

DRM:jal

JAN 30 1973

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.

*/ 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).*

*/ 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.

*/ 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

^{*}/ 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. 793 (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

*/ 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.

*/ 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 G. & 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 upon 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

*/ 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,

*/ 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.