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6 JAN 1981

MEMORANDUM FOR DOUGLAS HURON
Associate Counsel to the President

This responds to your oral request for our views on two issues relating to the President's power to make appointments to the District of Columbia Superior Court under Public Law 93-198, § 434(d)(1). As we understand the facts, the District of Columbia Judicial Nomination Commission sent a list of three names for each of two vacancies to the President during the second session of the Ninety-Sixth Congress. In conformance with the requirements of § 434(d)(1), the President submitted the names of his two nominees to the Senate within sixty days 1/ of the day on which the Commission submitted its choices to him. However, the Senate adjourned sine die without acting on the nominations. Your questions are, first, whether the President may resubmit his nominations to the Senate of the Ninety-Seventh Congress without asking the Commission for a new list of candidates, and second, whether the President has a sixty-day period within which to do so. We believe that the answer to both questions is in the affirmative.

Section 434(d)(1) provides in relevant part that "[i]n the event of a vacancy in any position of the judge of a District of Columbia court," the Commission must, within thirty days following the occurrence of the vacancy, "submit to the President, for possible nomination and appointment, a list of three persons for each vacancy." If "the President fails to nominate, for Senate confirmation, one of the persons on the list submitted to him under this section, within sixty days after receiving such list, the Commission shall nominate, and with the advice and consent of the Senate, appoint one of those persons to fill the vacancy for which such list was

1/ The President evidently acted on the fifty-fifth day.

originally submitted to the President." The first issue is whether this provision requires the President to ask for a new list of candidates from the Commission when the Senate has failed to act upon his previous nominations. There is nothing in the language or legislative history of the statute indicating that Congress addressed the problem. In the absence of legislative guidance, we do not think that the statute is to be read as requiring the President to undertake the unnecessary task of requesting a new list from the Commission if the President plans to choose a nominee from the list it has previously submitted to him. As long as the President is nominating a person from the list originally submitted, the statute does not, either by its terms or by any reasonable inference therefrom, require him to recommence the entire nominating process by obtaining a new set of candidates.

With respect to your second question, the statute makes no provision to govern a situation in which the Senate has adjourned sine die without acting on a nomination. In an earlier memorandum, however, we concluded in general terms "that the fact that Congress has adjourned sine die tolls the running of the 60-day period in which the President must nominate one of the three persons whose names are submitted to him by the Commission, and that the 60-day period will not commence until the first day upon which the 95th Congress convenes." Memorandum of October 15, 1976, from Leon Ulman, Deputy Assistant Attorney General, for Barry N. Roth, Associate Counsel to the President, at 1. We adhere to that conclusion in this context, and state our reasoning only briefly.

By its terms, the statute allows the sixty-day period to expire only if the President "fails to nominate . . . one of the persons on the list" That condition has not occurred here. The President did nominate two persons in a timely fashion, and he is required to renominate them not because of any delay on his part, but only because of the Senate's failure to act. The purpose of the 60-day deadline appears to be to prevent the President from delaying nominations and to give him a definite period within which to consider the Commission's list. In the case of the Senate's failure to act, the President has not delayed the nomination process, and he should be entitled to the full sixty-day period within which to reconsider his nominations in the light of the Senate's inaction. Any other result could force the President to act

immediately even in cases in which Congress has disapproved of his choice.^{2/} We do not accept that view in light of the clear legislative intention to allow the President sixty days for his deliberations.

Leon Ulman
Deputy Assistant Attorney General
Office of Legal Counsel

^{2/} In this case, for example, he would have only five days within which to make his nominations.