JAN 30 1973

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MEMORANDUM

cc: Mr. Marvin
Mrs. Gauf
Mr. Cramton
Files

Re: Application of the Freedom of Information Act to the President

The Freedom of Information Act applies to every "agency" that is a part of the federal government. Section 2 of the Administrative Procedure Act (5 U.S.C. §551), of which the Freedom of Information Act is a section, defines agency as

> . . . Each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include --
> (A) the Congress
> (B) the courts of the United States
> (C) the governments of the Territories or possessions of the United States
> (D) . . . (H) [other exceptions none of which is applicable to the questions involved here].*/

This definition is literally broad enough to include the President. However, because the definition does not by its terms include or exclude the President, the conventional rule of statutory construction that words in a statute should be given their plain meaning suggests that the Office of the President is not included in the definition. Certainly the President is not normally regarded as an administrative agency. An examination of the legislative history of section 2 of the APA reveals that Congress did not so regard the Office of the President when it formulated the definition of agency.

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*/ The coverage of the Administrative Procedure Act and the Freedom of Information Act is, with exceptions not relevant here, coextensive; both Acts reach governmental activities performed by "agencies." Thus, the arguments presented here with respect to the FOI Act apply equally as well to the coverage of the APA.

1. Legislative History of Section 2

The word "agency" was first defined in the original Administrative Procedure Act (60 Stat. 237, ch. 324, §2(a) (1946)). Although the Act has been amended a number of times, the definition has remained essentially intact.

The Administrative Procedure Act was substantially a legislative culmination of the work of the Attorney General's Committee on Administrative Procedure. Thus, the comments of the Committee on the coverage of the Act are especially significant:

> [m]any different, and sharply varying, figures of the number of Federal administrative agencies have been current in popular discussion. The particular total arrived at depends, of course, on the unit to be taken as constituting an 'agency' as well as on the concept applied in designating a particular agency as 'administrative.' The Committee has regarded as the distinguishing feature of an 'administrative' agency the power to determine, either by rule or by decision, private rights and obligations. If the largest possible units be taken as 'agencies,' there are in the Federal Government nine executive departments and eighteen independent agencies which possess significant administrative powers of this character. (Emphasis added.) Final Report of the Attorney General's Committee on Administrative Procedure, S.Doc. 8, 77th Cong., 1st Sess. (1941), at p. 7.

Although the Committee proceeded to explain that there were many smaller units within the departments and independent agencies which should themselves be regarded as individual agencies, the enumeration of the "largest possible units" purported to be categorical. The conspicuous omission of the President from that category suggests that the word "agency" was not intended to include the President.

Moreover, the Committee's intentional exclusion of the President was fully reflected in its proposed draft bill, which defined "agency" to mean "any department, board, commission, authority, corporation, administration, independent establishment, or other subdivision of the executive branch of the Government of the United States . . . ." Id., at 192. Although Congress substituted for this enumeration of various types of organizational entities the simple generic phrase "each authority (whether or not within or subject to review by another agency)," it is clear that Congress did not intend a substantive change designed to include the President but rather intended nothing more than a mere simplification of the Committee definition. As the Senate Judiciary Committee explained:

> It is necessary to define agency as "authority" rather than by name or form, because of the present system of including one agency within another or of authorizing internal boards or "divisions" to have final authority. Staff of Senate Comm. on the Judiciary, 79th Cong., 1st Sess., Report on the Administrative Procedures Act 13 (Comm. Print 1945).

The report of the House Judiciary Committee, issued in May 1946, included a single paragraph explaining why "agency" had been defined by use of the broad word "authority":

> Whoever has the authority is an agency, whether within another agency or in combination with other persons. In other words agencies, necessarily, cannot be defined by mere form such as departments, boards, etc. If agencies were defined by form rather than by the criterion of authority, it might result in the unintended inclusion of mere "housekeeping" functions or the exclusion of those who have the real power to act. H.R. Rep. No. 1980, 79th Cong., 2d Sess. 19 (1946).*/

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*/ See also, Attorney General's Manual on the Administrative Procedure Act, 9-10 (1947) to the same effect.

Furthermore a strong inference that Congress did not intend to include the President in the APA definition of "agency" arises from the difference in the definitions of the same word in the APA and the Federal Register Act, a difference of which Congress was cognizant.*/ In contrast to section 2 of the APA, section 4 of the Federal Register Act (49 Stat. 501, 44 U.S.C. 304) specifically includes the President in its definition of "Federal agency" or "agency." The failure of Congress to name the President expressly in section 2 of the APA suggests an intention that the provision is not to apply to the President.**/

The only relevant discussion of this question appears to be a colloquy between I.C.C. Commissioner Aitchison and Congressman Jennings, during the House hearings:

> "Mr. Aitchison: . . . I find the courts are excluded from section 2. Is the President? He makes rules; he makes adjudications of the type which are referred to in this act. Now, that is none of my business; I am just a citizen and just throw that question in for whatever it is worth. I do not know what the intent is, of course.

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*/ See Staff of Senate Comm, on the Judiciary, Op Cit. 12.

**/ The opposite conclusion could be drawn from a statement in a Senate Judiciary Committee Print, Op. Cit. p. 12, which states that the term "agency" in Section 2 "is defined substantially as in . . . the Federal Register Act." However, an examination of the definition in the Federal Register Act reveals that but for the addition of the President, the definition is the same as that in the draft bill prepared by the Attorney General's Committee. It is an enumeration of organizational entities. And, as stated above, the reason for changing from this enumeration to use of the broad word "authority" was not to include the President but to reach entities exercising final authority which were within larger entities.

"Mr. Jennings: Well, if it operates to forbid the President from operating as a legislative agency, I would say it is good law."

"Mr. Aitchison: I cannot debate that, because that is out entirely of my sphere." Administrative Procedure Act - Legislative History (House Hearings), S. Doc. 248, 79th Cong., 2d Sess., p. 123.

The oblique response, as well as the obviously mischievous question, strongly suggests a shared doubt that the section 2 definition of "agency," despite its breadth, would really include the President.

Further evidence of this conclusion can be found in several statements by Congressmen that the APA was enacted to deal with those agencies established by Congress to administer the laws. Congressman Sabath, who was in charge of the bill on the floor of the House, declared that

> [t]he object of the bill is . . . to improve the administration of rules and regulations made by the agencies under grants of power from Congress, and to establish uniformity of practice so that any citizen may have his day in court with a minimum of delay and expense. Administrative Procedure Act -- Legislative History (Senate Committee Print), S. Doc. 248, 79th Cong., 2d Sess., 345-346. (Emphasis added).

During the debate, Congressman Hobbs referred to a kind of fourth branch of the government:

> It seems to me that the Constitution of the United States, has divided the powers of our Government into three coordinate branches, the legislative, executive, and judicial. These have been swallowed up by some administrators and their staffs who apparently

> believed that they were omnipotent. These have exercised all of the powers of government, arrogating to themselves more power than ever belonged to any man, or group. This has made necessary the enactment of some such legislation as is now in process of passage.

Thus, it seems apparent that by the word "agency," Congress was not referring to the constitutional office of the Presidency but to entities created by Congress to administer legislative programs.

2. Construction of Section 2 since 1946

Since 1946, the Administrative Procedure Act has undergone a number of changes including the addition of the Freedom of Information section (5 U.S.C. §552) to the Act. However, nothing in the legislative history of the efforts to revise the APA sheds direct light on the status of the President as an 'agency."

Professor Davis appears to be the only witness during all of the Hearings who specifically refers to the question. He assumes that the President is subject to the Act. In the context of arguing against the deletion from section 10 of the exception from reviewability of any agency action which is "by law committed to agency discretion," Professor Davis asked;

> What is it under this act, under the present Administrative Procedure Act that prevents a court from reviewing the President's discretionary power to conduct our foreign policy? It is those words, 'except so far as agency action is by law committed to agency discretion.' If you knock out these words, then the act will say that the President's foreign policy decisions shall be judicially reviewable for abuse of discretion. Nobody wants that.

Senate Hearings on S. 1160, S. 1336, S. 1758 and S. 1879, 89th Cong., 1st Sess., p. 169.

Then, in response to Mr. Cornelius Kennedy's expressed doubt as to whether such Presidential decisions as the withdrawal of civilians from Vietnam would even come within the APA definition of "rule", Professor Davis insisted that it would, concluding:

> It is clearly rulemaking by the President. This is rulemaking by an agency . . . . Id. at 170.

Mr. Kennedy remained unconvinced that such a Presidential decision would constitute a "rule." The point was not raised by the Subcommittee whether the President was subject to the Act at all.

In his written statement to the Senate Subcommittee, Professor Davis also referred to the Act's application to the President:

> If President Johnson and Governor Johnson of Mississippi exchange letters or telegrams about strategies for keeping racial peace in Mississippi, the papers will have to be made promptly available to any person, including those who want to defeat the strategies. Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee on S. 1663, Administrative Procedure Act, 88th Cong., 2d Sess. 244, 248 (1964).

In an Article subsequent to the enactment of the Freedom of Information Act, Davis has concluded that the President is subject to the Act because "[w]ith that observation before the subcommittee, it made no change." Davis, The Information Act: A Preliminary Analysis 34 U. Chi. Law Rev. 761, 794 (1967).

The only other reference in the Hearings to this question is a written statement by Assistant Attorney General Norbert Schlei, Office of Legal Counsel. Mr. Schlei objected to the proposal to transfer to the courts ultimate responsibility for the disclosure of the records of the Executive branch on the grounds that the Executive's responsibility for the safekeeping of Executive records is a constitutionally derived responsibility and that in the exercise of this responsibility, "the Executive is accountable only to the electorate. Under the separation of powers concept, Congress cannot transfer responsibility for Executive records to the courts." Hearings on S. 1160, S. 1336, S. 1758, and S. 1879 Before the Subcommittee on Administrative Practice and Procedure, Senate Judiciary Committee, 89th Cong., 1st Sess. 200, 204-05 (1965). Appellants in their Reply Brief in Soucie v. David, 448 F.2d 1067 (1961), cited this language for the proposition that Congress was made aware that it was extending coverage of the Act to Presidential records not otherwise exempt and that, despite objections of the Department of Justice, Congress chose not to change the Act to exempt the President or Presidential records from its coverage. Reply Brief for Appellants, 6-7. However, the inference is just as plausible that Congress' inaction reflects its view that section 2 does not include the President in the definition of "agency." An even more likely conclusion is that the statement refers not to Presidential documents simpliciter but to records of "agencies" within the Executive branch. Construed in this way, the statement says nothing about whether the documents of the President are subject to the Act.

A more conclusive indication that Congress does not view the APA definition of "agency" as including the President can be found in a study by a Subcommittee of the House Government Operations Committee. In February 1965, the Subcommittee, headed by Congressman Moss, the leading proponent of Freedom of Information legislation in the House, sent a questionnaire to "all agencies, departments, boards, and commissions in the Government" to inquire about their practices under then section 3 of the Administrative Procedure Act, which subsequently was superseded by the Freedom of Information Act. The list

of agencies -- approximately 102 -- included several components of the Executive Office of the President -- the Bureau of the Budget, the Office of Emergency Planning and the Office of Science and Technology -- but omitted the President and the White House Office. Federal Public Records Law, Hearings Before a Subcommittee of the Committee on Government Operations, House of Representatives, 89th Cong., 1st Sess., on H.R. 5012, etc., pp. 103, 277-280.

Again in 1968, Congressman Moss issued a compilation of the implementing regulations required to be issued by the several departments and agencies under the Freedom of Information Act. Congressman Moss was critical of the fact that several agencies had been remiss in issuing such regulations. He did not comment, however, on the failure of the President or of the White House Office to do so. Freedom of Information Act (Compilation and Analysis of Departmental Regulations Implementing 5 U.S.C. 552), Committee Print, 90th Cong., 2d Sess., p. 3. Certainly, if the Office of the President is an "agency" at all, it is an extremely important one -- far too important to have been overlooked in two exhaustive studies of agency practices.

Finally, the fact that no President in office during the entire 26-year life of the APA has deemed it necessary to comply with the Act's rulemaking and adjudicatory provisions*/ illustrates that six successive Presidents have shared the unanimous view that the APA, despite its broad definition of "agency," simply does not include the President, a view which has not been questioned by successive Congresses. As

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*/ Rulemaking is defined as "agency process for formulating, amending, or repealing a rule," which, in turn, is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ." 5 U.S.C. 551(5), (4). Adjudication is defined as "agency process for the formulation of an order," which, in turn, is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking. . . . 5 U.S.C. 551(7), (6).

stated by Attorney General Kennedy, in sustaining the validity of Executive Order 10925, which barred racial discrimination in the performance of Government contracts:

> the unanimous view of four successive Presidents as to the extent of their authority is entitled to substantial weight. United States v. Midwest Oil Co., 236 U.S. 459, 472-75 (1915). That weight is increased by the fact that the Presidential view has been acquiesced in by successive Congresses. Such acquiescence in Executive practice will be inferred from silence over a period of years. United States v. Jackson, 280 U.S. 183, 196-97 (1930); Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 313 (1933). 42 Op. A.G., No. 21, pp. 10-11.*/

3. Implications if the Office of the President were considered an 'Agency'

Because statutory interpretation is "the art of proliferating a purpose," Brooklyn Nat'l Corp. v. Comm'ner, 157 F.2d 450, 451 (2d Cir.) cert. denied, 329 U.S. 733 (1946), the conclusions suggested by the legislative history must be placed in the context of the purposes underlying passage of the APA as a whole. An examination of the entire Act demonstrates that if the President is deemed to be an agency the application of the APA will produce inappropriate and incongruous results. This leads to the conclusion that the term "agency" does not include the Office of the President for, in interpreting a statute, it will not be assumed that

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*/ See also United States v. Hermanos, 209 U.S. 337, 339 (1908): "the reenactment by Congress, without change, of a statute, which had previously received long continued executive construction, is an adoption by Congress of such construction.

Congress intended to adopt laws that do violence to good sense and sound administration. A few examples illustrate the point.

If the President were an agency, the wage and price freeze order would have been subject to the procedural requirements of the rulemaking section of the Act (5 U.S.C. §553) because the order would have been "an agency statement of . . . future effect designed to . . . prescribe law or policy . . . and includes the approval or prescription for the future of rates, wages . . . [and] prices . . . ." As a result, the order would have had to have been first preceded by notice and public participation and could not have gone into effect for thirty days unless the President "for good cause" found (and incorporated the finding and a brief statement of reasons therefor in the rules issued) that notice and public participation were "impracticable, unnecessary, or contrary to the public interest", 5 U.S.C. §553. Even assuming the constitutionality of such an interference in the internal functioning of the Chief Executive's Office, see Myers v. United States, 272 U.S. 52 (1926), the intention of imposing these procedural requirements on the President should not be attributed to Congress in the absence of any evidence in the legislative history that shows that Congress contemplated such a result. Moreover, to permit public participation and to conform to the other procedural requirements of rulemaking, the Office of the President would have to be greatly expanded -- another result Congress did not contemplate.

A more dramatic illustration of the kind of incongruous consequences that would follow if the definition of "agency" included the President arises in the area of foreign affairs. Read literally, the Act would require notice of and public participation in any Presidential statement designed to implement, interpret and prescribe foreign policy unless:

> (a) the President specifically found that notice and public participation were impracticable or contrary to the public interest; or
> (b) the President specifically found that the public rulemaking provisions would

clearly provoke definitely undesirable international consequences.*/

It is highly questionable whether such procedural requirements could constitutionally be imposed upon the President in his conduct of foreign affairs.**/ But again, assuming that such measures were constitutional, it would be incredible to ascribe to Congress an intention to impose them on the President.

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*/ The phrase "foreign affairs function" which operates to make the rulemaking section inapplicable when such a function is involved "is not to be loosely interpreted to mean any function extending beyond the borders of the United States but only those 'affairs' which so affect relations with other governments that, for example, public rulemaking provisions would clearly provoke definitely undesirable international consequences." S. Rep. No. 752, 79th Cong., 1st Sess. 13 (1945).

**/ See C. & S. Airlines v. Waterman Corp., 333 U.S. 103, 109 (1948): "The President . . . possesses in his own right certain powers conferred by the Constitution on him as commander-in-chief and as the Nation's organ in foreign affairs"; and United States v. Curtiss-Wright Export, 299 U.S. 304 (1936): Because of "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . [Congress must] accord to the President a degree of discretion and freedom from statutory restrictions which would not be admissible were domestic affairs alone involved . . . . Secrecy in respect of information gathered by [the President's agents] may be highly necessary, and the premature disclosure of it productive of harmful results. This consideration, in connection with what we have already said on the subject discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed." Id. at 319-320.

4. Constitutional Considerations

In addition to the constitutional arguments with respect to particular applications of the Act briefly alluded to in the previous section of this Memorandum, serious constitutional questions would be raised by legislation that compelled public release of all Presidential documents. The fact that these constitutional doubts exist dictates that the statute be construed not to include the President. It is a well-settled rule of construction that an interpretation of a statute that raises substantial constitutional questions will not be adopted where another reading of the statute is possible. As the Supreme Court said in Crowell v. Benson, 285 U.S. 22, 66 (1932):

> When the validity of an Act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

The first question involves the doctrine of executive privilege. Although the doctrine refers to the power of Congress vis a vis that of the Executive, the power of Congress to compel disclosure of agency records to the public at large can be no greater than its power to compel disclosure to Congress itself. Premised on the doctrine of separation of powers the executive privilege is the right of the Executive to safeguard information in the discharge of his responsibilities under the Constitution, his exercise of executive power. Certainly, it cannot be contended that Congress sought to limit the Executive's privilege to the nine statutory exemptions in the Freedom of Information Act, for Congress does not have such power. Article II, section 1 of the Constitution ("[t]he Executive Power shall be vested in a President of the United States of America"), may well preclude Congress from enacting legislation in any way controlling the President's actions with regard to Presidential papers. Cf. Myers v. United States, 272 U.S. 52 (1926) (removal of executive officials

from office is an executive function and as such cannot be subject to any act enacted by Congress). A construction of the word "agency" to include the President would force the President to violate the law in the name of executive privilege whenever he chose to withhold documents of his Office. For that reason, a court would very likely avoid such a construction.*/

A second constitutional argument, building up n the first, also dictates that the definition of "agency" be interpreted not to include the President. Under the Freedom of Information Act, the remedy for the failure to make records available is a suit against the agency which withholds them. 5 U.S.C. 552(a)(3). If the President were considered an "agency" and therefore subject to the statutory sanction, the Act insofar as it affected the President would probably be unconstitutional. In Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1866), the Supreme Court, in holding that the State of Mississippi could not enjoin enforcement of the Reconstruction Acts by the President of the United States and his officers and agents, declared:

> We are fully satisfied that this court has no jurisdiction of a bill to enjoin the

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*/ It may be said that the President is forced to violate the Freedom of Information Act by exercising executive privilege whenever he chooses to withhold a document whether it be in his custody or the custody of another entity within the executive branch. But the implications of the doctrine of executive privilege are of even more import when the struggle is between two purely constitutional entities -- the President and Congress. This represents a classic conflict in the context of separation of powers. Even the possibility of such a constitutional conflict in its most pristine form dictates the conclusion that the President should not be subject to the Act.

President in the performance of his official duties; and that no such bill ought to be received by us.

A close reading of the case reveals that the Johnson decision cannot be cited for the bald proposition that a suit against the President is never appropriate because the Court observed that "the acts of both (the President and the Congress), when performed, are, in proper cases, subject to [the judiciary's] cognizance." Id. at 500. Yet, over the years the case has taken on that meaning.*/

Moreover, the argument that a suit against the President arising under the Freedom of Information Act would be an inappropriate case is, in our view, viable because an order by a court to compel the production of the documents would constitute a clear intervention in the internal functioning of the Chief Executive's office and would appear to be a clear breach of the separation of powers.

* * *

In sum, a serious constitutional question of infringement of the executive power vested in the President by Article II, sec. 1 of the Constitution would be presented by construing the word "agency" to include the President. Because a construction which exempts Presidential documents from the Freedom of Information Act accords with the wording of the Act, its legislative history and sound administration,

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*/ See, e.g., Judge Holtzoff's Opinion denying a temporary injunction in the Steel Seizure Case, on the grounds that an injunction might be "in essence and spirit . . . an injunction against the President," citing Johnson for the proposition that a suit against the President is improper. The Steel Seizure Case 247 (82d Cong., 2d Sess. H. Doc. No. 534, Pt. 1). See also Trimble v. Johnson, 173 F.Supp. 651-654 (D.D.C. 1959) which recognized that "no suit lies against the Congress or the President." and San Francisco Redevelopment Agency v. President Richard M. Nixon, et al., 329 F.Supp. 672 (N.D. Calif. 1971).

it is, in our view, likely that a court would adopt such a construction and thereby also avoid any constitutional doubts.

RCC:DRM:jal

cc: Files
Mr. Cramton
Miss Lawton
Mr. Marvin
Mrs. Gauf

JAN 30 1973

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MEMORANDUM FOR THE HONORABLE JOHN W. DEAN, III
Counsel to the President

Re: Application of the Freedom of Information Act to Certain Entities Within the Executive Office of the President

This is in response to your request for our views on the question whether certain entities within the Executive Office of the President are "agencies" as defined by 5 U.S.C. §551(1) and are therefore subject to the Freedom of Information (FOI) Act. The answer to this question depends in part upon whether the definition of "agency" includes the President --a question which the District of Columbia Court of Appeals expressly left open in Soucie v. David, 448 F.2d 1067, 1073 (1971). That is, if the Office of the President is deemed to be an agency under the Freedom of Information Act, the records of the entities within the Executive Office could be subject to the disclosure provisions of that Act on the theory that the records are Presidential documents,*/ notwithstanding the inapplicability of the Act to those entities per se. For this reason, we are attaching a separate memorandum prepared by this Office which examines the question

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*/ In Soucie v. David, the District Court, in a brief order signed August 21, 1970, found that the Garwin Report prepared by the Office of Science and Technology of the Executive Office was a Presidential document but went on to hold that it did not have the authority to compel the release of Presidential documents or the jurisdiction over a suit to obtain that relief. See 448 F.2d at 1071. On appeal, the Circuit Court of Appeals rejected the finding that the report was a Presidential document. See pp. 7-10, infra.

whether the President is subject to the Freedom of Information Act. It is our view, as expressed in that Memorandum, that based on the language of the statute, its legislative history and the possible unconstitutional results if the President were subject to the provisions of the Act, the definition of "agency" does not include the President.

With respect to the particular questions in your Memorandum, we have concluded that the White House Office, Domestic Council, National Security Council and Council on International Economic Policy are not "agencies" under the Administrative Procedure Act, and therefore are not subject to the Freedom of Information Act. This conclusion is based on the legislative history of the APA from which is derived the test that an agency is an entity that has by law the authority to take final and binding action and on the Soucie v. David test which includes in the definition of agency those entities that perform functions independent of advising the President. Moreover, it is our view that, in a suit against one of these entities to compel the disclosure of its documents, a court would likely construe the APA definition of agency so as not to include the respective entity in order to avoid serious constitutional doubts that would be raised by a construction to the opposite effect. Although it is not clear, because of conflicting statements in the legislative history of the act creating the Council of Economic Advisers, whether that Council is intended to perform functions independent of advising the President, it is our opinion that the position that the Council is not an agency under the APA is defensible. However, if suit were brought after a denial of requested documents, the outcome of litigation cannot be confidently predicted.

Part I of this Memorandum discusses the tests to be used to determine whether an entity is an agency under the APA. In Part II, we apply these tests to the entities in the Executive Office about which you specifically inquired. But before considering these points, we would like to make a few introductory remarks which may prove useful:

First, although it is our opinion that, as a matter of law, the Freedom of Information Act does not apply to the White House Office, Domestic Council, National Security Council, Council on International Economic Policy and perhaps to the Council of Economic Advisers, it occurs to us that you may not wish to adopt such a categorical position publicly if there are alternate methods of justifying non-disclosure. Because most cases in which withholding of Executive Office documents is desired would probably come under one of the exemptions to the Act, particularly Exemptions 1 (national defense and foreign policy) and 5 (internal communications), such an alternate basis would to that extent be available. Such cases could be handled by expressly reserving the question as to whether the Act applies to the entity to which the request was directed and stating in substance that even if it does, non-disclosure is justified under one of the exemptions.

Second, none of the entities should publish any regulations for obtaining information under procedures similar to the Freedom of Information Act procedures unless the regulations also state that the publication thereof is not intended as a recognition of the applicability of that Act. In Soucie, the Court of Appeals pointed to a notice published in the Federal Register by the Office of Science and Technology (OST) describing the information available to the public from the OST under the Freedom of Information Act, and setting forth procedures for obtaining that information, as evidence that OST considered itself subject to the AFA. When faced with a problem of statutory construction, a court will show great deference to the interpretation given the statute by the officers or agency charged with its administration. Udall v. Tallman, 380 U.S. 1 (1965).

I.

APPLICABILITY OF THE FREEDOM OF INFORMATION ACT GENERALLY

1. Legislative History of Section 2 of the APA

The Freedom of Information Act (and, incidentally, the entire Administrative Procedure Act) applies to every

"agency" that is a part of the federal government, with certain specified exceptions. Section 2 of the APA defines an "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency . . . ." 5 U.S.C. §551(a). The key word in this definition is 'authority," for it is only an entity which exercises "authority" that is deemed to be an agency. The Senate Judiciary Committee, in a committee print issued in June 1945, explained why "agency' had been defined by use of the broad word authority:

> It is necessary to define agency as "authority" rather than by name or form, because of the present system of including one agency within another or of authorizing internal boards, or "divisions" to have final authority. "Authority" means any officer or board, whether within another agency or not, which by law has authority to take final and binding action with or without appeal to some superior administrative authority. Thus "divisions' of the Interstate Commerce Commission and the so-called Schwellenbach Office of the Department of Agriculture would be "agencies" within this definition. Any other form of definition would raise serious difficulties in several Federal agencies. Staff of Senate Comm. on the Judiciary, 79th Cong., 1st Sess., Report on the Administrative Procedure Act 13 (Comm. Print 1945). (Emphasis added).

The report of the House Judiciary Committee, issued in May 1946, included a single paragraph of explanation of the definition of "agency":

> Whoever has the authority is an agency, whether within another agency or in combination with other persons. In other words agencies, necessarily, cannot be defined by mere form such as departments, boards, etc. If agencies were defined by form rather than by the criterion of

> authority, it might result in the unintended inclusion of mere housekeeping" functions or the exclusion of those who have the real power to act. H. R. Rep. No. 1980, 79th Cong., 2d Sess. 19 (1946).

The Attorney General's Manual on the Administrative Procedure Act, issued in 1947 also sheds some light on the definition of "agency":

> This definition was adopted in recognition of the fact that the Government is divided not only into departments, commissions, and offices, but that these agencies, in turn, are further subdivided into constituent units which may have all the attributes of an agency insofar as rule making and adjudication are concerned. For example, the Federal Security Agency is composed of many authorities which, while subject to the overall supervision of that agency, are generally independent in the exercise of their functions. Attorney General's Manual 9-10. (Emphasis added).

These few paragraphs comprise essentially all of the legislative history relevant to the problem. Fragmentary though they are, they suggest the tenor of the legislative opinion. The theme developed by the legislative history of section 2 is that an administrative agency is a part of government which is "generally independent in the exercise of [its] functions" and which "by law has authority to take final and binding action" affecting the rights and obligations of individuals, particularly by the characteristic procedures of rulemaking and adjudication.*/

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*/ The definitions of rulemaking and adjudication in section 2 of the APA are very broad and could conceivably encompass any actions taken by an entity affecting its own internal management policies without affecting any person outside the agency. An examination of the proper scope of these words as used in the APA is not warranted here. However, for discussion purposes, we use those words here as characterizing processes that prescribe law or policy or have a binding effect on rights and obligations of private individuals, institutions or other government agencies. This would include internal management practices or policies but only insofar as they affected individuals outside the entity.

This theme is consistent with the general conclusion of the Attorney General's Committee on Administrative Procedure, which "regarded as the distinguishing feature of an 'administrative' agency the power to determine, either by rule or by decision, private rights and obligations." Final Report of the Attorney General's Committee on Administrative Procedure, S. Doc. 8, 77th Cong., 1st Sess. (1941), at p. 7. It is also consistent with Professor Davis' general conclusion that an "administrative agency is a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking." 1 K. Davis, Administrative Law Treatise §1.01, at 1 (1958).

The same theme is reflected in several statements by Congressmen which declare that the APA was enacted to deal with those agencies established by Congress to administer the laws. Congressman Sabath, who was in charge of the bill on the floor of the House, stated that

> [t]he object of the bill is . . . to improve the administration of rules and regulations made by the agencies under grants of power from Congress, and to establish uniformity of practice so that any citizen may have his day in court with a minimum of delay and expense. Administrative Procedure Act--Legislative History (Senate Committee Print), S. Doc. 248, 79th Cong., 2d Sess., 345-346. (Emphasis added).

During the debate, Congressman Hobbs referred to a kind of fourth branch of the government:

> It seems to me that the Constitution of the United States, has divided the powers of our Government into three coordinate branches, the legislative, executive, and judicial. These have been swallowed up by some administrators and their staffs who apparently believed that they were omnipotent. These have exercised all of the powers of government, arrogating to themselves more power than

ever belonged to any man, or group. This has made necessary the enactment of some such legislation as is now in process of passage. Id. at 382.

Thus, it is apparent that by the word "agency," Congress was not referring to the executive offices that serve to advise the President but to entities created by Congress with authority to take final and binding action in administering legislatively created programs. In other words, what the legislative history of section 2 seems to teach is that Congress in using the word "agency," intended the APA to apply to authorities of government which are the center of gravity for the exercise of administrative power affecting the rights and obligations of individuals.*/

2. The Decision in Soucie v. David

Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971) is the only case that offers any guidance in defining "agency" for APA purposes. There, the United States Court of Appeals for the District of Columbia Circuit held that the Office of Science and Technology (OST) in the Executive Office of the President is an "agency" under the APA and, as a result, must comply with the disclosure requirements of the Freedom of Information Act.

At the threshhold of its discussion of the meaning of the word "agency," the court declared that although "the

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*/ We do not mean to imply that only entities that are subject to the rulemaking or adjudicatory procedures in sections 4 and 5, respectively, of the APA are agencies. An agency may be engaged in rulemaking having a binding effect on policy or rights or obligations but nevertheless not be required to comply with the procedural requirements of the rulemaking provision because of the exceptions within that provision. Instead, for the reasons stated above, we believe that the touchstone in determining whether an entity is an agency is the word "authority." That is, only those entities that have the authority to take final and binding action are agencies.

statutory definition of "agency" is not entirely clear, . . . the APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions. Id. at 1073. (Emphasis added). This definition is consistent with that derived from the legislative history. However, in determining whether the OST came within the scope of that definition, the court disregarded the effect of the word "authority" in its own definition and asked only whether the OST performed any functions independent of advising the President:

> If the OST's sole function were to advise and assist the President, that might be taken as an indication that the OST is part of the President's staff and not a separate agency. In addition to that function, however, the OST inherited from the National Science Foundation the function of evaluating federal programs. . . . By virtue of its independent function of evaluating federal programs, the OST must be regarded as an agency subject to the APA and the Freedom of Information Act. Id. at 1075. (Emphasis added).

Although the court recognized that there might exist a "confidential relation between the Director of the OST and the President -- a relation that might result in the use of . . . information [on federal programs accumulated by the OST] as a basis for advice to the President," the court found that by virtue of OST's independent evaluation role the OST forfeited any claims, based on the confidential relationship, that the information collected by it was privileged. As the court stated:

> [W]hen the responsibility for program evaluation was transferred to the OST, both the executive branch and members of Congress contemplated that Congress would retain control over information on federal programs accumulated by the OST, despite any confidential relation between the Director of the OST and the President . . . . 448 F.2d at 1075.

In other words, the court concluded that the privilege accorded the President to protect confidential communications between him and his personal advisers did not extend to the OST because Congress retained control over information accumulated by the OST.*/

However, in reaching this conclusion, the court did not even consider the element that the Senate and House Reports emphasized as the controlling consideration in defining the word "agency." It completely disregarded the effect of the key word in the definition -- that is, the word "authority." Indeed, the definition that the Soucie court applied renders meaningless the word "authority" for an agency that has only an evaluation role by definition cannot "by law [have] authority to take final and binding action."

Furthermore, a definition of "agency" that turns only upon the "exercise of specific independent functions,"**/ id. at 1073, is dysfunctional. It will reach a number of second-level employees, such as division chiefs, in any government office. To confer agency status on such employees not only would introduce confusion and uncertainty as to what entity is required to conform with the procedures prescribed in the APA and to what entity the public should look to for information but also would pervert the plain meaning of the word "agency."

So long as the Soucie case retains its vitality, the test that is derived from that decision and the legislative history of section 2 of the APA can be characterized as a two-prong test, the touchstones of which are the extent of

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*/ To buttress its conclusion, the court, as previously stated, pointed to the OST's publication of procedures for requesting documents under the Freedom of Information Act as evidence that OST considered itself subject to the Act.

**/ The word "independent," as used by the Soucie court, does not connote the capacity to take action autonomously. Instead it was used to distinguish the function of advising the President from the other functions which an entity is expected to perform; that is, as a synonym of the word "separate." See 448 F.2d at 1073, 1075.

the authority exercised and the existence of functions the entity performs independent of advising and assisting the President. Satisfaction of either prong of the test will impart to the entity agency status under the APA. With respect to the first prong of the test, the authority exercised must be that which is by law the final and binding action on the matter with or without appeal to some superior authority. To satisfy the second prong of the test, the charter of the entity, even though it may state that the primary purpose of the entity is to advise the President, need only refer to one function independant of advising the Executive. To the extent that the Soucie decision will be followed by other courts, the fact that the entity has no rule-making or adjudicatory functions having a binding effect on law or policy or on the rights and obligations of individuals but only a recommendation or evaluation role is immaterial as to whether it is subject to the APA.

II.

APPLICABILITY OF THE INFORMATION ACT TO CERTAIN ENTITIES WITHIN THE EXECUTIVE OFFICE

1. White House Office

It is quite clear that the White House Office is not an "agency" under the APA. Neither the White House Office itself, as an entity, nor any of its personnel, has the requisite authority, by statute or regulation, characteristic of a statutorily defined "agency." That is, the Office does not have "by law . . . authority to take final and binding action." Nor is the White House Office charged with any responsibility, other than serving in the capacity as advisor of or personal aide to the President, which could bring the Office within the definition of agency as developed in Soucie.

2. The Domestic Council

Reorganization Plan No. 2 of 1970 establishes in the Executive Office of the President a Domestic Council composed of the President, the Vice President and certain members of the Cabinet (§201). The Council is to "perform such functions as the President may from time to time delegate or assign thereto" (§202).

Executive Order No. 11541 (July 1, 1970), issued the same day the Plan went into effect, makes the following delegation from the President to the Domestic Council:

> Sec. 2. (a) Under the direction of the President and subject to such further instructions as the President from time to time may issue, the Domestic Council in the Executive Office of the President shall (1) receive and develop information necessary for assessing national domestic needs and defining national domestic goals, and develop for the President alternative proposals for reaching those goals; (2) collaborate with the Office of Management and Budget and others in the determination of national domestic priorities for the allocation of available resources; (3) collaborate with the Office of Management and Budget and others to assure a continuing review of ongoing programs from the standpoint of their relative contributions to national goals as compared with their use of available resources; and (4) provide policy advice to the President on domestic issues.

The President's Message accompanying the Plan emphasized the need for an entity cutting across departmental jurisdictions which would serve as the President's adviser on domestic matters:

> There does not now exist an organized, institutionally-staffed group charged with advising the President on the total range of domestic policy. The Domestic Council will fill that need. Under the President's direction, it will also be charged with integrating the various aspects of domestic policy into a consistent whole . . . .
>
> Overall, the Domestic Council will provide the President with a streamlined, consolidated domestic policy arm, adequately staffed, and highly flexible in its operation . . . .

For the following reasons, it is our view that the Domestic Council is not an agency under the APA and is therefore not subject to the Freedom of Information Act. First, the Council does not have any "authority" in the APA sense of the word. It does not have the power by law "to take final and binding action." Instead, it serves to formulate and coordinate domestic policy recommendations to the President. Second, the grounds on which the court in Soucie predicated its holding are not present with respect to the Domestic Council. Unlike the Office of Science and Technology, the Domestic Council is not charged with any responsibility other than to assist and advise the Executive. Thus, because the Council does not have any independent function, the privilege accorded the President to protect confidential communications between himself and his advisers extends to the Domestic Council.

The legislative history of Reorganization Plan No. 2 buttresses the conclusion that the Council would not be accountable to Congress or be subject to the power of Congress to question. Hearings were held on the Reorganization Plan in both the House*/ and the Senate.**/ A long report recommending rejection of the Plan was issued by the House Government Operations Committee***/ and a Resolution disapproving the

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*/ Hearings on Reorganization Plan No. 2 of 1970. Before the Subcomm. on Executive and Legislative Reorganization of the House Comm. on Government Operations, 91st Cong., 2d Sess. (1970).

**/ Hearings on Reorganization Plan No. 2 of 1970. Before the Subcomm. on Executive Reorganization and Government Research of the Senate Comm. on Government Operations, 91st Cong., 2d Sess. (1970).

***/ H.R. Rep. No. 1066, 91st Cong., 2d Sess. (1970).

Plan was debated at length on the House floor.*/ Alternative legislation was introduced, under which the Executive Director was to be appointed by the President with the advice and consent of the Senate, and which would have required the Executive Director to make an annual report to Congress and provide Congress with such other information as might be requested.**/

The Committee and Chairman Holifield opposed the Plan chiefly on the ground that it would increase executive secrecy; the House Report also questioned the legality of making an assistant to the President the Executive Director of the Council Staff under 5 U.S.C. §904(2). However, the apparent practical objection to heading the Council's staff with an Assistant to the President was that he would be less accessible to Congress. The House report states:

> In providing that the office of the Executive Director of the Domestic Council shall be filled by an assistant to the President, the Plan would render that officer and his large staff not accountable to Congress and beyond the power of Congress to question. Large and important areas of domestic concern could be completely concealed from the Legislative Branch.
>
> As a matter of practice and custom, Assistants to the President do not testify before Congressional Committees and are not required to respond to Congressional requests for information. They are regarded as having a personal responsibility and relationship

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*/ 114 Cong. Rec. H3772, H4078, H4312 (daily ed. Apr. 30, May 7, May 13, 1970).

**/ H.R. 17376, see 114 Cong. Rec. 4080 (daily ed. May 7, 1970).

to the President which throws a cloak of confidentiality over their activities and precludes their being accountable to the Legislative Branch of the Government.

> Without going into the legal or political merits of this nonaccountability of Presidential Assistants to Congress, the Committee notes that the doctrine is asserted. The testimony of Administration witnesses leaves little doubt that this doctrine would be asserted on behalf of the executive director.*/

A letter from Dwight Ink to the Subcommittee Chairman**/ indicates that only a very limited accountability to Congress was contemplated by the Administration.

> The Council staff would be expected to defend the Council's budget before Congress when required. This would include the Executive Director.

With this argument against the Plan before the Congress, Congress nevertheless acquiesced in the Plan. The obvious inference is that the Domestic Council enjoys a considerable degree of insulation from Congress. Certainly the power of the public to compel the disclosure of records can be no greater than that of Congress.

Finally, the fact that the President is the Chairman of the Domestic Council and that the Executive Director is a staff assistant who is appointed by the President without

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*/ H.R. Rep. No. 1066, at 11.

**/ Hearings, supra note 1, at 185-186.

Senate confirmation suggests that the Council is the alter ego of the President--it stands in the President's shoes in at least the preliminary stages of domestic policymaking; it is his "domestic policy arm." Thus, it can be argued that a suit against the Council is in essence and in spirit a suit against the President. This raises the constitutional issues alluded to in Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 591 (1866),*/ and a court could probably be persuaded

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*/ Since Mississippi v. Johnson, it has been a fundamental principle of our constitutional jurisprudence that a court lacks jurisdiction over the President of the United States. Judicial intervention in the exercise of the Executive power of the President is constitutionally prohibited in order to preserve the separation of powers of the three branches of the United States Government. See San Francisco Redevelopment Agency v. President Richard M. Nixon, et al., 329 F. Supp. 672 (N.D. Calif. 1971).

It is doubtful that a private litigant could avoid this jurisdictional point by naming the Executive Director as the defendant because the President, as chairman of the Council, would likely be held to be an indispensable party. In Williams v. Fanning, 332 U.S. 490, 493 (1947), the Supreme Court defined an indispensable party in suits challenging actions of public officials as follows:

> [T]he Superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him.

Because Sections 202 and 203 of Reorganization Plan No. 2 of 1970 provide respectively that the Council and the Executive Director are subject to the direction of the President, the power over the records of the Domestic Council appears to reside in the President. Therefore, a suit to compel the disclosure of the Council's records would require an injunction against the President and would have to be dismissed for lack of jurisdiction.

to interpret the word "agency" not to include the Council in order to avoid a possibly unconstitutional incursion upon the powers of the President.

3. National Security Council

The National Security Council is very similar to the Domestic Council both in composition and purpose. It is chaired by the President and acts as an advisory body to the President. The function of the Security Council is "to advise the President with respect to the integration of domestic, foreign and military policies relating to the national security, . . . [and] . . . to assess and appraise the [national security] objectives, commitments and risks of the United States . . . for the purpose of making recommendations to the President." 50 U.S.C. §402. The character of the Council is described in the Report of the Senate Committee that recommended Senate acquiescence in Reorganization Plan No. 4 of 1949 which transferred the Council to the Executive Office of the President:

> [t]he Council function of advising the President indicates the desirability of its official recognition as a strictly Presidential staff organization, a high-policy planning arm of the President. Reorganization Plan No. 4 of 1949, S. Rep. No. 838, 81st Cong., 1st Sess. 2 (1949).

Thus, it is apparent that the Council acts only in an advisory capacity. It has no authority by law "to take final and binding action" and thus does not come within the definition of "authority." Moreover, the fact that the Security Council has no functions independent of advising the President takes the Council out of the definition of "agency" as articulated by the Soucie Court.

The tenor of the legislative history of the Security Council suggests that Congress agreed with the President's Memorandum on the Reorganization Plan which contended that a confidential relationship must exist between the Council (and the members thereof) and the Executive--a relationship that results in the use of the information accumulated by

the Security Council as a basis for advice to the President.

> The President as chairman controls NSC business, making his desires known through the executive secretary who is appointed by the President without Senate confirmation, and who acts as the President's staff assistant for national security matters. The President is briefed daily by the executive secretary on the development of NSC affairs. S. Rep. No. 838, at 2.

The Senate Report on the Plan also found that the need of well-coordinated staff facilities to help the President to provide effective administration would be fulfilled by the transfer of the Council into the Executive Office. S. Rep. No. 838 at 1.

The Security Council then is the foreign policy arm of the President. As such and because the President is a member of the Council, a suit under the Freedom of Information Act against the Council may very well run afoul of the constitutional doctrine of Mississippi v. Johnson, as stated above with respect to the Domestic Council. Moreover, because the Security Council is involved in foreign affairs, the imposition of disclosure (and, incidentally, procedural) requirements under the APA may be an unconstitutional intervention in the President's conduct of foreign affairs. In United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), the Supreme Court, in speaking of "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations," commented on the need of the President to retain control over information in the foreign affairs area:

> It is quite apparent that if, in the maintenance of our international relations, embarrassment--perhaps serious embarrassment--is to be avoided and success for our aims achieved, congressional legislation . . . must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were

> domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, . . . He has his confidential sources of information . . . . Secrecy in respect of information gathered by [his agents and officials] may be highly necessary, and the premature disclosure of it productive of harmful results. . . . Id. at 319-320. */

Thus, a court would likely construe the word "agency" not to include the Security Council to avoid constitutional doubts.

For these reasons, it is our view that the National Security Council is not subject to the Freedom of Information Act.

4. Council on International Economic Policy

The Council on International Economic Policy (CIEP) was created by the President's Memorandum of January 19, 1971, to provide a clear, top-level focus on international economic issues and to achieve consistency between international and domestic economic policy. The President's Memorandum Establishing the Council on International Economic Policy, January 19, 1971, Weekly Compilation of Presidential Documents 80 (January 25, 1971). In response to an executive branch request for legislation authorizing appropriations for CIEP, Congress accorded statutory status to the Council in the International Economic Policy Act of 1972, P.L. 92-412, 86 Stat. 644. Stated generically, the duties of the Council under section 206 of the Act are to collect and evaluate information on international economic matters and to advise the President in the formulation and direction of international economic policies. For the following reasons, it is our view that, based on the provisions of the Act and its legislative history, the Council on International Economic Policy is not an "agency" as defined in the APA.

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*/ See also C. & S. Airlines v. Waterman Corp., 333 U.S. 103, 109 (1948): "The President . . . possesses in his own right certain powers conferred by the Constitution on him as commander-in-chief and as the Nation's organ in foreign affairs."

First, the Council does not exercise any authority in the APA sense of the word. CIEP does not have authority to take final and binding action on any matters--the dispositive characteristic of an agency as derived from the legislative history of the APA. It does not have the authority to make policy. Instead, the Council is a forum in which the President can discuss with his top level advisers policy options that are available. See in this respect the statements of Senator Brock, 118 Cong. Rec. S12303 (daily ed. July 31, 1972), and Congressman Brown, 118 Cong. Rec. H7177 (daily ed. Aug. 3, 1972).

Second, although it is not altogether clear, CIEP does not in our view perform a function independent of advising the President--a factor which would bring the Council within the Soucia definition of agency. Section 206 of the CIEP Act does provide that it is the purpose of CIEP, like that of the OST, to collect and evaluate information and to 'assess the progress and effectiveness of Federal efforts.' However, a reading of the entire Act and its legislative history indicates that the performance of these activities is not independent of advising the President but rather is concomitant with that purpose. Unlike the situation in Soucia v. David, there is no evidence of any contemplation on the part of either the executive branch or the members of Congress that Congress would assume control over the information accumulated by the Council of International Economic Policy. Instead, the tenor of the legislative debates indicates that the members of Congress considered CIEP only as a staff unit to the President.

Senator Brock, one of the principal authors of the bill which culminated in the International Economic Policy Act (S. 3726, 92d Cong., 2d Sess.), referred to CIEP as an entity that would provide a top level focus on international economic matters for the President:

> The CIEP is the mechanism that assumes this coordinating and advisory responsibility. The staff of the Council is responsible for collecting and synthesizing for presentation

to the President the sometimes divergent views of the agencies. The Council itself is a forum in which the President discusses with those top level policymakers the issues which need resolution . . . . Certainly, the President is entitled to the best advice possible and to organize his own office in the way which enables him to best serve the interests of the Nation. 118 Cong. Rec. S12303 (daily ed. July 31, 1972). (Emphasis added).

In the House, Congressman Johnson, in arguing against an amendment which would have provided for Senate confirmation of the Executive Director of the CIEP, spoke at length of the relationship between the Executive Director and the President:

> The Council on International Economic Policy is essentially a staff unit--I repeat a staff unit--in the Executive Office of the President . . . .
>
> The Executive Director of the Council must insure that the work of the Council and the work of the Council's staff meet the needs of the President, with whom he must have a close personal advisory relationship. The Executive Director should be the President's man, should be responsible only to him, and should serve only the needs of the President and the Council. To require Senate confirmation would alter this relationship. The Congress has long recognized situations involving the need for closer relationships between the President and his staff officers and has not required Senate confirmation in such areas.
>
> Although he must insure a thorough analysis of policy alternatives and present these alternatives to the President, the Executive Director does not make policy. Neither does the Council's staff make policy. . . .

> If we require that this position of Executive Director of the Council on International Economic Policy must be confirmed, then we are legislating a change in relationships between the President and his staff people. I do not believe it is desirable to begin requiring confirmation of key White House advisers. 118 Cong. Rec. H7179 (daily ed., Aug. 3, 1972).

In a parliamentary maneuver confusing even to the Congressmen on the floor, the House amendment providing for Senate confirmation was passed along with a number of other amendments. But then the House vacated the vote, and in lieu of the title in the House bill that would have legislatively established CIEP (H.R. 15989), the House passed the provisions in the Senate bill, S. 3726, but deleted from the bill the title establishing CIEP. The House then insisted on a conference. 118 Cong. Rec. at H7130-7199. The effect of this parliamentary maneuvering was to permit the House conferees to restore Title I in the form in which it passed the Senate. In the Committee of Conference, the House Conferees agreed to the title legislatively establishing CIEP in the Senate bill and in particular to the provision in that title that required the Executive Director of CIEP to keep certain committees in Congress fully and currently informed regarding the activities of the Council. Conference Report, H. Rep. No. 92-1342, 92d Cong., 2d Sess. (1972). This provision, itself, was a result of a compromise in the Senate Committee on Foreign Relations between those Senators who wanted the Executive Director to be subject to Senate confirmation and those who felt that White House advisers to the President should not be subject to confirmation. See S. Rep. No. 92-981, 92d Cong. 2d Sess. (1972).

During the House debates on this provision in the bill as reported from the Conference Committee, Congressman Widnall, one of the House Conferees, explained the consensus of opinion of the members of the Conference on the effect the provision would have on the relationship between the Executive Director and the President:

The conference committee considered this question during three session [sic] which were held on the bill. It was agreed that the 'fully and currently informed' provisions does not require the Executive Director to testify formally before congressional committees. The conference committee specifically rejected a proposition that the Executive Director be required to testify. It also rejected a proposal that such an understanding be included in the statement of managers.

Although the legislation does not mention that the Executive Director of the Council is to be an assistant to the President, it is a possibility that the President would appoint a Presidential assistant to that position as is the situation now. In such a case, it is not intended to alter the longstanding tradition that those who hold such a position and therefore have a personal and confidential staff relationship to the President do not testify.

However, as I stated earlier, it is understood that the Executive Director shall keep the enumerated committees fully and currently informed of the Council's activities. This will assure an adequate exchange of views and information. I have been assured that the Executive Director of CIEP will make himself available for informal meetings and briefings with Members and committees of the Congress.

Additionally, the annual report by the President on international economic matters which is required by the bill is another available means of keeping the Congress informed. 118 Cong. Rec. H7931 (daily ed., Aug. 18, 1972).

Congressman Ashley, another House Conferee, also commented on the availability of the Executive Director:

> We sought to obviate the issue of Presidential prerogative with respect to confidentiality and privilege by striking the language [in the Senate bill]-- 'shall be a special assistance [sic] to the President.' We simply placed the focus on the duties of an executive director, which we felt would embrace a task of considerable scope and importance.
>
> But we did not--and I repeat--we did not resolve the question of the availability or the nonavailability of an executive director who prospectively might also be a special assistant to the President. Id.*/

The tenor of these statements and those throughout the debates in Congress indicate that CIEP was legislatively established as an entity in the nature of a staff unit that would assist and advise the President in formulating international economic policy. The debates reveal that Congress did want the Executive Director of CIEP to keep certain congressional committees abreast of the activities of the Council. There was a great deal of discussion about secrecy of policies adopted within the executive branch and there were a number of references to the "Kissinger problem", that is, the nonavailability of Dr. Kissinger for congressional questioning. See, e.g., 118 Cong. Rec.

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*/ Congressman Patman agreed that the law, by its terms, did not require the Director to appear before congressional committees, but was of the view that the deletion of the language "Assistant to the President" left the Director "where he will have to appear before congressional committees." 118 Cong. Rec. at H7982.

at S12411, H7177. But Congress also recognized that a constitutional privilege might exist with respect to the information accumulated by CIEP, and apparently believed that the requirements that the President submit an annual report to Congress and that the Executive Director, consistent with his relationship with the President, inform Congress of the activities of the Council would suffice the congressional desire to be informed of international economic policies.*/ There is no indication that any of the members of Congress contemplated that the Council would perform an independent function of accumulating information for Congress. Control over the information accumulated by CIEP apparently was intended to remain within the executive branch.

Thus, CIEP is legally distinguishable from the OST which the Soucie Court found to be subject to congressional control over the information collected by it and, therefore, an agency under the APA. The OST's independent function derived from its responsibility for program evaluation which was transferred to it from another entity that Congress used to

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*/ See, e.g., statement of Congressman Ashley, 118 Cong. Rec. H7178 (daily ed. Aug. 3, 1972): "I was the one who insisted, as did the subcommittees and finally the full committee, upon complete and total accountability of the Council on International Economic Policy to the Congress. We achieved this accountability, at least to our satisfaction, by requiring an annual report." See also statement of Congressman Culver, who commented on the amendment that required the Director to keep certain congressional committees informed: "The purpose of this amendment is once again to make it possible to have a greater degree of accessibility and accountability with the appropriate committees of the Congress on the policy formulation making within the newly established Council." Id. at H7176. (Emphasis added).

keep abreast of scientific matters. There is no similarly clear demarcation between the duties assigned to CIEP. Neither the executive branch nor the members of Congress considered the function of the Council to evaluate information on international economic matters to be independent of its purpose of advising the President. Instead, it appears that they considered that function to be synonymous with that ultimate purpose.

Furthermore, there are two other factors which further distinguish CIEP from the OST. First, the Executive Director of CIEP is not subject to Senate confirmation. Second, and most important, the President is the chairman of the Council. Both of these factors indicate that the Council is an advisory staff to the President and not an entity responsible for performing functions independent of advising the President. Like the Domestic Council and the National Security Council with respect to their particular spheres, CIEP is the President's "international economic policy arm." It is the forum in which the President makes international economic policy.

Because of this singular character, a suit under the Freedom of Information Act may very well be an unconstitutional incursion upon the powers of the President. See the argument based on Mississippi v. Johnson, alluded to previously. The imposition of disclosure requirements could also run afoul of the constitutional doctrine of United States v. Curtiss-Wright Export Corp., as discussed above with respect to the National Security Council.

Thus, because CIEP does not have the authority to take final and binding action and because it does not perform a function independent of advising the President, the Council on International Economic Policy does not come within the definition of agency as derived from the legislative history of the APA and from the decision in Soucie v. David. Moreover, it is likely that a court would resolve any doubts that might exist with respect to the functions CIEP is expected to perform in favor of CIEP so that it could, consistent with established rules of construction, avoid the serious constitutional questions with which it would otherwise be confronted.

5. Council of Economic Advisers

The Council of Economic Advisers was established in the Executive Office of the President by the Employment Act of 1946, 15 U.S.C. 1023. There is nothing in the charter of the Council to indicate that it has by law any authority to take "final and binding action" with respect to economic matters and, for this reason, it does not fit within the definition of "agency" derived from the legislative history of section 2 of the APA. However, it is unclear from an examination of the legislative history of the Employment Act of 1946, whether the Council of Economic Advisers was intended to have any function independent of advising and assisting the President in the realm of economic policy--the factor the Soucie Court used to find that OST was an "agency". There is an indication that at least some Congressmen felt that the purpose of the Council was "to gather information on economic trends" and "to appraise the various programs of the Federal Government" in addition to assisting and advising the President in the preparation of the economic report and formulating national economic policy recommendations to the President. (Statement by Congressman Patman, one of the authors of the House bill, 92 Cong. Rec. 982, 79th Cong. 2d Sess., Feb. 6, 1946). Congressman Manasco declared that he was certain that "unless this Council does its duty and makes recommendations to Congress that are practicable and worthwhile the Congress in due time will repeal the Act." (Emphasis added). Id. at 977.

The Conference Committee, in rejecting a House provision that the reports of the Council should be made available on request to the joint economic committee, also indicated that the Council is answerable to Congress:

> The Congress on the joint committee without the provision has all the power that the provision would have given to secure the studies, reports and recommendations of the council. Quoted in 92 Cong. Rec. at 976.

Thus, if Congress has power to compel the disclosure of the records of the Council, it follows that it also has the power to compel disclosure at the request of a member of the public. The fact that the members of the Council are appointed by and with the advice and consent of the Senate also points to the conclusion that Congress intended to exercise some control over the Council. There is some indication that this conclusion has endured. In commenting on the Reorganization Plan transferring the OST to the Executive Office of the President, Congressman Holifield declared:

> With an Office established by the reorganization plan, and a Director and Deputy Director to head it, congressional committees will be able to deal with this organization on the same basis as they do with the Bureau of the Budget and the Council of Economic Advisers. We will have a responsible officer to whom we can direct inquiries, and whom we can summon to committees to give testimony on subjects of the greatest national importance. 108 Cong. Rec. 8473 (1962).

Moreover, the fact that it is the practice of the members of the Council to regularly appear before Congress and testify as to economic trends and appraise economic programs could also be cited as evidence that the Council performs a function of informing Congress on economic matters.

On the other hand, there are statements in the legislative history that just as clearly indicate that the Council of Economic Advisers would function not as a distinct entity but merely as part of the President's staff. Congressman Cochran, one of the House members on the conference committee drew a conclusion opposite to that found in the committee's report:

> The Conference bill drops the provision that the reports, studies and recommendations of the President's economic advisers should be

made available to the joint committee. This is a distinct improvement, because it emphasizes the fact that the council is not an autonomous agency, but that its sole purpose is to provide the President with essential assistance and information on economic matters. 92 Cong. Rec. at 980.

Senator Murray, the original sponsor of the bill in the Senate, in summarizing its substance declared:

> The Council set up in this bill is entirely subordinate to the President. It has no independent nor autonomous authority. . . . The purpose of creating a Council of Economic Advisers is merely to provide additional assistance to the President in order to help him in discharging his responsibilities. Id. at 1142 (Emphasis added).

Thus, because of the conflicting statements in the legislative history, it is a close question whether the Council performs a function which is, in essence, independent of its function of advising and assisting the President on economic matters. If the Council does in fact perform an independent function, the ratio decidendi of the Soucie case becomes particularly significant for then the answer to the question whether the Council of Economic Advisers is subject to the Freedom of Information Act depends on the propensity of a court to follow the reasoning in Soucie. If a court passing on this question agrees with the Soucie decision that the test is whether the entity is charged with the responsibility of performing any function--even if it be one of evaluation or recommendation--other than solely serving as a body to advise the President, the Council will be subject to the Freedom of Information Act. It is our view, for the reasons set forth in Part 1 of this memorandum, that a further judicial test of the ratio decidendi in the Soucie case may be warranted. Although we cannot confidently

predict the outcome of the litigation, we believe that the position that the Council of Economic Advisers is not an "agency" under the APA and is therefore not subject to the FOI Act is defensible. Accordingly, we defer to your judgment and that of the Council as to whether or not the Council should consider itself subject to the Act.

Roger C. Cramton
Assistant Attorney General
Office of Legal Counsel

cc: FILES
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Marblestone

1975

Out 2/26/75 @ 5:45P

MEMORANDUM FOR THE HONORABLE PHILIP W. BUCHEN
Counsel to the President

Re: Applicability of the Freedom of Information Act to the White House Office

This is in reply to your recent request for our views regarding the applicability of the Freedom of Information Act (FIA), as amended, to the White House Office.

Summary

The legislative history of the Freedom of Information Act Amendments of 1974 makes clear that some entities within the Executive Office of the President are not "agencies" for purposes of the FIA; but it does not provide clear guidelines for determining which they are. In our opinion, it is proper to conclude that generally speaking the components of the White House Office, in the traditional or budgetary sense, are not "agencies." The more difficult questions relate to the status of other entities within the Executive Office, such as the Domestic Council or the National Security Council.

Statutory Provisions

Prior to adoption of the 1974 Amendments, coverage under the FIA, 5 U.S.C. 552(b), depended entirely upon the definition of "agency" contained in the Administrative Procedure Act (of which the FIA is a part). The APA definition is not particularly helpful with respect to the present issue. That definition (5 U.S.C. 551(1)) reads as follows:

(1) 'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;
(B) the courts of the United States;
(C) . . . (H) [six other specific exceptions, none of which refers to the President or the White House Office].

The 1974 Amendments, which took effect on February 19, 1975, add a special definition of "agency" applicable only to the FIA portion of the APA. Section 3 of the Amendments adds the following provision to 5 U.S.C. 552:

(e) For purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

While the statutory language itself does not differentiate among the various parts of the Executive Office of the President, the legislative history makes clear that some parts are not intended to be covered. Before turning to the legislative history, it is necessary to discuss the most prominent feature in its background, which was a District of Columbia Circuit Court decision under the original definition of "agency."

Soucie v. David

Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971), involved an FIA request for a document of the Office of Science and Technology (OST), a unit within the Executive Office of the President, but not part of the White House Office. The principal issue in the case was whether OST was an "agency" within the meaning of 5 U.S.C. 551(1).

In resolving this issue in the affirmative, the court adopted a functional approach to the Act. 1/ It stated that "the APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions." 448 F.2d at 1073 (footnote omitted). The court's reasoning with respect to OST was explained, in part, as follows:

> If the OST's sole function were to advise and assist the President, that might be taken as an indication that the OST is part of the President's staff and not a separate agency. In addition to that function, however, the OST inherited from the National Science Foundation the function of evaluating federal programs. When Congress initially imposed that duty on the Foundation, it was delegating some of its own broad power of inquiry in order to improve the information on federal scientific programs available to the legislature. When the responsibility for program evaluation was transferred to the OST, both the executive branch and members of Congress contemplated that Congress would retain control over information on federal programs accumulated by the OST, despite any confidential relation between the Director of the OST and the President--a relation that might result in the use of such information as a basis for advice to the President. By virtue

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1/ In a recent case involving the applicability of the FIA to certain advisory committees of the National Institute of Mental Health, the court, in holding that the advisory groups are not "agencies," used a similar functional approach. Washington Research Project, Inc. v. Department of Health, Education and Welfare, 504 F.2d 238, 246 (D.C. Cir., 1974).

> of its independent function of evaluating federal programs, the OST must be regarded as an agency subject to the APA and the Freedom of Information Act. 448 F.2d at 1975 (footnotes omitted).

Thus, the principal basis of the court's decision was the fact that OST was not limited to advising and assisting the President, but also had an independent power delegated by Congress

The legislative history of the 1974 Amendments

The bill to amend the FIA reported by the House Committee on Government Operations in March 1974 contained a provision regarding the meaning of "agency" which was essentially the same as the provision ultimately enacted. 2/ H.R. Rep. No. 93-876, 93d Cong., 2d Sess. (1974), p. 29. Like the enacted provision, the House version expressly referred to the "Executive Office of the President."

The expanded definition of "agency" was explained as follows in the House report (p. 8):

> For the purposes of this section, the definition of 'agency' has been expanded to include those entities which may not be considered

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2/ The only difference between the House version and the final version related to the introductory phrase. The House version stated: "Notwithstanding section 551(1), for purposes of this section, the term 'agency' means any executive department . . . [etc.]." The provision which was enacted states: "For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department . . . [etc.]."

> agencies under section 551(1) of title 5, U.S. Code, but which perform governmental functions and control information of interest to the public. The bill expands the definition of 'agency' for purposes of section 552, title 5, United States Code. Its effect is to insure inclusion under the Act of Government corporations, Government controlled corporations, or other establishments within the executive branch, such as the U.S. Postal Service.
>
> The term 'establishments in the Executive Office of the President,' as used in this amendment, means such functional entities as the Office of Telecommunications Policy, the Office of Management and Budget, the Council of Economic Advisers, the National Security Council, the Federal Property Council, and other similar establishments which have been or may in the future be created by Congress through statute or by Executive order.

Thus, the report's explanation did not refer to the President or to the White House Office. It should be noted that the Department of Justice had sent the House committee a bill report which asserted that it would be unconstitutional for Congress to extend the FIA to the President's staff. House report, p. 20.

During House debate on the bill, Congressman Erlenborn paraphrased the committee report's discussion of the Executive Office of the President. Then he asked the floor manager, Congressman Moorhead, if it was correct that "it [the bill's definition of agency] does not mean the public has a right to run through the private papers of the President himself." 120 Cong. Rec. H 1789 (daily ed., Mar. 14, 1974). Congressman Moorhead replied that Congressman Erlenborn's view was correct, i.e., that no right of access to the private papers of the President was intended. The precise meaning of this exchange is not entirely clear. However, taken in con-

nection with the silence of the House report regarding the President, the exchange should establish that the House bill was not intended to make the FIA applicable to the President himself.

The bill reported by the Senate Judiciary Committee expanded the existing definition of "agency" in some respects (e.g., by adding an express reference to the Postal Service), but did not deal expressly with the status of the Executive Office of the President. The Senate report did refer, with approval, to the decision in Soucie v. David. S. Rep. 93-854, 93d Cong., 2d Sess. (1974), p. 33.

The only other pertinent item in the legislative record is the conference report, S. Rep. No. 93-1200, 93d Cong., 2d Sess. (1974), pp. 14-15. That report described the differences between the House and Senate provisions regarding "agency" and stated (p. 14) that: "The conference substitute follows the House bill." It then continued (p. 15):

> With respect to the meaning of the term 'Executive Office of the President' the conferees intend the result reached in Soucie v. David, 448 F.2d 1067 (C.A.D.C. 1971). The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.

Apparently, the conference committee read Soucie to mean that, if the functions of OST had been limited to advising and assisting the President, OST records would not have been subject to the FIA. The correctness of this interpretation of Soucie is questionable, for the court specifically stated that it found it unnecessary to decide that issue. 448 F.2d at 1073. Still, the main consideration here is not what the Soucie court stated, but what Congress intended.

Interpreting the legislative history

It can be argued that on the point at issue here the language of the 1974 Amendments ("any . . . establishment in the executive branch of the Government (including the Executive Office of the President)") is absolutely clear and thus permits no resort to legislative history. See, e.g., Caminetti v. United States, 242 U.S. 470, 490 (1917). If the parenthetical phrase "(including the Executive Office of the President)" clearly modified the word "establishment," that might be the case. However, its position in the sentence indicates that it modifies the word "Government"--which would leave for determination what units, within the Executive Office of the President, constitute "establishments" within the meaning of the Act, compelling examination of evidence of legislative intent. Moreover, any reading which would place the entire Executive Office within the Act would include the President himself, who is the head of that office; and since this would raise the most serious constitutional questions, an interpretation would be sought to avoid it--again compelling resort to legislative history. In short, we have no doubt that courts will not adopt the blanket view that all parts of the Executive Office are covered but will examine the legislative history to clarify the point.

The exact meaning of the legislative history, as described above, is unclear. As noted, the House report listed a number of entities within the Executive Office that were to be covered by the bill ("the Office of Telecommunications Policy, the Office of Management and Budget, the Council of Economic Advisers, the National Security Council, the Federal Property Council, and other similar establishments"). The conference report took an entirely different approach to the issue, seeking to clarify the meaning of "Executive Office" by principle rather than by example. The term "Executive Office" was not meant to include "the President's immediate personal staff or units . . . whose sole

function is to advise and assist the President." Because of this basic difference in approach, it is impossible to tell whether the conference committee agreed or disagreed with the House report. Tending to show agreement is the statement in the conference report that "the conference substitute follows the House bill"--but this is a reference to the language of the bill, and goes no further than the statute itself toward showing that the House committee's intent was adopted. This issue of the relationship between the House and conference committee reports is relevant but not crucial to the present determination; it will be absolutely central when we come to consider the status under the Act of units named in the House report.

Constitutional Considerations

It is a settled rule of statutory construction that an interpretation that raises substantial constitutional questions will not be adopted where another reading of the statute is possible. See, e.g., Crowell v. Benson, 285 U.S. 22, 66 (1932). This principle is pertinent here. For the Congress to subject the President, or that portion of the Executive Office that functions as a mere extension of the President, to the requirements of the FIA (including its provisions for judicial review) seems inconsistent with the doctrine of separation of powers. Cf. Myers v. United States, 272 U.S. 52 (1926). Moreover, the exemptions of the FIA do not necessarily correspond to the scope of Executive privilege, a privilege grounded on the Constitution. United States v. Nixon, 42 Law Week 5237 (1974). Finally, the practical burdens resulting from application of the FIA to the President and his staff, including the provisions for judicial review and sanctions, might unduly interfere with the President's duty under Article II, § 3 to execute the laws.

These considerations weigh heavily against any interpretation of "agency"--if another is feasible under the statute and its history--which would apply it to what might be termed the nucleus of the Presidency.

The status of the White House Office

Your immediate inquiry is whether the "White House Office" is covered by the Act. We are not entirely clear what that phrase is meant to include. The United States Government Manual (1974-75) lists officials who are in the White House Office (p. 81) and contains a chart (copy attached) showing the relation of that Office to other parts of the Executive Office of the President (p. 80). The Executive Office Appropriation Act for 1975 (and for prior years) contains a separate line item for that unit. 3/ Public Law 93-381 (1974), Title III. However, more recently, a revised chart showing the organization of the "White House Staff" was issued (copy attached). 4/ That chart does not use the term "White House Office," and appears to give parallel treatment to units that are in our view not at all comparable for present purposes. We assume that your inquiry relates to the White House Office as shown in the Government Organization Manual and as separately funded in the Budget.

It is clear from the legislative history that the FIA does not embrace the "President's immediate personal staff." This phrase is used in the conference report, but is not explained. Presumably, it means that records maintained in the President's own offices or maintained

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3/ Other line items within the Executive Office include the CEA, Domestic Council, NSC, OMB and OTP.

4/ 10 Weekly Compilation of Presidential Documents 1588-89 (Dec. 23, 1974).

by his closest aides are beyond the scope of the FIA.[5/] This would seem to include the records of the four cabinet-rank advisers listed on the recent chart (Messrs. Buchen, Hartmann, Marsh and Rumsfeld); and those of the units listed as White House Operations, Counsellor to the President (Mr. Marsh), Office of the Press Secretary, Counsellor to the President (Mr. Hartmann), and Office of the Counsel. It would appear that the White House Office includes all of the aforementioned entities. They all perform staff functions for the President, and they do not appear to have OST-type independent functions. In our view they all must be considered as "advising and assisting" the President, even if that phrase is narrowly construed.

5/ That the President himself is not an "agency" for purposes of the FIA should follow, a fortiori, from the expressed intent to exclude the President's immediate staff. See also the Erlenborn-Moorhead exchange (discussed above).

It may also be noted that the recent opinion of the U.S. District Court for the District of Columbia (Judge Richey), dealing with access to White House tapes and other material compiled during the Nixon Administration, stated that the "Office of the President" is not an "agency" and that records of the "President and his immediate aides" are not subject to the FIA. Nixon v. Samoson, Civ. Action No. 74-1518, D.D.C. (Jan 3, 1975), p. 69. The court supported its conclusion by reference to the legislative history of the 1974 Amendments, i.e., the conference report. (The effect of this opinion has been stayed by the Court of Appeals.)

We are expressing no opinion at the present time as to the application of the FIA to other units of the Executive Office, such as OMB, 6/ NSC, 7/ CEA, and the Domestic Council. Each of those units must be considered separately, and the question can be reserved for consideration when requests addressed to each of them are received.

As a matter of sound planning, we urge that two steps be taken for the future:

(1) Any functions performed by those units described above as being within the White House Office which do not consist of "advising and assisting" the President should, if possible, be located within another Executive Office unit. If this is not possible, then a segregable subunit of the White House Office unit should be created.

6/ On February 19, 1975, OMB published an FIA regulation implementing the view that some, but not all, of OMB's functions are subject to the FIA. See 40 Fed. Reg. 7346, 7347.

7/ The recent FIA regulation published by the NSC staff contains language which seeks to leave open the question of coverage. See 40 Fed. Reg. 7316 (Feb. 19, 1975).

(2) The concept of a separate "White House Office" should be fostered and strengthened in as many ways as possible. Any future organizational charts should clearly indicate the existence of such a unit separate and apart from the rest of the Executive Office. Judicial acceptance of such a functional division can greatly simplify our FIA problems with respect to the Executive Office.

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

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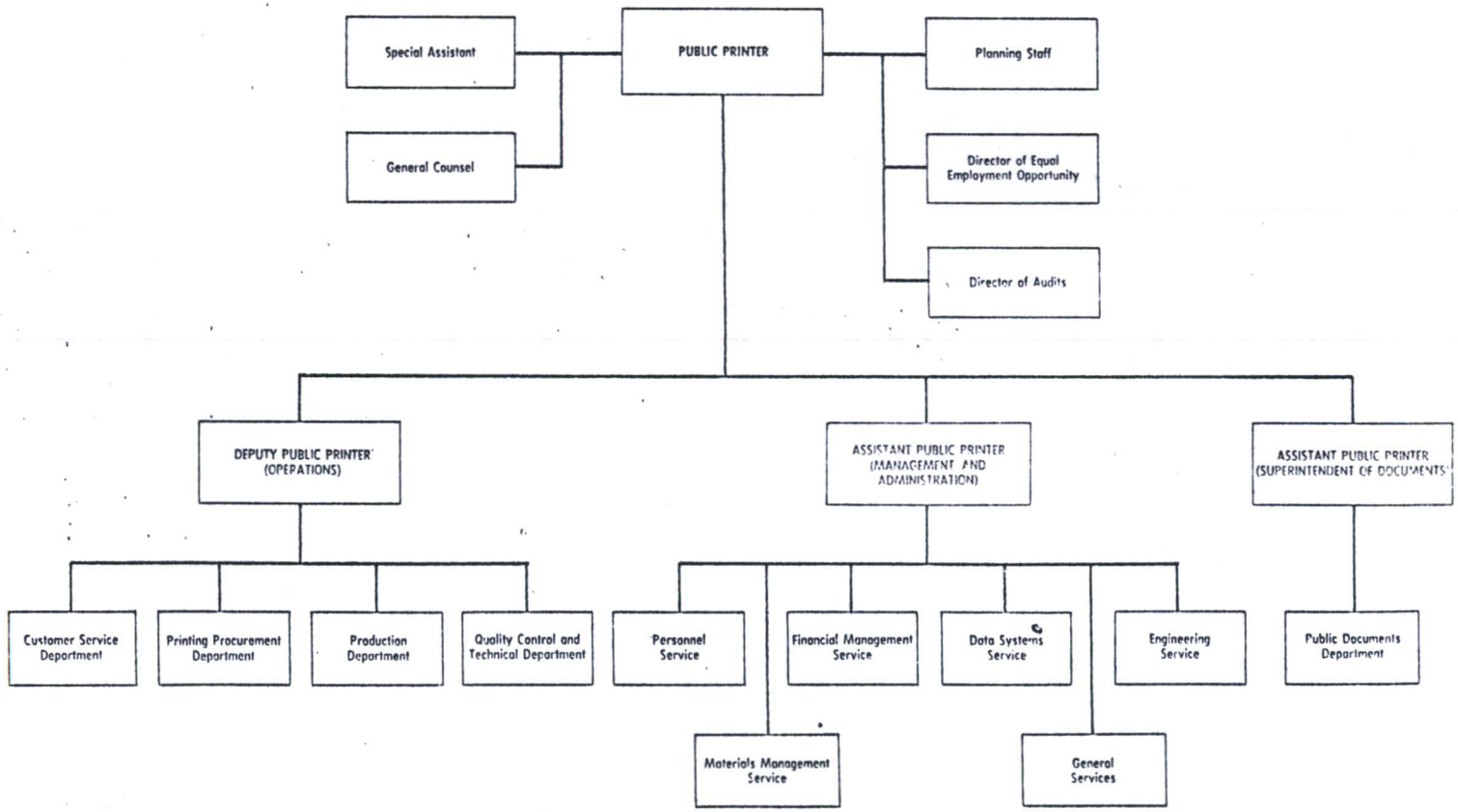

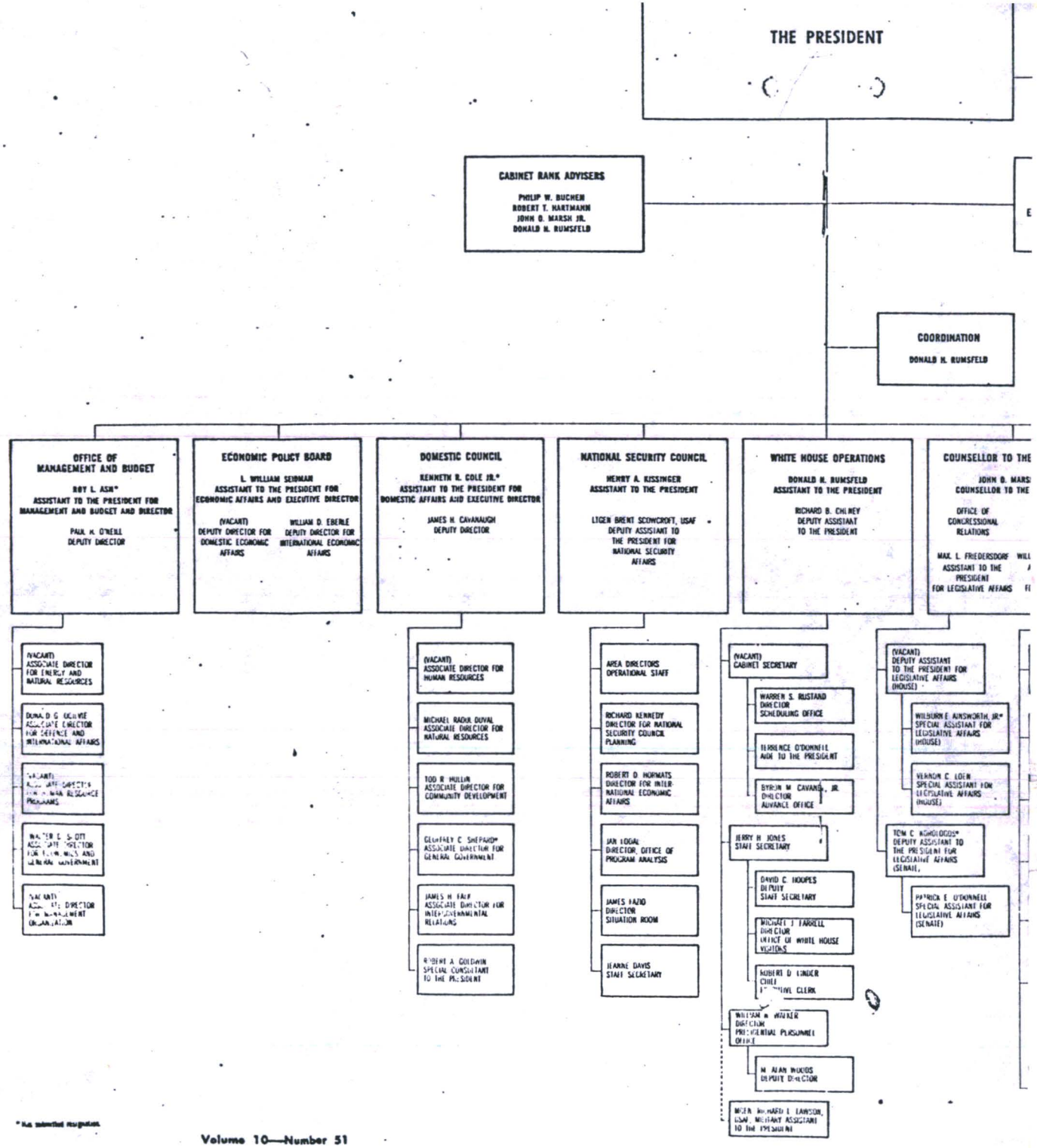

*Has submitted resignation.