Reg. Reform

Office of the Attorney General
Washington, D. C. 20530

February 2, 1982

The Honorable George Bush
The Vice President of the United States
The Executive Office Building
Washington, D.C. 20501

Dear George:

As you know, the Department of Justice has become increasingly concerned with the "regulatory reform" legislation which appears to be proceeding rapidly through Congress this session, and the failure of the Administration to take a clear position on some very important issues which this legislation presents. You and I have discussed this legislation before, and I know that you and your staff have worked very hard on it. I thought, however, that it was time that you had the benefit of our views in writing.

This legislation, which is sponsored principally by Senator Paul Laxalt in the Senate, makes several very useful changes to current law. Most importantly, it codifies into law the authority which the Office of Management and Budget currently exercises through the Vice President's Task Force on Regulatory Relief under Executive Order 12035, to review agency regulations and assure that the costs and benefits of existing and proposed regulations are carefully weighed. At the same time, however, it appears probable that this legislation will ultimately contain some provisions which can cause great harm to the legal defense of this Administration's program.

First, the legislation in its current form in both the House and the Senate contains provisions proposed by Senator Dale Bumpers which would significantly modify the current rules of judicial review of agency actions. These provisions are intended to eliminate traditional rules of judicial deference to agency legal determinations and to shift the burden of proof to the agencies to demonstrate that the government has authority to act. These provisions are a clear invitation to the federal judiciary to intervene more extensively and creatively into the decision making of executive branch agencies. Since almost forty percent of the federal judiciary was appointed by the prior Administration, our acquiescence to such provisions would effect a self-defeating transfer of

governmental power to a judiciary broadly unsympathetic to the programs of this Administration.

Moreover, this Administration has argued forcefully that the expanding role of the courts in the development of social policy must be stopped and indeed reversed. The Bumpers' provisions, however, greatly increase the power of the judiciary to interfere with the conduct of executive agencies and invite broad-scale judicial challenge of executive branch actions. It is clear to the Department of Justice that these provisions will make defense of this Administration's regulatory and deregulatory programs in court far more difficult in innumerable cases. Accordingly, we believe that the Administration should make it very clear that it is firmly opposed to the proposed revisions of the standards of judicial review of agency conduct contained in S. 1080 as well as various "compromise" versions thereof.

We are also deeply concerned that this legislation will become the vehicle for a legislative veto provision enabling Congress without the concurrence of the President to veto actions by all federal agencies. It is our understanding that Senator Schmitt has informed you that he intends to add such a provision to the Senate version of the regulatory reform legislation (S. 1080). Moreover, it appears at this time that there are enough votes in both the Senate and the House to pass a legislative veto.

We are greatly concerned with this prospect both for constitutional and practical, political reasons. Legally, it is our firm view that a legislative veto of administrative action which does not require the concurrence of the President is unconstitutional. This conclusion is strongly buttressed by the decision of the United States Court of Appeals for the District of Columbia Circuit announced last Friday in Consumer Energy Council of America v. Federal Energy Regulatory Commission, No. 80-2184 (D.C. Cir. Jan. 29, 1982), that legislative vetoes are unconstitutional even as applied to an independent regulatory agency. This holding is consistent with the Ninth Circuit's earlier decision in Chadha v. INS, on which the Supreme Court has scheduled argument on February 22.

As a practical matter, a legislative veto also has the potential to cause enormous and ongoing political problems. It would enable interested lobbies to pit the Congress against the executive branch on a continuous series of regulatory issues. One need only recall the problems of dealing with a "legislative veto" in the AWACs affair to realize the risks inherent in any such proposal.

Finally, we would note that the regulatory reform bills add a variety of procedural requirements to agency rule-making which will greatly complicate the rulemaking process and create

additional opportunities for challenge by litigation. While certain of these procedural requirements (such as cost-benefit analysis) will in many instances be useful, the effect of some of these procedures will often be unnecessarily wasteful, time-consuming and duplicative agency efforts, adverse to the management and deregulatory efforts of this Administration.

We believe it is very important to clarify the Administration's position on the adverse aspects of this legislation before it reaches the Senate floor (probably at the end of February) to assure, at least, that the most troubling provisions are not enacted into law. If the matter is not addressed promptly, the President may be placed in the difficult position of either vetoing a bill closely associated with his friend, Senator Laxalt, or accepting a statute which constrains his executive power in a variety of exceedingly harmful ways.

With best regards.

Sincerely yours,

Bill

William French Smith

cc: Fred F. Fielding
Counsel to the President

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