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

17 NOV 1978

MEMORANDUM

TO: The President

FROM: James T. McIntyre, Jr. *Jim*

SUBJECT: Overview of the Attached Proposal for Better
Managing the Government's Lawyers

The attached memorandum contains a series of proposals designed to improve the work done by government lawyers. An announcement of steps you are taking to better manage the government's lawyers should be generally well received by the public. Significantly, the package has also been generally supported by the clients involved (the agencies that should receive better service), the government lawyers (who are aware of the shortcomings in the present Federal system) and knowledgeable interests groups (including key committees of the American Bar Association and the Federal Bar Association).

The one controversial aspect to the package is the question of which lawyers should be authorized to take their own cases into court. While outside groups have not taken much interest in this question, agency lawyers and members of Congress have strong and conflicting views on the matter. There are really two parts to the debate. First is the question of which independent regulatory commissions should do their own litigation. Second is the question of litigation by Executive agencies.

There are two positions that have been taken on the independent agencies. The Department of Justice would like to do all of their litigation - at least at the appellate level. Senators Glenn, Ribicoff and Percy, on the other hand, introduced a bill in July that would authorize the independent commissions to do all of their own litigation. We think that the best answer lies between these two extremes. First, it is important to distinguish between two kinds of litigation. Regulatory litigation, meaning litigation that involves only the special statutory responsibilities of an agency, to the extent it is now being conducted by an independent agency, should not be moved. The SEC, for example, should continue to litigate SEC matters. In our view, litigation involving statutes

that apply to all agencies, on the other hand, should be controlled by the Justice Department. This would allow the government to have a consistent position when it comes to litigating such things as the Freedom of Information or Privacy Act and would therefore help to implement the goal of an "open government."

Because the independents don't want to concede even this limited amount of control to the Executive Branch (particularly now that Senator Ribicoff is suggesting they should be granted even more independence than they already have) we are asking you to take a position on this part of the memo only in principle. This will enable us to confer further with agencies and Congress before drafting the final reorganization plan.

The Executive agencies would also like to do more of their own litigation. They have agreed for the most part, however, that their fight should not be taken to Congress. In other words, they will not oppose vesting all statutory authority for Executive Branch litigation in the Justice Department (most of it is there now anyway) so long as the Justice Department delegates litigation on non-controversial cases back to them.

At the suggestion of Dick Pettigrew, we carefully considered the possibility of coupling the announcement of this initiative with an announcement of a reduction in the number of government lawyers or a ceiling on their growth rate. It is our conclusion that a reduction or ceiling should not be undertaken at the present time.

First, until the management reforms contained in this package are implemented, we will not have enough data about the various legal offices to set appropriate limits. The public interest might suffer if we inadvertently increased the imbalance that now sometimes exists in court when government lawyers litigate against a larger number of lawyers from well-organized private firms. Some flexibility is needed, moreover, in light of the judgeship bill, and announced initiatives to prosecute white collar crime and government fraud and waste.

Second, lawyers will be covered in any overall personnel limits that are established. A separate ceiling for lawyers, by contrast, would be difficult to administer.

Finally, OMB is already examining ways to monitor lawyers on a government-wide basis as part of its normal budget review process.