

6 FEB 1981

MEMORANDUM FOR FRED FIELDING
Counsel to the President

Re: Removal of Recess Appointee to Board of Directors
of the Corporation for Public Broadcasting.

This responds to Mr. Bolton's telephone inquiry of January 28, 1981, concerning the power of the President to remove a director of the Corporation for Public Broadcasting ("Corporation") who has received a recess appointment to that position.

On January 2, 1981 President Carter gave recess appointments to Reuben W. Askanase and Melba Beals to be members of the Board of Directors of the Corporation for Public Broadcasting. He submitted their nominations for those positions to the Senate on January 8, 1981. 17 (16?) Weekly Compilation of Presidential Documents 2859, 2871 (1981). President Reagan withdrew those nominations on January 21, 1981. 17 Weekly Compilation 42 (1981).

Your question is whether the President now has the power to remove the director who accepted one of these recess appointments. 1/ We have previously advised your Office that the President has the power to make recess appointments to the Board of Directors of the Corporation and that the withdrawal of the nomination of a recess appointee does not in itself constitute removal. The question therefore is whether the President can remove Ms. Beals who is now serving as a director of the Corporation under a valid and persisting recess appointment. While the matter is not entirely free from doubt, it is our view that the President has the power to remove such director by the appointment of a successor, by and with the advice and consent of the Senate. Whether he can remove her without such appointment is quite problematical given the absence of any precedent and in view of weighty opposing constitutional and policy considerations.

1/ It appears that Mr. Askanase never accepted the commission. We therefore assume that he declined the appointment.

I.

According to Article II § 2, cl. 4 of the Constitution:

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate by granting Commissions which shall expire at the End of their next Session.

The provision that the commission given to a recess appointee shall expire at the end of the next session of the Senate has not been interpreted to mean that the appointee has a constitutional right to stay in office that long. It has been consistently construed to the effect that the commission cannot continue beyond that time, but that it can be terminated sooner by any act the President is otherwise authorized to take. The phrase therefore constitutes a limitation on, rather than a grant of, a term. Cf. Parsons v. United States, 167 U.S. 324, 338-42 (1897); Myers v. United States, 272 U.S. 52, 146 (1926). Hence, if the President has the power to remove a director of the Corporation, he is not precluded from doing so by the constitutional provision that a recess commission expires at the end of the next session of the Senate.

II.

Section 201(b) of the Public Broadcasting Act of 1967, 47 U.S.C. § 396(b), which authorizes the establishment of the Corporation, provides:

There is authorized to be established a non-profit corporation, to be known as the "Corporation for Public Broadcasting", which will not be an agency or establishment of the United States Government. The Corporation shall be subject to the provisions of this section, and, to the extent consistent with this section, to the District of Columbia Nonprofit Corporation Act.

According to the District of Columbia Nonprofit Corporation Act, D.C. Code § 29-1019(d):

A director may be removed from office pursuant to any procedure therefor provided in the articles of incorporation or the bylaws, and if none be provided may be removed at a meeting called expressly for that purpose, with or without cause, by such vote as would suffice for his election.

The Articles of Incorporation and the Bylaws of the Corporation are silent on the issue of removal. Section 1019(d) accordingly would authorize the removal of a director at "a meeting called expressly for that purpose." The term "meeting" manifestly refers to the meetings of the members of the nonprofit corporation referred to in D.C. § 29-1014. The Corporation, however, has no members. D.C. Code § 29-1012, Certificate of Incorporation § 4.01. That does not make the directors unremovable. Section 1019(d) provides for removal at a meeting of the members, because directors are normally elected at such meeting. §§ 29-1014, 1019(b). The principle underlying the removal provision of §§ 29-1019(d) is, we believe, that in the silence of the Articles of Incorporation or Bylaws, a director may be removed by the authority which appointed him. According to 47 U.S.C. § 396 (c)(1), the directors of the Corporation are appointed by the President by and with the advice and consent of the Senate. Since the Senate's advice and consent to an appointment does not constitute participation in the appointment, Myers v. United States, supra, at 122-23, we believe the President can remove a director of the Corporation under § 1019(d) with or without cause, unless this result is inconsistent with 47 U.S.C. § 396.

III.

Textually there is no conflict between § 1019(d) and 47 U.S.C. § 396, since § 396 is silent on the issue of the removal of directors and because under federal constitutional law the power to appoint presumptively carries with it the power to remove. Matter of Hennen, 13 Pet. (38 U.S.) 230, 259 (1834); Myers v. United States, supra, at 119. This, however, leaves open the question whether § 396 by implication prohibits the removal of a director by the President with or without cause.

The ruling in Myers, supra, that the President's power to remove the officers appointed by him by and with the advice and consent of the Senate cannot be curtailed by Congress was subsequently limited in Humphrey's Executor v. United States, 295

U.S. 602 (1935) and Wiener v. United States, 357 U.S. 349 (1958) to officers performing Executive duties. Wiener, in particular, held that Congress may primarily accomplish a statutory purpose by providing for a non-executive procedure designed to preclude the "control or coercive influence" of the Executive. Where Congress adopts such a procedure, it limits the President's removal power by necessary implication (Wiener, supra, at 355-56) because one "who holds his office only during the pleasure of another, can not be depended upon to maintain an attitude of independence against the latter's will." Humphrey supra, at 629.

In this context the method of removal envisaged becomes important. If the director is to be removed by the appointment of a successor by and with the advice and consent of the Senate, the question whether Congress sought to limit the President's removal power is probably immaterial. Although the matter is not entirely free of doubt, this Office adheres to the position that a recess appointee can be removed by the appointment of a successor by and with the advice and consent of the Senate even if the President's power to remove him is limited. See the memoranda of January 18, 1961 and October 9, 1980, copies of which are attached. 2/ The removal of a director serving

2/ While we adhere to the legal analysis underlying the memoranda of January 18, 1961 and October 9, 1980, we would add that relevant facts tend to weaken the precedential value of at least two of the three historical incidents cited on pp. 5-7 of the 1961 memorandum and on p. 4 of the 1980 memorandum as instances in which successors to recess appointees to judicial or quasi-judicial/quasi-legislative positions took office prior to the end of the next session of the Senate. In the Buchanan-Kuykendall situation the memorandum itself states that Kuykendall took office only after Buchanan's resignation. Similarly Chief Justice Rutledge resigned shortly after the Senate refused to confirm him, several weeks prior to appointment of his successor. History of the Supreme Court of the United States, Vol. I, Goebel, Antecedents and Beginnings, pp. 748-49, fn. 120 (1971). In the third incident cited as a precedent, the documents available to us do not indicate whether the recess appointee resigned prior to the accession of his successor. There can, of course, be no question that the tenure of a recess appointee terminates with his resignation and that the President is then free to appoint a successor even if the session of the Senate has not yet come to an end. In this context, we note that President Eisenhower withdrew the nomination of two judges who had received recess appointments from President Truman. The successor of one judge took office on the day on which the "next session of the Senate came to an end"; the successor to the other was appointed only in the following year. President Kennedy withdrew the nominations of two commissioners (continued next page)

under a recess appointment by the appointment of a successor confirmed by the Senate therefore would not be inconsistent with § 396, even if that section by implication were read to limit the President's removal power.

IV.

This Office also adheres to the serious reservations contained in the January 18, 1961 memorandum as to whether the President can remove a recess appointee from a position with respect to which the President's removal power is limited, absent the appointment of a successor by and with the advice and consent of the Senate. We believe that § 369 provides by necessary implication that the directors of the Corporation do not serve at the President's pleasure. Hence, they are not freely removable by him, whether they serve after Senate confirmation or merely under a recess appointment.

The findings in § 396(a) and the pertinent legislative history disclosing a Congressional intent to preclude Governmental control and political influence over the Corporations indicate that the Corporation was to be of a hybrid nature. While some of its functions were declared to be of concern to the federal government, Congress did not intend to create a purely executive agency whose members were to serve at the pleasure of the President.

2/ (Continued)

of independent commissions who had received recess appointments from President Eisenhower. Their successors took office prior to the end of the next session of the Senate. But, again, we know that at least in one instance the recess appointee resigned prior to the appointment of his successor. With respect to the other, information is not available to us but could be found in the White House records office.

The Congressional Record and the Weekly Compilation of Presidential Documents disclose a number of additional instances in which recess appointments to independent regulatory commissions given by one President were withdrawn by his successor. In view of the paucity of precedents supporting our position that such appointee can be replaced prior to the end of the "next session of the Senate", it might be profitable to ascertain from the White House records office what the actual practice has been beginning with the Truman-Eisenhower transition. We would be pleased to pursue this line of inquiry should you think it desirable.

To the contrary, Congress sought to establish an organization insulated from governmental control or influence. Thus, while § 396(4) and (6) state that "the encouragement and support of public telecommunications . . . are also of appropriate and important concern to the federal government," and "that it is necessary and appropriate for the Federal Government to complement, assist, and support a national policy that will most effectively make public telecommunications services available to all citizens of the United States," the findings conclude, in par. 7 (emphasis added):

(7) a private corporation should be created to facilitate the development of public telecommunications and to afford maximum protection from extraneous interference and control.

The legislative history explains that a nonprofit corporation was selected because it would provide the most effective insulation from government control or influence over the expenditure of funds. H.R. Rep. No. 572, 90th Cong., 1st Sess. 15, 19, 28 & 29 (1967); S. Rep. No. 222, 90th Cong., 1st Sess. 7, 11 (1967). Section 396(b) therefore establishes a nonprofit corporation which is not an agency or establishment of the United States Government. By the same token the Corporation's directors are not to be deemed to be employees of the United States § 396(d)(1). Moreover § 396(d)(1) and (4) provide for bipartisanship of the Commission and for six year terms, strong indications of a Congressional intent to limit the President's removal power. Humphrey, supra, at 624.

We therefore conclude that § 396 limits the President's power to remove the directors of the Corporation. This means that a director appointed during a recess of the Senate can be removed without cause only by the appointment of a successor by and with the advice and consent of the Senate.

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