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MEMORANDUM FOR FRED FIELDING
Counsel to the President

Re: Power of the President to Remove Presidential Appointee
to the District of Columbia Judicial Nominating Commission.

This responds to Mr. Hauser's oral request for our views concerning the power of the President to remove the Presidential appointee to the District of Columbia Judicial Nominating Commission (Commission). In our view this question should be answered in the affirmative. We must, however, add the caveat - indispensable in this area of law - that the judicial rulings in this area of law have been unpredictable. See the memorandum from Assistant Attorney General Rehnquist to Jonathan C. Rose, dated October 28, 1969.

The Commission was established by § 434 of the District of Columbia Self-Government and Governmental Reorganization Act of December 24, 1973, D.C. Code § 11 Appendix - 434. The Commission consists of seven members; one is appointed by the President, two by the Board of Governors of the D.C. Bar, two by the Mayor, one by the D.C. Council, and one by the Chief Judge of the United States District Court for the District of Columbia. The member of the Commission appointed by the President serves for a term of five years, the others generally serve for six year terms. It is the function of the Commission in the event of a vacancy on one of the D.C. Courts to submit to the President a list of three persons for possible nomination and appointment. If the President fails to nominate to the Senate any of the persons recommended by the Commission, the Commission itself may nominate, and with the advice and consent of the Senate appoint, one of the persons it had recommended to the President.

Our conclusion that the President has the power to remove the member of the Commission appointed by him flows from the basic rule of construction stated by James Madison during the first session of the First Congress that "the power of removal result[s] by a natural implication from the power of appointing." 1 Ann. Cong. 496 (1789). The courts have adopted this rule. Matter of Hennen, 13 Pet. 230, 259-260 (1839); Blake v. United States, 103 U.S. 227 (1880); Myers v. United States, 272

U.S. 52, 119 (1926). The principal problem in this field involves the question whether and to what extent Congress may limit this power of removal which flows from the power of appointment. Myers v. United States, supra, determined that Congress may not generally limit the power of the President to remove purely executive officers appointed by and with the advice and consent of the Senate. On the other hand, it has been held that Congress can expressly or by necessary implication limit the President's power to remove members of the independent regulatory commissions and of commissions charged with the adjudication of claims against the United States "according to law." Humphrey's Executor v. United States, 295 U.S. 602 (1935); Wiener v. United States, 357 U.S. 349 (1958).

Moreover, it was held in United States v. Perkins, 116 U.S. 483 (1886), that Congress may limit the removal power flowing from the power to appoint if it vests the appointment power in a Department head pursuant to the terminal sentence of Article II, § 2, cl. 2. The court's opinion in Myers, supra, at 160-62, suggests strongly that the Perkins doctrine is not applicable if the appointment power is vested, as here, in the President alone.

The question therefore is to determine whether Congress expressly or by necessary implication sought to limit the President's removal power when it enacted § 434. Section 434 does not contain an express provision denying the removal power altogether or limiting it to certain situations. The provision for a five year term does not in itself mean that the appointee has the right to serve out the term. It has been established since Parsons v. United States, 167 U.S. 324, 338 (1897), that a provision for a term is an act of limitation and not of grant. It means that the officer cannot stay in office for more than the length of the term without reappointment, not that he has the right to stay in office for the full duration of the term.

The problem therefore is whether the office of the Presidential appointee to the Commission contains such strong quasi-judicial or quasi-legislative elements that Congress by necessary implication limited the President's removal power. Wiener v. United States, supra at 355-356.

The principal function of the Commission is to assist the President in the selection and nomination of candidates for judicial office in the District of Columbia. This is preeminently

an executive function. 1/ Under this view, the President has the power to remove the Presidential appointee to the Commission. This conclusion is supported by the legislative history of the Act. It is true that during the debate on the bill on the floor of the House of Representatives Congressman Breckinridge referred to the Commission as a blue panel jury. 119 Cong. Rec. 33636 (1973). This would carry with it the implication that the Commission was intended to be an independent body, removed from the influence of the authorities which appointed its members. Other participants in the debate, however, recognized that the members of the Commission were expected to represent the views of those who appointed them. See, e.g. id. at 33638 (Congressman Adams), id. at 33640 (Congressman Fraser).

More important than sporadic remarks of legislators during the debate is the explanation of the Conference Report by Congressman Diggs, who was in charge of the legislation:

The judicial nomination procedure as encompassed in the conference report reflects both the Federal interest in local judicial nominees and the need for a merit selection process for these nominees.

The purpose of the new Judicial Nomination Commission is to recommend qualified persons to the President of the United States to fill vacancies on either of the District of Columbia local courts. The composition of the Commission reflects both the need for community input and representation of the Federal interest in the consideration of nominees for judgeships.

Id. at 42038 emphasis added.

1/ Even though this "executive" function is manifestly not that kind of function which must be performed by "officers" of the United States appointed in accordance with Art. II, § 2, cl. 2 of the Constitution, we believe it is reasonable to analyze this problem under the Court furnished rule of statutory construction applied in Humphrey's Executor, supra, and Wiener, supra.

The Federal interest, of course, cannot be represented by a Presidential appointee who does not have the President's confidence, who is not subject to the President's guidance, and, if necessary, to removal.

We therefore conclude that Congress did not expressly or by implication limit the President's power to remove the Presidential appointee to the Commission and that the appointee serves at the pleasure of the President but for not more than five years.

Larry L. Simms
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