

Memorandum

September 17, 1995

To: The Review Board

From: David G. Marwell
 Executive Director

Subject: Recommendations

This memorandum addresses two important issues that face the Board: (1) a necessary change in Board procedure that will provide a mechanism for agency reaction to Board decisions short of an appeal to the White House; and (2) the selection of our General Counsel.

A Change in Board Procedure

Recently, for the third time, the Review Board agreed to reconsider one of its formal determinations pending the submission of additional information from an affected agency. These decisions were, in my view, appropriate, prudent actions taken in an effort to ensure that the Board, in carrying out its mandate, is fully informed of all relevant information. The decisions also underscore a fundamental problem with the process defined by our Act and the procedures followed by the Board. By providing the agencies with only one formal appellate recourse — the President — the current procedures foreshorten and distort a process that should allow more perspective and depth.

I would like to propose that the Board consider a change in its procedures¹ that would allow agencies to register their concern and to present additional evidence about a particular Board determination before having to appeal to the President. Under this proposal, the Board would make preliminary determinations at one meeting which would be presented as such to the relevant agencies. These decisions would be ratified *en bloc* at the next meeting or reconsidered in those situations where agencies had presented a compelling case to do so. With this proposal, the Board gives up nothing and gains the benefit of avoiding the awkward appearance of reconsidering a formal determination. With this new mechanism, appeals to the President, having gone through a process of distillation, will serve more clearly to highlight issues of true importance. How often and under what circumstances the Board decides to reconsider a determination will do more to define the Board's resolve than sticking to a procedure that allows little flexibility and almost guarantees a series of *ad hoc* appeals arranged through last-minute telephone calls.

¹Jeremy indicates that the Board's published rules of procedures would **not** need to be changed.

General Counsel

I would like to make permanent Jeremy Gunn's temporary appointment as General Counsel. I have addressed several questions in arriving at this decision: (1) Is it appropriate to join the positions of General Counsel and Research and Analysis Chief? (2) Is Jeremy the best candidate to be General Counsel? (3) All things considered, what is best for the Board?

1. When I appointed Jeremy Acting General Counsel, I was initially concerned about joining two key positions. The General Counsel position should be independent within the office, I reasoned, in order to prevent any possible conflict of interest that might arise in the aggressive, purposeful operational pursuit of our mandate. After careful reflection and two months of real-life experience, I no longer have any qualms about the wisdom of joining the positions. I am, in fact, aware of the advantages that such a union can offer. Jeremy has already gained a solid reputation with other General Counsel and legal offices in the agencies with which we deal. He has served the Board well in the range of routine and complex issues that have faced him. There are examples of other organizations where the General Counsel also plays an operational role, and I am comfortable with my ability to identify and steer clear of any problems that could theoretically arise out of a possible conflict

Can Jeremy carry out both roles effectively? This question is an obvious and appropriate one. The answer is yes. As you know, I have assigned some of the routine General Counsel duties to other attorneys on the staff. Dennis Quinn, for instance, serves as our Ethics Officer, and Laura Denk handles our FOIPA issues. In addition, thanks to an extraordinary effort earlier this summer, most of the start-up work has been completed. We will soon be issuing the last of our major regulations, completing our regulatory and legal infrastructure. This period of sustained, labor-intensive legal work was ably managed by Jeremy who called upon other staff members to assist. It is hard to imagine that we will see another set of circumstances that will call for the same commitment of legal resources. If we do, we know that Jeremy and his colleagues can meet the challenge. It is far more likely that General Counsel issues will occupy less than 25 percent of Jeremy's time and often on issues that are closely connected to his duties in Research and Analysis. I am completely confident that Jeremy would be able to dedicate the necessary time and energy to carry out the important duties of both positions.

2. I have interviewed the six top candidates who applied for the General Counsel position and have identified two who appear as though they might possess the right mixture of intelligence, experience, and personality to make a valuable contribution to our effort. However, neither of these individuals (nor, for that matter, any of the other candidates) can match Jeremy for his combination of legal skills, academic credentials, and profound knowledge of the issues facing the Board. I have found in him a loyal counselor who speaks his mind and bases his advice on a ferocious fidelity to the highest ethical and legal standards. He has an unwavering commitment to seeing that the business of the Board is conducted consistent with applicable laws and regulations, and equally important, that our own statute is applied with vigor, creativity, and purpose.

3. Selecting Jeremy as General Counsel makes sense for a number of practical reasons as well. There are definite costs associated with adding a new senior member to our staff at this time. First, it can take a great deal of time. As you know, the clearance process alone can take up to several months. In addition, we would have to reckon with a steep learning curve given the range of complex issues that the Board now considers routine but were once thought daunting and obscure. Second, it can upset a system of working relationships and a division of labor that functions very well. Inserting another personality into the senior staff at this time is a risky business. The result might be an improvement, but there is a distinct risk that the adjustments required by the addition would cause a significant investment of time and energy. In any case, it would be, at least initially, disruptive. Third, the General Counsel salary, with benefits, represents approximately five percent of our annual budget. Even an action that had a negative impact on an organization could justify a savings of this magnitude. Appointing Jeremy General Counsel, with all of the benefits outlined above, makes the financial savings a bonus that is hard to ignore.

I would like to discuss both of these issues with you during the upcoming meeting. I will be happy to answer any questions or address any concerns that you may have.