recommend that you establish a 15 person Federal Legal Council. The Council would be chaired by the Attorney General who would also provide staff.

Representative general counsels from all departments and agencies would serve on a rotating basis. The Council would be directed to:

1. Improve coordination and communication in the Federal legal system by such measures as
 - Publication of a government lawyer's manual modeled on the U.S. Attorney's Manual.
 - Establishment of a central clearinghouse for dissemination of information about legal job openings in Federal legal offices.
 - Creation of a job rotation program that would enable Federal lawyers to work for a time in other Federal offices.

2. Improve management of the Federal lawyers by such measures as
 - Having all agencies establish an appropriate system for keeping track of how their lawyers' professional time is allocated. (While almost a universal practice in private law firms and corporations, more than 40% of our legal offices do not now do this. A government system need not be as detailed as one in the private sector, as clients are not being billed; but it must be precise enough to aid in the effective allocation of legal resources.)

- Devising a system for tying compensation of lawyers more directly to merit as was done for senior managers in the civil service plan.
 - Increasing the amount and quality of training provided to Federal lawyers.
 - Giving guidance as to whether staff lawyers should be responsible to lawyers in civilian departments and agencies rather than to field program officials. The goal of such guidance would be to increase the professional quality of legal work done. All general counsels, of course, would remain responsible to the agency heads.
 - Increasing the amount of day-to-day legal work (including litigation) delegated to field offices so that less legal paper has to be cleared through Washington.
3. Increase the amount of pro bono legal work donated by Federal attorneys (not the government) to poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice through such measures as allowing attorneys to adjust their work hours when it does not interfere with the conduct of government business.

The creation of such a Council is strongly supported by most departments and agencies (including the Department of Justice) and is not opposed by any major one. The first year costs of a small (6 person) staff in Justice to help not only the Council, but to assist the Attorney General in his duties of managing the Federal lawyer resources would be less than \$200,000 per year (plus an estimated \$50,000 one time start-up cost). The benefits of improved legal capability and coordination expected far outweigh these costs.

DECISION 6.

_____ Establish a Federal Legal Council as described to work with the Attorney General in improving the Federal legal system. (OMB, Justice and all major departments and agencies support.)

_____ Take no action.

III. IMPLEMENTATION

All decisions in this memorandum, other than those requiring transfer of statutory litigation authority, can and will be implemented this fall by appropriate Executive Orders if you approve.

Any transfers of current statutory grants of litigation authority would require a reorganization plan or new legislation for implementation. Because Senator Ribicoff, Chairman of the Senate Governmental Affairs Committee, has endorsed the Glenn-Percy bill of June 23, 1978, to increase the litigation authority of 12 independent commissions, we will meet during the fall with Senator Ribicoff and other congressional leaders and interest groups to develop an appropriate reorganization package, to assess its chances for passage and to identify the shifts in legal personnel, if any, that would be required by various shifts in litigation authority.

DECISION 7.

_____ Implement all decisions in this memorandum this fall (except those altering statutory authority to litigate) by arranging their announcement and drafting appropriate Executive Orders. Report back to me on Congressional views on statutory changes. (OMB supports.)

_____ Other. (Justice indicated a preference for delaying implementation of management reforms until 1979.)