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Freedom of Information Act - [5 U.S.C. 552(b)]

B-1 National security classified information [(b)(1) of the FOIA]
B-2 Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
B-3 Release would violate a Federal statute [(b)(3) of the FOIA]
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E.O. 13233

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*RADIATION POLICY COUNCIL (No limit)

Heads of the following agencies or their representatives and such others as the President may designate:

Department of Defense	Department of Transportation
Department of Justice	Department of Energy
Department of Commerce	Veterans' Administration
Department of Labor	Environmental Protection Agency (CHAIRMAN)
Department of HHS	National Science Foundation
Department of HUD	Federal Emergency Management Agency
	Nuclear Regulatory Commission is invited to particip

NAME	POL.	STATE	DATE APPOINTED	TERM EXPIRES
RAILROAD RETIREMENT BOARD (3)				
Member at Large (CHAIRMAN)				
~~William P. Adams~~	~~D~~	~~Va.~~	~~2/14/78~~	~~8/28/82~~
Robert A. Gielow	R	Ill.	3/2/83	8/28/87
Representing Carriers				
Earl Oliver	D	Ill.	10/20/78	8/27/83
~~Earl Oliver~~	~~D~~	~~Ill.~~		~~8/27/88~~ Oct 3, 1983
Representing Employees				
Charles J. Chamberlain		Ill.	7/27/79	8/28/84
Inspector General				
*RED CROSS, AMERICAN NATIONAL				
Principal Officer				
~~Jerome Holland~~		~~N.Y.~~	~~3/30/79~~	~~3/31/82~~
Jerome Holland		N.Y.	4/21/82	3/31/85
Board of Governors (8)				
~~Harold Brown, Secretary of Defense~~			~~9/26/77~~	~~9/25/80~~
~~Julius B. Richmond, Assistant Secretary of HEW~~			"	"
~~John Patrick White, Deputy Director, OMB~~			~~2/26/79~~	~~2/25/82~~
~~Jerome Holland~~		~~N.Y.~~	~~3/30/79~~	~~3/31/82~~
~~Patricia Roberts Harris, Secretary of HEW~~			~~9/11/79~~	~~9/10/82~~
~~John W. Macy, Director of FEMA~~			"	"
~~Robert B. Pirie, Jr., Assistant Secretary of Defense~~			"	"
~~Alexander M. Haig, Jr., Secretary of State~~			~~7/6/81~~	~~7/5/84~~
Caspar Willard Weinberger, Secretary of Defense			7/6/81	7/5/84
~~Richard S. Schweiker, Secretary of HHS~~			~~7/6/81~~	~~7/5/84~~
Terrel H. Bell, Secretary of Education			7/6/81	7/5/84
Edward N. Brandt, Jr., Ass't. Sec. for Health, HHS			7/6/81	7/5/84
Louis O. Giuffrida, Dir., FEMA			7/6/81	7/5/84
~~David C. Jones, General, Chmn., JCS~~			~~7/6/81~~	~~7/5/84~~
Jerome Holland			4/21/82	3/31/85
George P. Shultz, Secretary of State			8/25/82	8/24/85
General John W. Vessey, Jr., Chmn., JCS			8/25/82	8/24/85
Margaret M. Heckler, Secretary of HHS			3/21/83	3/20/86

new file

THE WHITE HOUSE

WASHINGTON

November 7, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS OAR

SUBJECT: Railroad Retirement Board

Becky Norton Dunlop called on Friday to alert us to a potential problem in connection with an appointment to the Railroad Retirement Board. Under 45 U.S.C. § 228j(a), the President appoints the three members of the Board, by and with the advice and consent of the Senate. One member is appointed from recommendations by representatives of employees and one from recommendations by representatives of carriers. The carriers have recommended [redacted] however, recently testified in opposition to Administration proposals concerning the Board, and Presidential Personnel has put processing of his prospective nomination on hold. Dunlop has asked for our advice concerning the President's authority to nominate someone other than [redacted] whether Personnel should solicit new recommendations from the carriers, etc.

b6

It seems clear that the President is not bound to nominate [redacted] and that he should simply ask the carriers for new recommendations. I have begun researching the question to confirm this view, but wanted to advise you of the inquiry so that it might be appropriately staffed.

b6

THE WHITE HOUSE

WASHINGTON

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DOC NO	Document Type / Document Description	No of pages	Doc Date	Restrictions	
3	NOTES RE APPOINTMENT	1	11/9/1983	B6	823

Freedom of Information Act - [5 U.S.C. 552(b)]

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To John

Date 11/9 Time 10:25

WHILE YOU WERE OUT

M Becky Dunlop

of

Phone 6440

Area Code Number Extension

TELEPHONED	✓	PLEASE CALL	
CALLED TO SEE YOU		WILL CALL AGAIN	
WANTS TO SEE YOU		URGENT	

RETURNED YOUR CALL

Message U. info on Railroad Retirement Act.

dca

Operator

AMPAD EFFICIENCY®

23-020

and amendment of other provisions of this section to take effect Oct. 1, 1981, and shall apply only with respect to annuities awarded on or after Oct. 1, 1981, see section 1129 of Pub.L. 97–35 set out as a note under section 231 of this title.

Effective Date. Section effective on Jan. 1, 1975, see section 602(a) of Pub.L. 93–445, set out as a note under section 231a of this title.

Legislative History. For legislative history and purpose of Pub.L. 93–445, see 1974 U.S. Code Cong. and Adm.News, p. 5702. See, also, Pub.L. 97–35, 1981 U.S.Code Cong. and Adm. News, p. 396.

Library References

Social Security and Public Welfare ⇐166.
C.J.S. Social Security and Public Welfare § 89.

§ 231f. Railroad Retirement Board

(a) Administration

This subchapter shall be administered by the Railroad Retirement Board established by the Railroad Retirement Act of 1937 [45 U.S.C.A. § 228a et seq.] as an independent agency in the executive branch of the Government and composed of three members appointed by the President, by and with the advice and consent of the Senate. Each member shall hold office for a term of five years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of the term and any member holding office pursuant to appointment under the Railroad Retirement Act of 1937 when this subchapter becomes effective shall hold office until the term for which he was appointed under such Railroad Retirement Act of 1937 expires. One member shall be appointed from recommendations made by representatives of the employees and one member shall be appointed from recommendations made by representatives of employers as defined in paragraph (i) of section 231(a)(1) of this title, in both cases as the President shall direct, so as to provide representation on the Board satisfactory to the largest number, respectively, of employees and employers concerned. One member, who shall be the chairman of the Board, shall be appointed without recommendation by either employers or employees and shall not be in the employment of or be pecuniarily or otherwise interested in any employer or organization of employees. Vacancies in the Board shall not impair the powers or affect the duties of the Board or of the remaining members of the Board, of whom a majority of those in office shall constitute a quorum for the transaction of business. Upon the expiration of his term of office a member shall continue to serve until his successor is appointed and shall have qualified.

(b) Powers and duties

(1) The Board shall have and exercise all the duties and powers necessary to administer this subchapter. The Board shall take such steps as may be necessary to enforce such subchapter and make awards and certify payments. Decisions by the Board upon issues of law and fact relating to annuities or death benefits shall not be subject to review by any other administrative or accounting officer, agent, or employee of the United States.

(2) In the case of—

(A) an individual who will have completed ten years of service creditable under this subchapter.

(B) the wife or divorced wife or husband of such an individual,

(C) any survivor of such an individual if such survivor is entitled, or could upon application become entitled, to an annuity under section 231a of this title, and

(D) any other person entitled to benefits under Title II of the Social Security Act [42 U.S.C.A. § 401 et seq.] on the basis of the wages and self-employment income of such an individual (except a survivor of such an individual where such individual did not have a current connection with the railroad industry at the time of his death);

the Board shall provide for the payment on behalf of the Managing Trustee of the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund of monthly benefits payable under Title II of the Social Security Act [42 U.S.C.A. § 401 et seq.] which are certified by the Secretary to it for payment under the provisions of Title II of the Social Security Act.

(3) If the Board finds that an applicant is entitled to an annuity or death benefit under the provisions of this subchapter than the Board shall make an award fixing

the amount of the annuity or benefit, as the case may be, and shall certify the payment thereof as hereinafter provided; otherwise the application shall be denied. For purposes of this section, the Board shall have and exercise such of the powers, duties and remedies provided in subsections (a), (b), (d), and (n) of section 12 of the Railroad Unemployment Insurance Act [45 U.S.C.A. § 362] as are not inconsistent with the express provisions of this subchapter. The Board is authorized to delegate to any member, officer, or employee of the Board any of the powers conferred upon the Board by this subchapter, excluding only the power to prescribe rules and regulations, including the power to make decisions on applications for annuities or other benefits: *Provided, however,* That any person aggrieved by a decision on his application for an annuity or other benefit shall have the right to appeal to the Board. Notice of a decision of the Board, or of an employee thereof, shall be communicated to the applicant in writing within thirty days after such decision shall have been made.

(4) The Board shall from time to time certify to the Secretary of the Treasury the name and address of each individual entitled to receive a payment, the amount of such payment, and the time at which it should be made, and the Secretary of the Treasury through the Division of Disbursements of the Treasury Department, and prior to audit by the General Accounting Office, shall make payment in accordance with the certification by the Board.

(5) The Board shall establish and promulgate rules and regulations to provide for the adjustment of all controversial matters arising in the administration of this subchapter. All rules, regulations, or decisions of the Board shall require the approval of at least two members, and they shall be entered upon the records of the Board, which shall be a public record.

(6) The Board shall gather, keep, compile, and publish in convenient form such records and data as may be necessary to assure proper administration of this subchapter, including subdivision (2) of this subsection. The Board shall have power to require all employers and employees and any officer, board, commission, or other agency of the United States to furnish such information and records as shall be necessary for the administration of this subchapter, including subdivision (2) of this subsection. The several district courts of the United States and the District Court of the United States for the District of Columbia shall have jurisdiction upon suit by the Board to compel obedience to any order of the Board issued pursuant to this section. The orders, writs, and processes of the District Court of the United States for the District of Columbia in such suits may run and be served anywhere in the United States. Witnesses summoned before the Board shall be paid the same fees and mileage that are paid witnesses in the district courts of the United States. The Board shall make an annual report to the President of the United States to be submitted to Congress.

(7) Notwithstanding any other provision of law, the Secretary of Health and Human Services shall furnish the Board certified reports of wages, self-employment income, and periods of service and of other records in his possession, or which he may secure, pertinent to the administration of this subchapter, the Railroad Unemployment Insurance Act [45 U.S.C.A. § 351 et seq.], the Milwaukee Railroad Restructuring Act [45 U.S.C.A. § 901 et seq.], and the Rock Island Railroad Transition and Employee Assistance Act [45 U.S.C.A. § 1001 et seq.]. The Board shall furnish the Secretary of Health and Human Services certified reports of records of compensation and periods of service reported to it pursuant to section 231h of this title, of determinations under section 231a of this title, and of other records in its possession, or which it may secure, pertinent to subsection (c) of this section or to the administration of the Social Security Act 42 U.S.C.A. § 301 et seq.] as affected by section 231q of this title. Such certified reports shall be conclusive in adjudication as to the matters covered therein: *Provided, however,* That if the Board or the Secretary of Health and Human Services receives evidence inconsistent with a certified report and the application involved is still in course of adjudication or otherwise open for such evidence such recertification of such report shall be made as, in the judgment of the Board or the Secretary of Health and Human Services, whichever made the original certification, the evidence warrants. Such recertification and any subsequent recertification shall be treated in the same manner and be subject to the same conditions as an original certification.

(8) Any department or agency of the United States maintaining records of military service, at the request of the Board, shall certify to the Board, with respect to any

THE WHITE HOUSE

WASHINGTON

December 6, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Railroad Retirement Board

On November 4, 1983 Becky Norton Dunlop alerted us to a potential problem with an appointment to the Railroad Retirement Board. As I explained in my memorandum to you of November 7, the President appoints the three members of the Board, by and with the advice and consent of the Senate. One member is appointed from recommendations by representatives of employees and one from recommendations by representatives of carriers. The carriers have recommended

[redacted]

b6

[redacted] b6

[redacted] our previous advice concerning the President's authority.

Attachment

THE WHITE HOUSE

WASHINGTON

December 6, 1983

MEMORANDUM FOR BECKY NORTON DUNLOP
DEPUTY ASSISTANT TO THE PRESIDENT
PRESIDENTIAL PERSONNEL

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Railroad Retirement Board

On November 4, 1983, you asked our advice concerning the authority of the President to nominate members of the Railroad Retirement Board. Specifically, you asked whether the President could nominate [redacted] b6

John Roberts of this office advised you on November 9 that the President need not proceed with [redacted] nomination, b6
and that if your office wanted to nominate someone else you should solicit new recommendations from representatives of employers, as provided in 45 U.S.C. § 231f(a). That statute specifies that the President shall appoint the three members of the Board, by and with the advice and consent of the Senate, and that:

> One member shall be appointed from recommendations made by representatives of the employees and one member shall be appointed from recommendations made by representatives of employers as defined in paragraph (i) of section 231(a)(1) of this title, in both cases as the President shall direct, so as to provide representation on the Board satisfactory to the largest number, respectively, of employees and employers concerned.

[redacted]

We reiterate our advice that the President is not required to nominate [redacted] and that you should solicit new recommendations from representatives of employers if the decision is made not to nominate [redacted]

FFF:JGR:aea 12/6/83
cc: FFFielding/JGRoberts/Subj/Chron

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DOC NO	*Document Type / Document Description*	*No of pages*	*Doc Date*	*Restrictions*	
6	LETTER EARL OLIVER TO BONNIE NEWMAN RE NONIMATION	1	11/29/1983	B6	826

Freedom of Information Act - [5 U.S.C. 552(b)]

B-1 National security classified information [(b)(1) of the FOIA]
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E.O. 13233

C. Closed in accordance with restrictions contained in donor's deed of gift.

THE WHITE HOUSE

WASHINGTON

February 3, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Power of the President to Remove Members of the Railroad Retirement Board

Presidential Personnel has asked for an opinion from our office concerning the authority of the President to remove members of the Railroad Retirement Board ("the Board") from office, particularly those in a holdover status. I have worked on questions concerning the Board in the past -- you may recall the dispute concerning whether the President was required to [redacted] to the Board as the choice of carrier representatives -- and have begun to research this question. I send it over at this point only to alert you to the inquiry, and for formal staffing.

b6

I would point out, however, that my preliminary view is that the President may not remove members of the Board, even those in a holdover status. The Board is an "independent agency" and appears to have quasi-judicial functions, see 45 U.S.C. § 231f. The members serve fixed five-year terms, and there is a statutory holdover provision. I will advise further when I have completed some additional research.

THE WHITE HOUSE

WASHINGTON

February 27, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Power of the President to Remove Members of the Railroad Retirement Board

By memorandum dated February 3, 1984, I advised you of a request from Presidential Personnel for an opinion as to whether the President may remove members of the Railroad Retirement Board from office. I noted that I doubted that the President had such authority, in light of the establishment of the Board as an "independent agency" and the fact that the Board performed quasi-judicial functions. Additional study has confirmed my initial view that the President may not remove the members of this Board.

Officers performing largely executive functions cannot be insulated by Congress from the President's removal power, Myers v. United States, 272 U.S. 52 (1926), but those performing quasi-judicial or quasi-legislative functions may be accorded such independence from Presidential control by Congress, Humphrey's Executor v. United States, 295 U.S. 602 (1935); Wiener v. United States, 357 U.S. 349 (1958). In this case there can be little doubt that Congress intended to protect the members of the Board from removal by the President. The statute specifies fixed terms of five years for Board members (with a holdover provision) and, as noted, establishes the Board as an "independent agency." 45 U.S.C. § 231f(a). The issue, accordingly, is whether the Board members perform quasi-judicial or quasi-legislative functions. If they do, Congress acted within its constitutional authority in insulating the members from removal; if not, the President may constitutionally fire the Board members despite Congress's intent that they not be subject to removal.

The duties of the Board are clearly judicial in nature. The basic function of the Board is to make awards and certify payments under the Railroad Retirement Act of 1974. 45 U.S.C. § 231f(b). That Act established criteria for the award of annuities and death benefits to certain employees. The Board is authorized to issue subpoenas, administer oaths and examine witnesses, and receive evidence in order to determine if applicants are entitled to awards under the Act. Id. § 231f(b)(3). Decisions by the Board upon issues of law and

fact are not reviewable by any other administrative or accounting officer, id. § 231f(b)(1), and orders of the Board may be enforced in district court, id. § 231f(b)(6).

Since the Board performs the quintessentially judicial function of determining whether applicants are entitled to payments under the terms of a statute, Congress may constitutionally insulate the members from removal by the President. As noted, I think Congress has done so, by establishing the Board as an independent agency whose members serve fixed terms.

One of the Board members is holding office pursuant to the statutory holdover provision. This is irrelevant to the question of the President's removal power. If the President can remove an officer, a holdover provision will not protect the officer from removal. This was, of course, the crux of our position in both the Legal Services and Civil Rights Commission cases. The converse, however, is also true: if the President cannot remove an officer, he still cannot do so when the officer is in a holdover status. The holdover period is simply a part of the term fixed by Congress.

A memorandum to Dunlop, who raised the question initially, is attached.

Attachment

cc: Steve Abrams

THE WHITE HOUSE

WASHINGTON

February 27, 1984

MEMORANDUM FOR BECKY NORTON DUNLOP
DEPUTY ASSISTANT TO THE PRESIDENT
FOR PRESIDENTIAL PERSONNEL

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Power of the President to Remove Members of the Railroad Retirement Board

You have asked for our opinion concerning whether the President has the authority to remove members of the Railroad Retirement Board. After careful consideration we are compelled to conclude that the President lacks such authority.

Congress may not, consistent with the Constitution, insulate officers who perform largely executive functions from Presidential removal. Myers v. United States, 272 U.S. 52 (1926). Officers who perform quasi-judicial or quasi-legislative functions, however, may be insulated from Presidential removal, if Congress so directs. Humphrey's Executor v. United States, 295 U.S. 602 (1935); Wiener v. United States, 357 U.S. 349 (1958).

In this case it seems clear that Congress has attempted to insulate the members of the Railroad Retirement Board from Presidential removal. The Board is established as an "independent agency," and its members are accorded fixed terms of five years, with a holdover provision. 45 U.S.C. § 231f(a). It also seems clear that the Board performs quasi-judicial rather than largely executive functions. It is the principal function of the Board to make awards and certify the payment of annuities and death benefits to eligible applicants under the Railroad Retirement Act of 1974. 45 U.S.C. § 231f(b). In the discharge of this responsibility the Board is authorized to issue subpoenas, administer oaths and examine witnesses, and receive evidence. The Board's decisions on issues of law and fact are not otherwise reviewable by accounting or administrative officers, and Board orders may be enforced in district court.

In sum, by establishing the Board as an independent agency whose members serve fixed terms, Congress has evinced the intent to insulate Board members from Presidential removal. Such insulation is constitutional because the Board members exercise quasi-judicial functions. Accordingly, the President

may not remove the members of the Railroad Retirement Board. The fact that a member may hold office pursuant to a holdover provision does not affect this conclusion.

FFF:JGR:aea 2/27/84
cc: FFFielding/JGRoberts/Subj/Chron

ID # 202854 CU

JV

FG 246

DBW

~~[crossed-out handwriting]~~ ? no

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) __ / __ / __

Name of Correspondent: John Herrington

☐ **MI Mail Report** **User Codes:** (A) ______ (B) ______ (C) ______

Subject: Power of the President to Remove Members of the Railroad Retirement Board

ROUTE TO: Office/Agency (Staff Name)	ACTION: Action Code	Tracking Date YY/MM/DD	DISPOSITION: Type of Response	Code	Completion Date YY/MM/DD
W Holland	ORIGINATOR	84/02/09			/ /
	Referral Note:				
WAT 14	D	84/02/09		S	84/02/19
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				

ACTION CODES:
- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

DISPOSITION CODES:
- A - Answered
- B - Non-Special Referral
- C - Completed
- S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: ______

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
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5/81

THE WHITE HOUSE

WASHINGTON

February 3, 1984

202851 Cu

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Power of the President to Remove Members of the Railroad Retirement Board

Presidential Personnel has asked for an opinion from our office concerning the authority of the President to remove members of the Railroad Retirement Board ("the Board") from office, particularly those in a holdover status. I have worked on questions concerning the Board in the past -- you may recall the dispute concerning whether the President was required to [redacted] to the Board as the choice of carrier representatives -- and have begun to research this question. I send it over at this point only to alert you to the inquiry, and for formal staffing.

b6

I would point out, however, that my preliminary view is that the President may not remove members of the Board, even those in a holdover status. The Board is an "independent agency" and appears to have quasi-judicial functions, see 45 U.S.C. § 231f. The members serve fixed five-year terms, and there is a statutory holdover provision. I will advise further when I have completed some additional research.

classified to subchapter C of Chapter 9 of Title 26, I. R. C. 1939 and is now classified to chapter 23 of Title 26, I. R. C. 1954. Section 4 of act Feb. 10, 1939, ch. 2, 53 Stat. 1, which act enacted Title 26, I. R. C. 1939, provided that all laws and parts of laws codified into the I. R. C. 1939, to the extent that they related exclusively to internal revenue laws, were repealed. See enacting sections preceding section 1 of Title 26, I. R. C. 1939, 53 Stat. 1. Provisions of I. R. C. 1939 were generally repealed by section 7851 of Title 26, I R. C. 1954 (Act Aug. 16, 1954, ch. 736, 68A Stat. 3). See, also section 7807 of Title 26, I. R. C. 1954, respecting rules in effect upon enactment of I. R. C. 1954. See, also, Codification Note for former sections 1101—1103 and 1105—1110 of Title 42, The Public Health and Welfare, set out preceding section 1101, for distribution of sections 1101—1110 in Title 26, I. R. C. 1939 and I. R. C. 1954.

Section 102 of Title 5, referred to in subsec. (c), which related to expenditures for newspapers, was section 102 of title 5 prior to its revision by Pub. L. 89–554, and was repealed by act Aug. 2, 1946, ch. 744, § 17(a), 60 Stat. 811.

Railroad Retirement Act of 1937, referred to in subsec. (c), is classified to sections 228a to 228c–1, 228e—228h, and 228i to 228s–2 of this title.

Railroad Retirement Act of 1935, referred to in subsec. (c), is set out in note under sections 215 to 228 of this title.

This Act, referred to in subsec. (c), has reference to act June 23, 1948, which is classified to sections 228c, 228c note, 228e, 228e note, 358, 358 note, 360 and 361 of this title.

AMENDMENTS

1966—Subsec. (a). Pub. L. 89–700 substituted "0.25 per centum" for "0.2 per centum."

1958—Subsec. (a). Pub. L. 85–927 substituted provisions directing Secretary of Treasury to maintain in the unemployment trust fund established pursuant to section 1104 of Title 42 an account to be known as the railroad unemployment insurance administration fund, for provisions which established railroad unemployment insurance administration fund in Treasury of United States.

1948—Subsec. (a)(1). Act June 23, 1948, changed the computation of the administration funds.

EFFECTIVE DATE OF 1958 AMENDMENT

Amendment of subsec. (a) by Pub. L. 85–927 effective September 6, 1958, except as otherwise indicated, see section 207 (c) of Pub. L. 85–927, set out as a note under section 351 of this title.

EFFECTIVE DATE OF 1940 AMENDMENT

Effective date of act Oct. 10, 1940, see note under section 351 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 360, 362 of this title.

§ 362. Duties and powers of Board.

(a) Witnesses; subpenas, service, fees, etc.

For the purpose of any investigation or other proceeding relative to the determination of any right to benefits, or relative to any other matter within its jurisdiction under this chapter, the Board shall have the power to issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence, documentary or otherwise, that relates to any matter under investigation or in question, before the Board or any member, employee, or representative thereof. Any member of the Board or any of its employees or representatives designated by it may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and production of evidence may be required from any place in the United States or any Territory or possession thereof at any designated place of hearing. All subpenas may be served and returned by anyone authorized by the Board in the same manner as is now provided by law for the service and return by United States marshals of subpenas in suits in equity. Such service may also be made by registered mail or by certified mail and in such case the return post-office receipt shall be proof of service. Witnesses summoned in accordance with this subsection shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States.

(b) Enforcement of subpenas by courts; contempts; service of orders, writs, or processes.

In case of contumacy by, or refusal to obey a subpena lawfully issued to, any person, the Board may invoke the aid of the district court of the United States or the United States courts of any Territory or possession, where such person is found or resides or is otherwise subject to service of process, or the United States District Court for the District of Columbia if the investigation or proceeding is being carried on in the District of Columbia, or the United States District Court for the Northern District of Illinois, if the investigation or proceeding is being carried on in the Northern District of Illinois, in requiring the attendance and testimony of witnesses and the production of evidence. Any such court shall issue an order requiring such person to appear before the Board or its specified employee or representative at the place specified in the subpena of the Board, whether within or without the judicial district of the court, there to produce evidence, if so ordered, or there to give testimony concerning the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof. All orders, writs, and processes in any such proceeding may be served in the judicial district of the district court issuing such order, writ, or process, except that the orders, writs, and processes of the United States District Court for the District of Columbia or of the United States District Court for the Northern District of Illinois in such proceedings may run and be served anywhere in the United States.

(c) Repealed. Pub. L. 91–452, title II, § 239, Oct. 15, 1970, 84 Stat. 930.

(d) Information as confidential.

Information obtained by the Board in connection with the administration of this chapter shall not be revealed or open to inspection nor be published in any manner revealing an employee's identity: *Provided, however,* That (i) the Board may arrange for the exchange of any information with governmental agencies engaged in functions related to the administration of this chapter; (ii) the Board may disclose such information in cases in which the Board finds that such disclosure is clearly in furtherance of the interest of the employee or his estate; and (iii) any claimant of benefits under this chapter shall, upon his request, be supplied with information from the Board's records pertaining to his claim. Subject to the provisions of this section, the Board may furnish such information to any person or organization upon payment by such person or organization to the Board of the cost incurred by the Board by reason thereof; and the amounts so paid to the Board shall be credited to the railroad unemployment insurance

administration fund established pursuant to section 361 (a) of this title;

(e) Certification of claims; authorization of employee to make payment; bond.

The Board shall provide for the certification of claims for benefits and refunds and may arrange total or partial settlements at such times and in such manner as may appear to the Board to be expedient. The Board shall designate and authorize one or more of its employees to sign vouchers for the payment of benefits and refunds under this chapter. Each such employee shall give bond, in form and amount fixed by the Board, conditioned upon the faithful performance of his duties. The premiums due on such bonds shall be paid from the fund and deemed to be a part of the expenses of administering this chapter.

(f) Cooperation with other agencies administering unemployment, sickness, or maternity compensation laws; agreements.

The Board may cooperate with or enter into agreement with the appropriate agencies charged with the administration of State, Territorial, Federal, or foreign unemployment-compensation or sickness laws or employment offices, with respect to investigations, the exchange of information and services, the establishment, maintenance, and use of free employment service facilities, and such other matters as the Board deems expedient in connection with the administration of this chapter, and may compensate any such agency for services or facilities supplied to the Board in connection with the administration of this chapter. The Board may enter also into agreements with any such agency, pursuant to which any unemployment or sickness benefits provided for by this chapter or any other unemployment-compensation or sickness law, may be paid through a single agency to persons who have, during the period on the basis of which eligibility for and duration of benefits is determined under the law administered by such agency or under this chapter or both, performed services covered by one or more of such laws, or performed services which constitute employment as defined in this chapter: *Provided*, That the Board finds that any such agreement is fair and reasonable as to all affected interests.

(g) Benefits also subject to a State law; mutual reimbursement.

In determining whether an employee has qualified for benefits in accordance with section 353 of this title and in determining the amount of benefits to be paid to such employee in accordance with section 352(a) and (c) of this title, the Board is authorized to consider as employment (and compensation therefor) services for hire other than employment (and remuneration therefor) if such services for hire are subject to an unemployment or sickness compensation law of any State, provided that such State has agreed to reimburse the United States such portion of the benefits to be paid upon such basis to such employee as the Board deems equitable. Any amounts collected pursuant to this subparagraph shall be credited to the account.

If a State, in determining whether an employee is entitled for unemployment or sickness benefits under an unemployment or sickness compensation law of such State, and in determining the amount of unemployment or sickness benefits to be paid to such employee pursuant to such unemployment or sickness compensation law, considers as services for hire (and remuneration therefor) included within the provisions of such unemployment or sickness compensation law, employment (and compensation therefor), the Board is authorized to reimburse such State such portion of such unemployment or sickness benefits as the Board deems equitable; such reimbursements shall be paid from the account, and are included within the meaning of the word "benefits" as used in this chapter.

(h) Assistance from employers and labor organizations; compensation.

The Board may enter into agreements or arrangements with employers, organizations of employers, and railway-labor organizations which are duly organized in accordance with the provisions of the Railway Labor Act, for securing the performance of services or the use of facilities in connection with the administration of this chapter, and may compensate any such employer or organization therefor upon such reasonable basis as the Board shall prescribe, but not to exceed the additional expense incurred by such employer or organization by reason of the performance of such services or making available the use of such facilities pursuant to such agreements or arrangements. Such employers and organizations, and persons employed by either of them, shall not be subject to section 66 of Title 5.

(i) Free employment offices; registration of unemployed; statements of sickness; reemployment.

The Board may establish, maintain, and operate free employment offices, and may designate as free employment offices facilities maintained by (i) a railway labor organization which is duly authorized and designated to represent employees in accordance with the Railway Labor Act, or (ii) any other labor organization which has been or may be organized in accordance with the provisions of the Railway Labor Act, or (iii) one or more employers, or (iv) an organization of employers, or (v) a group of such employers and labor organizations, or (vi) a State, Territorial, foreign, or the Federal Government. The Board may also enter into agreements or arrangements with one or more employers or railway labor organizations organized in accordance with the provisions of the Railway Labor Act, pursuant to which notice of the availability of work and the rights of employees with respect to such work under agreements between such employers and railway labor organizations may be filed with employment offices and pursuant to which employees registered with employment offices may be referred to such work.

The Board shall prescribe a procedure for registration of unemployed employees at employment offices. Such procedure for registration shall be prescribed with a view to such registration affording substantial evidence of the days of unemployment of the employees who register. The Board may, when such registration is made personally by an employee, accept such registration as initial proof of unemployment sufficient to certify for payment a claim for benefits.

(n) Sickness benefits; examinations; information and reports; contracts and expenses for examinations.

Any employee claiming, entitled to, or receiving sickness benefits under this chapter may be required to take such examination, physical, medical, mental, or otherwise, in such manner and at such times and by such qualified individuals, including medical officers or employees of the United States or a State, as the Board may prescribe. The place or places of examination shall be reasonably convenient for the employee. No sickness benefits shall be payable under this chapter with respect to any period during which the employee unreasonably refuses to take or willfully obstructs an examination as prescribed by the Board.

Any doctor who renders any attendance, treatment, attention, or care, or performs any examination with respect to a sickness of an employee, upon which a claim or right to benefits under this chapter is based, shall furnish the Board, in such manner and form and at such times as the Board by regulations may prescribe, information and reports relative thereto and to the condition of the employee. An application for sickness benefits under this chapter shall contain a waiver of any doctor-patient privilege that the employee may have with respect to any sickness period upon which such application is based: *Provided,* That such information shall not be disclosed by the Board except in a court proceeding relating to any claim for benefits by the employee under this chapter.

The Board may enter into agreements or arrangements with doctors, hospitals, clinics, or other persons for securing the examination, physical, medical, mental, or otherwise, of employees claiming, entitled to, or receiving sickness benefits under this chapter and the performance of services or the use of facilities in connection with the execution of statements of sickness. The Board may compensate any such doctors, hospitals, clinics, or other persons upon such reasonable basis as the Board shall prescribe. Such doctors, hospitals, clinics, or other persons and persons employed by any of them shall not be subject to section 66 of Title 5. In the event that the Board pays for the physical or mental examination of an employee or for the execution of a statement of sickness and such employee's claim for benefits is based upon such examination or statement, the Board shall deduct from any sickness benefits payable to the employee pursuant to such claim such amount as, in the judgment of the Board, is a fair and reasonable charge for such examination or execution of such statement.

(o) Liability of third party for sickness; reimbursement of Board.

Benefits payable to an employee with respect to days of sickness shall be payable regardless of the liability of any person to pay damages for such infirmity. The Board shall be entitled to reimbursement from any sum or damages paid or payable to such employee or other person through suit, compromise, settlement, judgment, or otherwise on account of any liability (other than a liability under a health, sickness, accident, or similar insurance policy) based upon such infirmity, to the extent that it will have paid or will pay benefits for days of sickness resulting from such infirmity. Upon notice to the person against whom such right or claim exists or is asserted, the Board shall have a lien upon such right or claim, any judgment obtained thereunder, and any sum or damages paid under such right or claim, to the extent of the amount to which the Board is entitled by way of reimbursement.

(p) Disqualification to execute statements of sickness or receive fees.

The Board may, after hearing, disqualify any person from executing statements of sickness who, the Board finds, (i) will have solicited, or will have employed another to solicit, for himself or for another the execution of any such statement, or (ii) will have made false or misleading statements to the Board, to any employer, or to any employee, in connection with the awarding of any benefits under this chapter, or (iii) will have failed to submit medical reports and records required by the Board under this chapter, or will have failed to submit any other reports, records, or information required by the Board in connection with the administration of this chapter or any other Act heretofore or hereafter administered by the Board, or (iv) will have engaged in any malpractice or other professional misconduct. No fees or charges of any kind shall accrue to any such person from the Board after his disqualification.

(q) Investigations and research with respect to accidents and disabilities.

The Board shall engage in and conduct research projects, investigations, and studies with respect to the cause, care, and prevention of, and benefits for, accidents and disabilities and other subjects deemed by the Board to be related thereto, and shall recommend legislation deemed advisable in the light of such research projects, investigations, and studies. (June 25, 1938, ch. 680, § 12, 52 Stat. 1107; June 20, 1939, ch. 227, § 16, 53 Stat. 848; Oct. 10, 1940, ch. 842, §§ 23, 24, 54 Stat. 1099; July 31, 1946, ch. 709, §§ 319—323, 60 Stat. 739, 740; June 25, 1948, ch. 646, §§ 1, 32 (b), 62 Stat. 878, 895, 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Oct. 28, 1949, ch. 782, title XI, § 1106 (a), 63 Stat. 1972; Aug. 12, 1955, ch. 869, § 6, 69 Stat. 716; Sept. 6, 1958, Pub. L. 85–927, pt. II, § 206, 72 Stat. 1783; June 11, 1960, Pub. L. 86–507, § 1(37), 74 Stat. 202; Oct. 30, 1966, Pub. L. 89–700, title II, § 206, 80 Stat. 1087; Feb. 15, 1968, Pub. L. 90–257, title II, § 206, 82 Stat. 25; Oct. 15, 1970, Pub. L. 91–452, title II, § 239, 84 Stat. 930.)

REFERENCES IN TEXT

Railway Labor Act, referred to in subsecs. (h) and (i), is classified to chapter 8 of this title.

Section 66 of Title 5, referred to in subsecs. (h) and (n), was repealed by act June 25, 1948, ch. 645, § 21, 62 Stat. 862, eff. Sept. 1, 1948, and is covered by section 209 of Title 18, Crimes and Criminal Procedure.

The civil service laws, referred to in the catchline and text of subsec. (*l*), are classified generally to Title 5, Government Organization and Employees.

Said Act, referred to in subsec. (*l*), has reference to the Railroad Retirement Act of 1937, which is classified to sections 228a to 228c–1, 228e–228h, and 228i to 228s–2 of this title.

Section 205 of act June 24, 1937, referred to in subsec. (*l*), is not classified to the code.

the hearing that resulted in his dismissal. In the absence of such an allegation, even assuming plaintiff could substantiate his averment of NYSED cooperation in the development and institution of the degree programs, he has failed to allege State involvement in the only events that could form the basis upon which this Court could grant relief, that is, the dismissal of plaintiff without due process. See *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

Even a liberal reading of the complaint would not permit the Court to infer a charge that NYSED somehow insinuated itself into the particular campus issue of the charges against plaintiff and influenced or coerced LIU to dismiss him. See *Graseck v. Mauceri*, 582 F.2d 203, 209 (2d Cir. 1978). Nor can it be said that the complaint avers that NYSED in any way "put its weight on the side of the" complained of procedures or placed its "imprimatur" on plaintiff's dismissal.[4] *Jackson v. Metropolitan Edison Co., supra*, 419 U.S. at 357, 95 S.Ct. at 456–57. *Cf. Coleman v. Wagner College*, 429 F.2d 1120 (1970).

Plaintiff's claim that his conduct was not violative of the degree programs approved by NYSED more than two years prior to the disciplinary proceedings, rather than investing those proceedings with the quality of State action, is more properly viewed as a possible defense to the charges of unprofessional conduct that were brought against him. It is apparent from the complaint and his motion papers that the involvement of LIU with NYSED that plaintiff would have this Court review relates not to the disciplinary *procedures* but to the *substance* of the charges brought against him as they may relate to the degree programs he authored. These matters, however, turn on issues of academic and professional standards that this Court considers itself peculiarly unadapted to resolve.

Accordingly, since it appears beyond doubt that plaintiff can prove no set of facts in support of his claims that would entitle him to relief under either the Fourteenth Amendment or 42 U.S.C. § 1983, *Conley v. Gibson, supra*, the complaint is dismissed for failure to state a claim. Rule 12(b)(6), F.R.Civ.P.

SO ORDERED.

4. Indeed, although the complaint repeatedly alludes to "pressures" brought to bear upon defendants by the news media to investigate and discipline unprofessional conduct at C.W. Post, there is no allegation whatsoever that any official or agent of the State was involved in any way in these alleged calls for an inquiry.

William A. BORDERS, Jr., Plaintiff,

v.

Ronald REAGAN, President, United States of America, Alexander Haig, Government of the District of Columbia, District of Columbia Judicial Nomination Commission and Philip A. Lacovara, Defendants.

Civ. A. No. 81–1312.

United States District Court,
District of Columbia.

July 7, 1981.

Member of District of Columbia Judicial Nomination Commission who had been appointed by previous President, brought suit seeking permanent injunction and declaratory judgment to prevent his removal by the President. The District Court, John Garrett Penn, J., held that: (1) District of Columbia Self-Government and Governmental Reorganization Act did not grant President power to remove member of District of Columbia Judicial Nomination Commission prior to expiration of Commissioner's term, and (2) purported removal of plaintiff was invalid in view of constitutional considerations.

Order accordingly.

1. District of Columbia ⇐7

District of Columbia Self-Government and Governmental Reorganization Act did not grant President power to remove previous President's appointed member of District of Columbia Judicial Nomination Commission prior to expiration of Commissioner's term. D.C.Code 1977 Supp., Tit. 11 App. §§ 434, 434(a), (b)(2).

2. United States ⇐35

In determining whether power of President to remove officer shall prevail over authority of Congress to condition the power by fixing definite term and precluding removal except for cause, court should determine whether statute creating office was designed to insure those serving in that office independence from executive direction and control, and if so, the court should uphold congressional circumscription of presidential removal at will since coercive influence of that power would threaten independence. U.S.C.A.Const. Art. 2, § 2, cl. 2.

3. District of Columbia ⇐7

Purported removal by President of member of District of Columbia Judicial Nomination Commission who had been appointed by previous President pursuant to District of Columbia Self-Government and Governmental Reorganization Act prior to expiration of Commissioner's five-year term was not authorized by President's power under appointments clause and was contrary to Congress' expansive role in managing affairs in District of Columbia that Constitution specifically and expressly granted to Congress, and therefore was invalid. D.C.Code 1977 Supp., Tit. 11 App. § 434; U.S.C.A.Const. Art. 1, § 8, cl. 17; Art. 2, § 2, cl. 2.

4. District of Columbia ⇐7

Under clause of United States Constitution expressly granting to Congress exclusive legislative power over all matters whatsoever involving District of Columbia, it is a proper legislative function to establish conditions for removal of officials performing certain functions exclusively related to District of Columbia, whether to establish certain "causes" as only grounds for removal or to set fixed term and other insulating protections in order to foster independent decision making entrusted to certain commission. U.S.C.A.Const. Art. 1, § 8, cl. 17.

Dudley R. Williams, Robert L. Bell, Washington, D. C., for plaintiff.

Dennis A. Dutterer, Asst. U. S. Atty., Michael E. Zielinski, Asst. Corp. Counsel, Washington, D. C., Frederick B. Abramson, Chairperson, D. C. Judicial Nomination Commission, Washington, D. C., for defendants.

OPINION

JOHN GARRETT PENN, District Judge.

The plaintiff, William A. Borders, Jr., was appointed to the District of Columbia Judicial Nomination Commission (Commission), pursuant to Section 434 of the District of Columbia Self-Government and Governmental Reorganization Act (Act)[1], 11 D.C.Code App. § 434 (Supp. IV 1977), by President Carter in July 1980. The term of the appointment was five years or until July 1985. On May 16, 1981, President Reagan purported to appoint Philip A. Lacovara in place of plaintiff. On that same date the President advised the plaintiff by letter that he had appointed a successor to his position on the Commission and advised him that the plaintiff's "membership on that Commission is terminated as of this date". He thanked plaintiff for his "dedicated service".[2]

The plaintiff now brings this action for a permanent injunction and declaratory relief and asks, among other things, that the Court enter an injunction compelling the

1. P.L. 93-198, 87 Stat. 774.

2. Compl.Ex. A.

President and the Secretary of State[3] to withdraw the certificate purporting to appoint Mr. Lacovara to the Commission.

I

Underlying Facts

There are no factual issues in this case. The plaintiff, a well-known and respected member of the bar, a practicing attorney in the District of Columbia and the current President of the National Bar Association, a national professional organization, was duly appointed to the Commission by President Carter on July 2, 1980, for a term of five years or until July 1985, at the expiration of the term of President Ford's appointee. Mr. Borders' predecessor, Mr. Willie F. Leftwich, had been named by President Ford in 1975, and had served a full term. President Carter was defeated in his bid for reelection by President Reagan in November 1980. Although it is undisputed that Mr. Borders has given dedicated service to the Commission, President Reagan decided to replace Mr. Borders with a representative of his own choosing. Accordingly he appointed Mr. Lacovara, also a distinguished practicing attorney in the District who is well respected in the local legal community. The President makes no contention that Mr. Borders has not faithfully and ably fulfilled his Commission duties. The decision to appoint Mr. Lacovara in place of Mr. Borders results simply from the desire of the President to exercise what he feels to be his right to appoint the Commission member who represents the President.

The letter purporting to terminate Mr. Borders' position on the Commission was delivered to plaintiff on May 16, 1981, and he filed the instant action on June 8, 1981.

The Posture of This Case

At the time he filed his complaint, the plaintiff also filed a motion for a temporary restraining order and a motion for a preliminary injunction. Since it appeared that this case would require expedited treatment and consideration in view of an anticipated vacancy on the Superior Court of the District of Columbia, the Court, *sua sponte*, scheduled the case for a Status Hearing on June 10, 1981. The plaintiff advised the Court at the Status Hearing that since no Commission meetings were scheduled in the near future, he did not wish to pursue his motion for a temporary restraining order, and it was agreed by the parties that they would present arguments on the motion for preliminary injunction on June 18, 1981. The Court entered an order setting that date for the hearing and establishing a briefing schedule. *See* Order filed June 10, 1981.

The Court heard oral arguments on June 18, 1981. Just prior to the arguments, all parties agreed that the hearing on the motion should be consolidated with the trial on the merits pursuant to Fed.R.Civ.P. 65(a)(2). The motion hearing was consolidated with the trial on the merits since there were no outstanding genuine issues of material fact and the legal issues had been fully briefed by the parties, taking into consideration the expedited treatment accorded this case.

Position and Alignment of the Parties

The President, the Secretary of State, and Mr. Lacovara, sometimes hereinafter referred to as the federal defendants, argue that the removal of Mr. Borders and the appointment of Mr. Lacovara were within the power of the President and they ask that this action be dismissed.

The District of Columbia (District) was joined as a party defendant since it "grants special rights, privileges and emoluments, to the members of the Judicial Nomination Commission pursuant to P.L. 93–198 [the Act]". Compl. ¶ 7. However, the District *favors* the relief requested by the plaintiff and argues that the members of the Commission do not serve at the pleasure of the appointing authority and may not be removed at will. The District bases its argument on the Constitution, Article I, Section 8, Clause 17, which provides in part that Congress shall "exercise exclusive Legislation in all Cases whatsoever, over [the] Dis-

3. The Secretary of State was joined as a defendant in this action since he is charged with the responsibility of making out, recording and affixing the seal of the United States to the Commission of an Officer appointed by the President. *See* 5 U.S.C. § 2902.

trict". It contends that Congress, pursuant to the authority granted by the Constitution, properly delegated certain of its powers to the local government and the Commission, pursuant to the Act and the District of Columbia Court Reform and Criminal Procedure Act of 1970 (Court Reform Act), P.L. 91–358, 84 Stat. 473, and thereby circumscribed the power of the President. The District further urges that Congress intended that the "Commission maintain an independent status . . . free from the potential for disruption posed by serving at the will of the appointing authority". District of Columbia Response at 2–3. According to the District, the members of the Commission are not officers of the United States, *see* U.S.Const., art. I, § 2, cl. 2, but are merely agents of the Congress. The District interprets Section 434 of the Act as not limiting the term of the federal appointee to the Commission to five years, but rather, establishing a term of five years.[4]

The final named defendant is the Commission. The Commission in a letter dated June 17, 1981, signed by its chairperson, Frederick B. Abramson, and concurred in by five members, with one abstaining[5], takes no position at this time "with respect to the varying contentions made by the parties or the merit of the issues involved in the lawsuit". The Commission was also unanimously of the view

> that Congress, in creating the Commission, intended to institute a merit selection process for the appointment of judges to the nonfederal courts of the District of Columbia, and that, in order to carry out this function, the Commission as a whole through its individual Members should have a high degree of independence from political control.

Time Constraints

There are certain time constraints in this case which necessitate expedited consideration of the not insubstantial issues raised herein. In an effort to render a decision at the earliest time, it is necessary for the Court to shorten its discussion of the applicable law.

The work of the Commission and the time frame in which it must be accomplished is more fully set forth in Part II, *infra*. Suffice it to say however, that once a vacancy occurs on either of the two local courts, the Superior Court or the District of Columbia Court of Appeals, the Commission "shall, within thirty days following the occurrence of such vacancy submit to the President, for possible nomination and appointment a list of three persons for every vacancy". Act, § 434(d)(1).

Recently there were four vacancies on the local courts, three in the Superior Court and one in the Court of Appeals. President Reagan, after securing the lists from the Commission in accordance with Section 434(d)(1) nominated three persons for the Superior Court and one for the Court of Appeals. The person named for the Court of Appeals, Judge James A. Belson, is presently a judge on the Superior Court and when he is appointed yet another vacancy will exist on that court thereby setting into motion the Commission's consideration of other names to submit to the President. The Court is advised that Judge Belson has been confirmed, thus the Commission will be required to submit a list of names for the upcoming vacancy on the Superior Court within slightly more than thirty days.

II

In considering whether the President has the power to remove the plaintiff prior to the expiration of his term, the Court must first address the language of Section 434 of the Act which established the Commission. If the Act grants such power then there is no need to consider the other arguments made by the parties.

The Act establishes a Commission of seven members who are appointed for staggered terms of six years, except for the

4. The question of removal for disability or good cause is not before the Court.

5. For obvious reasons neither Mr. Borders nor Mr. Lacovara was consulted by the Commission.

member appointed by the President, who is appointed for five years. Act, § 434(a). No person may be appointed to the Commission unless he is a citizen of the United States, a bona fide resident of the District of Columbia, and has maintained an actual place of abode in the District for at least 90 days immediately prior to his appointment, and is not a member, officer or employee of the Legislative Branch or of an executive or military department or agency of the United States, and except for the judicial member of the Commission, is not an officer or employee of the judicial branch of the United States or the District of Columbia. Act, § 434(b)(1). These qualifications are the same as for any judicial candidate for selection to the local courts. *See* Act, § 433(b).[6] The qualifications for members of the Commission are similar to those of the Commission on Judicial Disabilities and Tenure. *See* Act, § 431.

The members of the Commission are appointed by different persons. One member is appointed by the President, two by the Board of Governors of the Unified District of Columbia Bar, two by the Mayor, one of whom shall not be a lawyer, one by the City Council, who shall not be a lawyer, and one by the Chief Judge of the United States District Court for the District of Columbia, who shall be an active or retired Federal Judge serving in the District. Act, § 434(b)(4). Except for the Federal judicial member of the Commission who serves without additional compensation, the other members receive "the daily equivalent at the rate provided by Grade 18 of the General Schedule, established under Section 5332 of title 5 of the United States Code, while actually engaged in service for the Commission". Act, § 434(b)(5).

In the event of any vacancy on either of the local courts, the Commission is required to submit to the President, three names for each vacancy for possible nomination and appointment. Any nomination made by the President is with the advice and consent of the United States Senate. If the President fails to nominate one of the persons on the list submitted by the Commission within 60 days after receiving the list, the Commission "shall nominate, and with the advice and consent of the Senate, appoint one of the persons named on the list". Act, § 434(d)(1).

With respect to the term each member of the Commission shall serve, the statute provides:

> § 434. District of Columbia Judicial Nomination Commission.
>
> (a) There is established for the District of Columbia the District of Columbia Judicial Nomination Commission (hereafter in this section referred to as the "Commission"). The Commission shall consist of seven members selected in accordance with the provisions of subsection (b). Such members shall serve for terms of six years, except that the member selected in accordance with subsection (b)(4)(A) shall serve for five years; of the members first selected in accordance with subsection (b)(4)(B), one member shall serve for three years and one member shall serve for six years; of the members first selected in accordance with subsection (b)(4)(C), one member shall serve for a term of three years and one member shall serve for five years; the member first selected in accordance with subsection (b)(4)(D) shall serve for six years; and the member first appointed in accordance with subsection (b)(4)(E) shall serve for six years. In making the respective first appointments according to subsections (b)(4)(B) and (b)(4)(C), the Mayor and the Board of Governors of the unified District of Columbia Bar shall designate, at the time of such appointments, which member shall serve for the shorter term and which member shall serve for the longer term.

Act, § 434(a).

The statute makes no provision for the removal of members of the Commission but

6. Prior to the Act, 11 D.C.Code App. § 433(b), there was no requirement that persons selected as judges on the local courts be bona fide residents of the District of Columbia or that they maintain an actual place of abode in the District. It was only required that such persons appointed be bona fide residents of the District or the surrounding contiguous counties in Maryland or Virginia. *See* 11 D.C.Code § 1501(b).

it does provide that "[a]ny *vacancy* on the Commission shall be filled in the same manner in which the original appointment is made" and that "[a]ny person so appointed to fill a *vacancy* occurring *other than upon the expiration* of a prior term shall serve only for the remainder of the *unexpired* term of his predecessor" (emphasis the Court's). Act, § 434(b)(2).

[1] The language of the statute makes clear that Congress did not intend that a member of the Commission serve only at the pleasure of the appointing authority or that he be removable at will; rather, once an appointment is made it is anticipated that the member will serve a complete term. This is demonstrated by the plain wording of the statute in that it provides that a member "shall serve" for the term of six years, except for the member appointed by the President, who shall serve five years. The statute makes no provision for the removal of a member, but does provide for the appointment of a member *when a vacancy occurs*. Act, § 434(b)(2). Section 434(b)(2) contemplates that vacancies will occur *only* at the expiration of a term but provides that in the case of a vacancy "occurring other than upon the expiration of a prior term", the appointee shall serve only for the "*remainder* of the *unexpired term* of his predecessor". (emphasis the Court's) *Id.*

The intent that members be isolated from political considerations and political changes in order that they may exercise their decisions free from outside influences, other than may be necessary for the consideration of candidates for judicial offices, is also demonstrated by the provision for staggered terms. The fact that the terms are staggered and that each is for a set period of years, reflects the decision of Congress to maintain continuity on the Commission without abrupt changes. This, of course, is necessary taking into consideration that when a vacancy occurs the Commission is under severe time constraints to submit a list of names for the vacancy. Any interpretation of the statute that would permit the removal of a Commission member at will would obviously make it difficult for the Commission to fulfill its statutory duties.

This Court concludes then that the plain language of the Act establishes the right of any Commission member to serve out his term without fear of removal. Removal at will is not consistent with the intent of Congress.

III

From this discussion of the background of and the specific provisions contained in the statutes establishing substantial home rule and reforming judicial administration in the District of Columbia, it is clear that the statutory intent was to ensure, so far as possible, the independence of the District's judicial personnel Commissions. To further the overriding concern of freeing judicial personnel decisions for the local courts from political pressures and considerations, be it from local or federal sources, the Act endeavored to ensure that judicial selection, retention and disqualification would be decided solely on the basis of merit. To that end, the Act established the exceptional device of two parallel Commissions, one on Nominations and the other on Tenure and Disqualifications. It constituted both in the same way, as outlined in Part II, *supra*, and provided an elaborate procedure designed to safeguard the goal, shared by Congress and the President, that only merit should guide judicial personnel decisions for the local courts.

In its grant to five different authorities of appointive power over the seven offices created on each Commission the Act aimed not at a scheme of permitting each of various interest groups to have its "own man" (or woman) on the Commissions, but rather reflected a realization that various *institutional* points of view *on merit qualifications* were worthy of representation. Though a local view, a federal view, a Bar view, and a judicial view were to be represented, it was merit that would be the focus for all of the "viewers," not political or philosophical conformity with the opinions of the President, the Mayor, or the other appointing authorities.

Moreover, the legislative history makes quite clear that the Act, far from intending the President's appointee to represent the institutional viewpoint on merit of the presidency or even the Executive Branch, intended that that person would represent the overall *federal* interest and viewpoint.

> 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.

See 119 Cong.Rec. 42038 (1973) (emphasis supplied).

Moreover, the statute forbids the appointment of an official of *any* of the federal branches of Government (except in the case of the one member who must be a federal judge) to the Commission. *See* Act, § 434(b)(1). In particular, no member, officer or employee of any executive department or agency of the United States can be appointed. *Id.* at 434(b)(1)(C).

The provisions of the statute are entirely consistent with the intent to safeguard merit selection by insulating the Commission from political pressure.[7] The statute fixed terms longer, sometimes substantially longer, than those of the appointing officials (except, on occasion in the case of the one member who must be a federal judge, whose appointing official, the Chief Judge, may, depending on age factors, serve more than six years as Chief Judge). While the Mayor serves a four-year term, the statute provides his two appointees with six-year terms. Indeed, both of the current Mayor-appointed members were appointed by the

7. The clear intent of the acts involved in this case was to make judicial selection (and tenure and disqualification) for the local courts as independent of federal and, particularly, presidential control as possible. Indeed, the original Senate bill provided for establishment of a judicial nomination commission consisting of five members: "2 to be appointed by the Mayor from Bar Association lists, 2 non-lawyers to be appointed by the Mayor from [City] Council lists, and the Chief Judge of the District of Columbia Court of Appeals." 1973 *D.C.Code Leg. & Adm.Service* 645–46 (legislative history of P.L. 93–198). That Commission would prepare a list of three names, from which *the Mayor* would appoint one. *Id.* at 645. The House version differed in that it gave various relevant institutional interests, particularly federal ones, greater representation on the Commission. It did not diverge in contemplating any less *independence* for the members of that Commission. For example, the House amendment set *longer terms*, not the four years of the Senate version, but six. It proposed the following composition of that Commission: "2 appointed by the Unified D.C. Bar, 2 appointed by the Mayor from Council lists, 1 member appointed by the Speaker of the House of Representatives and 1 member appointed by the President of the Senate, and 3 members appointed by the President...." *Id.* at 646. The Commission would prepare a list of three to five names, from which *the President* would appoint one, "subject to Senate approval." *Id.*

> It is clear from both those versions and from the Conference substitute, enacted into law and set forth in this opinion, that the two Houses disagreed about the institutional interests to be represented on the Commission, particularly the proportion of federal to local representation, but not about the need for the commissioners, however appointed, to be free, once appointed, from political pressures, whether local or federal, whether from a legislative or an executive source. The debates in Congress also amply show the legislative intent to insulate the Commission. For example, Congressman Smith of New York stated:
>
> > An innovation in the committee bill, which in my estimation is a great step forward, is the creation of a District of Columbia Judicial Nomination Commission. This is a variation of the Missouri plan for selecting judges and represents the growing trend in the United States toward the selection of able and qualified judges, as insulated from politics and political pressure as possible.
>
> Committee Print: Home Rule for the District of Columbia 1973–1974, Background and Legislative History of H.R. 9056 and H.R. 9682 and Related Bills, 93rd Cong., 2d Sess., at 2172. Congressman Breckenridge of Kentucky stated:
>
> > [T]he real point here ... is that the law will govern and determine the quality of the bench of the District of Columbia, and not the President of the United States and not the Mayor of the District.
>
> *Id.* at 2375.

current Mayor's predecessor. City Council members' terms range from two to four years, yet their appointee serves a six-year term. The Board of Governors of the Unified Bar of the District of Columbia serve only a three-year term yet, again, the Bar appointees serve for six years.

With respect to the President's appointee, the statute specifically establishes a five-year term, though the President's term is, of course, only four years. Thus, the statute, signed by the President, necessarily contemplates the "hold-over" on the Commission of the prior President's appointee into the term and possibly even *throughout the entire term* of his successor. It is clear that that result, sought by the statute, would be defeated by reading into the statute a power of presidential removal at will of his federal appointee. In sum, the Act contemplated the very situation now before this Court. As a matter of statutory construction it resolved this situation in favor of the plaintiff. It denied a power of removal at will to the appointers of Commission members. In the case of the President's appointee it made that intent particularly manifest. It chose a term for the President's appointee that necessarily plays "leapfrog" with that of the President. It forbade appointment of persons from the federal executive branch of government. And it stressed that the President's appointee was charged with representing the *federal* viewpoint, not that of the President or the Executive Branch.

Constitutional considerations

Of course, the Court's conclusion on the matter of statutory construction hardly resolves this dispute. The federal defendants have asserted a number of constitutional defenses to the plaintiff's claim. They assert that the President can remove the plaintiff at will regardless of the contrary command of the statute, and notwithstanding the former President's acquiescence in the holding over throughout almost his entire presidential term of the plaintiff's predecessor. They claim that removal at will is the President's constitutional right. That argument takes as its starting point the Appointments Clause, U.S.Const., Art. II, sec. 2, cl. 2, which reads in pertinent part:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Their argument continues that the plaintiff is an officer of the United States. Thus, they claim, he is either one of those high officers "whose appointments are not herein otherwise provided for," and who must be nominated by the President and approved by the Senate, or one of those "inferior officers" whose appointment Congress has thought it proper to vest in the President alone. In either event, the federal defendants argue, since the power to appoint carries with it the power to remove, the President may remove at least his appointee to the Commission at will.

This argument presents obvious problems.[8] If the President's appointee to the Commission is a high officer he must be approved by the Senate. Yet, there is no requirement in the Act that the President, or for that matter the other appointing authorities, seek the advice and consent of the Senate. If Senate confirmation is necessary, it follows that no member of the Commission has been validly appointed.[9]

8. The Appointments Clause and the appointive and removal powers in the context of this case will be discussed at some length, *infra*.

9. The federal defendants hint at a position that the entire Commission system is invalid. *See* Federal Defendants' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction at 10 n.3: "Assuming that a restriction of this sort [having a Commission that "assist[s] in the appointment of judges"] on the President's power to appoint these judges is permissible at all...."

Thus, it appears that the federal defendants base their Appointments Clause argument on the plaintiff's being an "inferior officer." This argument assumes then that the members of a blue-ribbon panel charged with the use of their independent judgment in the crucial public service of selecting those candidates most fit to be the trial and appellate judges for the local courts of the Nation's capital are "inferior" officers. If one of them is an inferior officer of the United States, all of them are. Hence, under this argument, their appointment would have to be vested in either the President alone, the courts of law, or the head of a federal department. It would follow that five of the seven members of the Commission have been improperly appointed and are serving unlawfully, since neither the Mayor, the Bar, nor the City Council is president or a court of law or head of a federal department.

At the oral argument on the merits of this case, counsel for the federal defendants stated that their position is that only the President's appointee is an officer of the United States, and that none of the other Commission members is. That is based on the circular notion, for which there is some support in a number of old cases, *see, e. g. United States v. Germaine*, 99 U.S. 508, 25 L.Ed. 482 (1878), that the way to determine whether an official is an "officer of the United States" is to examine by whom he was appointed. First, that rule has been much criticized and is open to serious question today. Second, it clearly should not apply to the somewhat unusual context of this case. All seven Commission members have identical duties and offices (except that the presidential appointee has a term fixed at one year less than those of the others) *created under the same statute.*

The Court recognizes that one possibility is that no member is an "officer of the United States" as that term is used in the Appointments Clause, but rather that all are officers of the District of Columbia, or simply should not be deemed officers of the United States for that or some other reason.

The federal defendants appear to believe that the outcome of this case may hinge on whether members of the Commission are or are not "officers of the United States". They argue that *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam) controls this case and compels the result that members of the Commission are officers of the United States by virtue of the language in that opinion that "any appointee exercising significant authority pursuant to the laws of the United States" is such an officer. While the plaintiff's work on the Commission *is* "significant", he is hardly entrusted with enforcing the laws of the United States to the degree or in the sense as were the Federal Election Commissioners in *Buckley*. While they were charged with interpreting and enforcing the complex federal statutes regulating various aspects of elections, the plaintiff here is charged with the use of his best judgment in determining the merit of potential judges. Except for the fact that his position arises under federal law, which will often be the situation in cases where the question is whether a particular *government* official is an "officer of the United States," the faithful execution of his office and duties has no more to do with interpreting or applying the law of the United States than do the personnel decisions of a hiring co-ordinator at a law firm. Moreover, this Court concludes that *Buckley* is distinguishable from this case for a number of other reasons. For example, that case did not involve the unique home rule, federal/local problem that is presented by a case involving the District of Columbia, and that case involved the question whether all Federal Election Commissioners had been properly *appointed*, not whether one of them had been properly *removed*. "[T]he [Appointments] Clause controls the *appointment* of the members of a typical administrative agency even though its functions, as this Court recognized in *Humphrey's*[10] . . . may be 'predominantly quasi-judicial and quasi-legislative' rather than executive. . . .

10. *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935).

In ... *Humphrey's* ..., the Court was careful to note that it was dealing with an agency *intended to be independent of executive authority 'except in its selection.'* ... *Wiener*[11] ... did not question in any respect that members of independent agencies are not independent of the Executive *with respect to their appointments.*" *Buckley, supra* at 136, 96 S.Ct. at 690. (emphasis supplied).

More importantly, this Court's decision simply does not hinge on whether plaintiff is or is not an officer of the United States, and hence on an application of the Appointments Clause. Rather, the important constitutional principle that this case illustrates so well, and which controls the outcome of it, is that the President does not have the power to remove at will certain officers the function and duty of whose office is the exercise of independent judgment and decision-making in and for the District of Columbia.

To return to the federal defendants' argument in this context, they assert that a fixed term of office, imposed by statute, even by the same statute creating the office, never limits by itself the President's power to remove at will the occupant of that office. Only if that office can be pigeonholed as a quasi-legislative or quasi-judicial one, that is, only if it is on all fours with the factual pattern presented in the two leading cases decided by the Supreme Court, *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935) and *Wiener v. United States*, 357 U.S. 349, 78 S.Ct. 1275, 2 L.Ed.2d 1377 (1958), would the federal defendants concede that there is any limitation on the President's right to remove at will a presidentially-named official.

This Court concludes that the federal defendants' constitutional argument on the President's "inherent, constitutional power" of removal takes an erroneous view of those cases in its suggestion that, basically, this Court should limit them to their facts. Consideration of those cases suggests, rather, that they establish the principle that there are some offices that by their nature and function are meant to be independent of control, direction, or interference from the President. At the same time, of course, the great bulk of nonlegislative, nonjudicial officers, by *their* nature and function, are meant to do the President's bidding. There can be no doubt, however, that in this unusual case of first impression, the Commission is, in terms of the nature and function of the office, of the small former group.

Demanding complete independence from Presidential direction, it is at least on a par with the Federal Trade Commission in *Humphrey's* or the War Claims Commission in *Wiener*. Indeed, the judicial commissioner may be an *a fortiori* instance of those cases, since there must not be in his case even the appearance of any direction of decision-making from the White House, and since his or her duties extend only to matters involving the District of Columbia, a jurisdiction treated differently by the *Constitution* and with respect to which *Congress* has clearly attempted to extend substantial home rule, and in particular, independence from the federal and presidential direction that had theretofore been the practice. Even though the concept of presidential oversight and direction would seem to be a necessarily included part of the concept of a "purely executive officer," this Court does not understand the federal defendants to contest the view that it would actually be *improper* for the President or any other Executive officer to attempt to oversee or direct any of the decisions of any member of the Commission. Rather, the federal defendants seem to freely concede that *all* the Commissioners, including the President's appointee, should operate entirely independent of the White House. Their brief notes prominently that "the record will not support any suggestion that the President has attempted to undermine the Commission's independence in its evaluation of particular prospective nominees." Federal Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction at 10.

11. *Wiener v. United States*, 357 U.S. 349, 78 S.Ct. 1275, 2 L.Ed.2d 1377 (1958).

The Constitution has very little to say expressly about removal from office that is relevant to this case. As one author has written, "Aside from the reference to impeachment, the Constitution is silent on the subject of removal." [12] Interestingly, though, the Constitution vests the only removal power it mentions—impeachment—in different hands than the appointment of those officials. Article III judges, for instance, appointed by joint action of the President and the Senate, can only be removed by joint action of the Senate and the House. Not only is the Constitution not explicit on most removal matters, but neither were many of the early statutes. Hence, the question arose for the courts of the proper procedures for removing officials. Fairly early, the rule emerged that "in the absence of all constitutional provision or statutory regulation it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment." *In re Hennen*, 38 U.S. (13 Pet.) 230, 259, 10 L.Ed. 138 (1839) (permitting a district court judge to remove a district court clerk he had appointed). Then, in *Parsons v. United States*, 167 U.S. 324, 17 S.Ct. 880, 42 L.Ed. 185 (1897), the Court ruled that it was proper for the President to discharge a U.S. Attorney he had appointed with the advice and consent of the Senate. To the argument that the statute fixing the term of a U.S. Attorney at four years constituted the sort of "statutory regulation" that would alter *the rule of construction* laid down in *Hennen* for removal at will, the Court held that that particular statute had intended the fixing of the four-year term as words "of limitation and not of grant". *Id.* 167 U.S. at 338, 17 S.Ct. at 885. In other words, the Court concluded that Congress' *intent* in fixing the term was not to keep U.S. Attorneys independent from direction by the President but apparently to keep them from becoming *too* independent. It is clear how different the intent of the statute in question in this case is from the statute in *Parsons*. As stated more fully in Part II, *supra*, the intent of this statute was to ensure *complete independence* of Commission members from any presidential direction so that the members could be single-minded in their pursuit and evaluation of *merit*.

Then in *Reagan v. United States*, 182 U.S. 419, 21 S.Ct. 842, 45 L.Ed. 1162 (1901), the Court upheld the President's dismissal of a U.S. Commissioner in the Indian Territories, because Congress had not conditioned discharge from that office on prescribed "causes." Had Congress done so, however, the Court implied in *Reagan* and other cases decided between *Parsons* and *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926), the President would have to abide by those restrictions on removal even for those who would later be termed "purely executive" officers. Indeed, in *Shurtleff v. United States*, 189 U.S. 311, 23 S.Ct. 535, 47 L.Ed. 828 (1903), the Court, while making clear that its holding was a very limited one that it was proper for the President to remove an appraiser of merchandise for reasons other than those stated in the statute involved in that case, stated in dictum that by using "very clear and explicit language," Congress could limit the President's power to remove even "purely executive" officers like the plaintiff appraiser there.

It was into this background that the lengthy, expansive, dictum-filled opinion in *Myers v. United States, supra*, fell. Justices Holmes, Brandeis, and McReynolds [13] dissented strenuously. Justice Brandeis in dissent took sharp issue with the spirit of *Myers* of vesting the removal power exclusively in the President. In his view not only was there a lack of historical, prece-

12. Burkoff, *Appointment and Removal under the Federal Constitution: The Impact of Buckley v. Valeo*, 22 Wayne L.Rev. 1335, 1379 (1976).

13. In his comments from the bench after the announcement of the majority opinion, dissenter Justice McReynolds termed the majority decision "revolutionary." Burkoff, *supra*, at 1404.

dential, and analogical [14] support for a presidential right of removal illimitable by conditions set by Congress, but there was nothing in the doctrine of the separation of powers that "make[s] each branch completely autonomous. [Rather, that doctrine] left each, in some measure, dependent upon the others, as it left to each power to exercise, in some respects, functions in their nature executive, legislative and judicial." *Myers, supra*, 272 U.S. at 291, 47 S.Ct. at 84 (Brandeis, J., dissenting).

The federal defendants would like this Court to read the *Myers* decision broadly. Yet it is quite clear from an analysis of the fairly narrow limits of the actual dispute in *Myers*, and from the subsequent Supreme Court cases of *Humphrey's* and *Wiener* rejecting the bulk of *Myers* as dictum and elaborating a functional approach hinging on the legitimate need for independence from executive control in the nature of certain offices, that indeed *Myers* should be read narrowly. As noted above, *Myers* was a 5–3 decision of a sharply divided Court. *Humphrey's* and *Wiener*, on the other hand, were subsequent unanimous decisions. In retrospect, it is clear that the issue in *Myers* was quite limited. An inferior officer, a postmaster, who was indisputably "purely executive" in the sense that his charge was *not* to be independent of the President or of Executive direction in any way, but rather was clearly meant to be the "eyes and arms of the President", *Humphrey's, supra*, 295 U.S. at 628, 55 S.Ct. at 874, was held to be removable at the will of the President when the President concluded that he was no longer serving well as his "extension". That was so even though a statute sought to tie the President's hands in removing subordinates. The counterargument on the real issue in *Myers*, made pithily by Justice Holmes in his separate dissent, was that if an office, as was the case with the postmastership in *Myers*, "owes its existence to Congress, and . . . may [be] abolish[ed] tomorrow [by] Congress," and if "its duration and the pay attached to it while it lasts depend on Congress alone," and if "Congress alone confers on the President the power to appoint to it and at any time may transfer the power to other hands," then "Congress has power to prescribe a term of life for it free from any interference." *Id.* 272 U.S. at 177, 47 S.Ct. at 46 (Holmes, J., dissenting). Limited by later Supreme Court decisions, *Myers* stands for only this: Even though Congress has established an office, has the power to abolish it, sets its pay and prescribes a desirable duration for it, if that federal office performs purely executive functions, that is, if it is the eyes and arms of the President, then, consistent with the doctrine of the separation of powers, the Congress may not restrict the President in removing the occupants of that office. It is worth noting that the majority opinion's dictum in *Myers exceeded* the position argued by the Solicitor General of the United States *on behalf of the President*. Interestingly, the Solicitor General in *Myers* argued for a "middle position". He urged on the Supreme Court the view that "Congress may guide and direct the discretion of the President by such statutory qualifications as are *properly inherent in the nature of an office*," but that the nature of Mr. Myers' office as a postmaster was to be merely the eyes and arms of the President and thus it followed that the President could remove Mr. Myers at will. *Myers, supra* 272 U.S. at 96.

In *Humphrey's*, President Roosevelt purported to dismiss Mr. Humphrey less than two years into the latter's seven-year term as a member of an independent regulatory agency, the Federal Trade Commission (FTC). The Congress had made clear in the Act establishing the FTC that the FTC was intended to be "independent of any department of the government." As the Court stated, "the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates,

14. Justice Brandeis analogized the statutory encumbrances or qualifications on the range of presidential *nominees* with what he saw in *Myers* as the analogous situation of statutory encumbrances or qualifications on the range of presidential *removees*. *Myers, supra*, 272 U.S. at 264–274, 47 S.Ct. at 75–78 (Brandeis, J., dissenting).

all combine to demonstrate the congressional intent to create a body of experts who shall gain experience by length of service; a body which shall be independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government." *Humphrey's, supra*, 295 U.S. at 625–26, 55 S.Ct. at 872–73 (emphasis in original). As this Court noted in discussing the intent and the language of the statute in question in this case, the same is true of its language, its legislative history and its general purposes as the Court said of the FTC Act in *Humphrey's*.

It was likewise clear in *Humphrey's*, as it is undisputed in this case, that the reason for the attempt to dismiss the officeholder was not inefficiency, incompetence, corruption or other "cause".

Though called upon to decide *Humphrey's* less than a decade after *Myers*, the Supreme Court, in a unanimous decision [15] repudiated much of what had been said in *Myers* and held that the President's purported removal of Commissioner Humphrey had been unlawful. On the facts of *Humphrey's*, involving a position on an administrative agency, the Court had occasion to distinguish the quasi-legislative, quasi-judicial *and quasi-executive* FTC from the "eyes and arms of the President" postmaster in *Myers*. The reasoning of the opinion, though, was not that the relevant judicial inquiry is to determine whether an agency from which an officeholder had been removed could be pigeonholed as either an administrative agency or an executive one. Rather, as Justice Frankfurter wrote for a unanimous Court in *Wiener, supra* 357 U.S. at 352, 78 S.Ct. at 1277, in describing the *Humphrey's* reasoning (emphasis supplied):

> The assumption was short-lived that the *Myers* case recognized the President's inherent constitutional power to remove officials, *no matter what the relation of the executive to the discharge of their duties* and no matter what restrictions Congress may have imposed regarding the nature of their tenure.[16]

[2] Although given the facts of *Humphrey's* and *Wiener*, it was natural that some have tended to adopt the shorthand of comparing "quasi-legislative" offices with "purely executive" ones, the focus for deciding "whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the *character of the office* . . . ." *Humphrey's, supra*, 295 U.S. at 631, 55 S.Ct. at 875. This Court concludes that by that phrase, the Court meant that the following analysis is appropriate. First, the court should determine whether the statute creating the office was designed to ensure those serving in that office independence from executive direction and control. Once the court has determined, as it has in this case, that that was the design of Congress, and that such a design was legitimate, thereby distinguishing the situation under the Tenure in Office Acts involved in *Myers* where a Congress had arrogated the President's power to remove at will subordinates charged with doing his bidding, then the Court should uphold congressional circumscription of presidential removal at will since the "coercive influence" of that power would "threaten . . . *independence*." *Id.* 295 U.S. at 630, 55 S.Ct. at 875 (emphasis supplied). And again: "[O]ne who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of *independence* against the latter's will." *Id.* at 629, 55 S.Ct. at 874 (emphasis supplied). Significantly, the *Humphrey's* Court cited with approval dictum in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 & 165–66, 2 L.Ed. 60 (1803), where Chief Justice Marshall drew a distinction

15. Chief Justice Taft was no longer on the Court.

16. One commentator wrote of the *Humphrey's* decision that the issue became completely different once the Court faced a case of "officeholders . . . in positions where direct hierarchical obedience to the President was, to say the least, inappropriate, and most certainly unintended." Burkoff, *supra* at 1405.

between those officers of whom it could legitimately be said that "their acts are his [the President's] acts" and where his will should therefore control, and those officers of whom that could not be said and where, in the interest of giving meaning to independence, removal could be circumscribed. Finally, it was clear in *Humphrey's*, as it later was in *Wiener*, that the President had no inherent constitutional power, flowing from either the Appointments Clause or the duty to faithfully execute the laws of the United States, to remove officials serving in offices intended to be independent from Executive direction, control or influence.

Wiener presented a situation fairly akin to the one in *Humphrey's*, and produced a second unanimous holding invalidating a President's purported removal of an official meant to be independent of the Executive Branch. The case is particularly significant since it was the Court's last word on the subject of removal of officials meant to be independent, since it further repudiated any idea of reading *Myers* expansively, and since it involved a situation where, as in this case but unlike in *Humphrey's*, Congress had *not* specified anything *in the statute* establishing and structuring the War Claims Commission about the grounds for removal. As is the case with the statutes in question here then, the Court should not assume that Congress meant thereby to leave the matter to, or to recognize, an inherent constitutional power to remove a Commissioner at will. Rather, a unanimous Court instructed, the proper judicial response to the lack of express language in the statute, in a removal case, is to determine from the statute, the legislative history, and the general purpose of the legislation "the nature of the function that Congress vested in the . . . Commission." *Wiener, supra* 357 U.S. at 353, 78 S.Ct. at 1278. Hence, the Court invalidated President Eisenhower's purported dismissal of a member of the War Claims Commission who was to serve until the Commission wound up its business of "receiv[ing] and adjudicat[ing] according to law" claims for compensating internees, prisoners of war, and religious organizations which had suffered harm at the hands of the enemy in connection with World War II. Under the Act establishing the Commission [17] the task of distributing funds from the Treasury for that compensatory purpose was given to a Commission "established as an adjudicating body with all the paraphernalia by which legal claims are put to the test of proof, with finality of determination. . . ." *Id.* Again, as in *Humphrey's*, because of the facts of the particular case before the Court, comment has naturally revolved around a "quasi-judicial" agency. But in again dismissing *Myers* unanimously as having had its "scope" "narrowly confined" "to include only 'all purely executive officers,'" *id.* 357 U.S. at 352, 78 S.Ct. at 1277, and in again stressing independence, the Court made clear that the crucial consideration was that the statutory scheme had sought to ensure the *independence* of a Commission that Congress had created, and that it was legitimate for Congress to have made that office independent. As the Court put in in its conclusion in *Wiener*, Congress set up "a body that was [to be] 'entirely free from the control or coercive influence, direct or indirect,' [citing *Humphrey's, supra*, 295 U.S. at 629, 55 S.Ct. at 874] of either the Executive or the Congress."

If, as one must take for granted, the War Claims Act precluded the President from influencing the Commission in passing on a particular claim, *a fortiori* must it be inferred that Congress did not wish to

17. The Court noted the legislative history and made some comments about it which are interesting for this Court's situation. The Court explained that the House had originally vested that task or a part of it in a federal security administrator. *Id.* at 354, 78 S.Ct. at 1278. The Court referred to such an administrator as "indubitably an arm of the President," whom the President could have therefore discharged at will if the President disagreed with his performance of that task. However, the Senate rewrote the bill in the form which, in substance, passed. Because further duties, requiring independence and not being the eyes and arms of the President, had been added to the Commission's tasks, Commissioners could *not* be removed at will by the President.

have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.

Id. 357 U.S. at 355–56, 78 S.Ct. at 1279. And again a unanimous Court left little doubt that since the concern was preservation of legitimate independence, the analytical mode should not be pigeonholing, but rather the "philosophy" of the cases and their implications. Commentators on what was to become the Supreme Court's last pronouncement on this subject, recognized the demise of technical considerations and particularly of *Myers*, and the centrality to the inquiry of whether there is a legitimate need for independence in the functioning of an agency or commission whose member(s) the President seeks to remove at will. As the *Harvard Law Review* commented in its annual summary of the Court Term: [18]

> The Government, in support of its position that the members of the War Claims Commission performed "purely executive" functions, contended that the settlement of claims against foreign nations had traditionally been an executive function, related to the power to conduct foreign affairs. The Court, however, indicated that Congress could have given the Commission's function to any branch of the Government. * * * [In sum, the statute] involved in [*Myers*] was enacted in a period of extreme antagonism between Congress and the President and seemed to be aimed only at undermining the position of the President. It seems likely that *if a congressional restriction of the President's power to discharge government officials other than high policy-making officials is designed to achieve a purpose reasonably related to the sound administration of the Government, it will be sustained.* Only in the extremely rare instance of clear congressional abuse would the constitutional limitation of the *Myers* case be applied.

Note, *The Supreme Court Term, 1957 Term*, 72 Harv.L.Rev. at 165–66 (1958) (emphasis the Court's).[19]

IV

The District of Columbia Aspect of this Case

In Part III this Court concluded that the philosophy and the implications of the *Myers-Humphrey's-Wiener* trilogy of cases support the conclusion that the paramount interest in independence that Congress legitimately mandated as the function and duty of a member of the Commission limits the President's power of removal at will of any such commissioner. That conclusion is reinforced by the circumstance that this case involves Congress' expansive role in managing affairs in the District of Columbia that the Constitution specifically and expressly grants to Congress. The Constitution, art. I, sec. 8, cl. 17 reads in pertinent part:

> The Congress shall have power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States. . . .

Two arguments, both favoring the position of the plaintiff, emerge from that express grant of exclusive legislative control over all matters whatsoever involving the District. The first argument goes to appointment, the second, on which this Court relies, goes to removal, the real issue presented by this case.

With respect to the first argument, separation of powers *notions* are an underlying

18. A later commentator wrote:

> Where the *Myers* Court leaned over backwards to accommodate the President, the *Wiener* Court was unwilling, even in the total absence of explicit congressional expression on point, to give the President a removal power that went beyond the Court's conception of the degree of independence from the executive branch necessary to insure the viability of particular agencies or individuals. Burkoff, *supra* at 1410.

19. The Court has considered *Martin v. Tobin*, 451 F.2d 1335 (9th Cir. 1971), *Lewis v. Carter*, 436 F.Supp. 958 (D.D.C.1977) and *Nader v. Bork*, 366 F.Supp. 104 (D.D.C.1973), and finds they are distinguishable.

with which J. S. is charged is described in this court's prior opinion (*Id.* at pp. 105–106). When J. S. was apprehended he was in possession of a 20-gauge shotgun, sawed off barrel, loaded with one round of ammunition.

4) *The extent and nature of J. S.' prior delinquency record.* A charge of attempted robbery stemming from an incident with another youth at Yankee Stadium was filed against J. S. on June 8, 1976. Prosecution was declined on that day.

5) *Present intellectual development and psychological maturity.* The written report by the psychiatrist who examined J. S. establishes that although J. S.' intellectual capabilities are limited, there is no significant impairment of his capacity for logical and rational thought. Additionally the report indicated that J. S. was deficient in terms of an altruistic concern for others. J. S.' school record indicates that he failed the majority of his high school courses and that he was discharged as overage on December 22, 1980.

6) *The nature of past treatment efforts and J. S.' response to such efforts.* No evidence has been submitted with respect to any treatment program made available to J. S. and perforce with respect to his response.

7) *The availability of programs designed to treat the juvenile's behavioral problems.* The availability of treatment programs has already been described.

The above are my findings on the factors enumerated in the statute. The decisions to transfer R. S. and J. S. are difficult. However, meaningful differences exist with respect to R. S., J. S., and J. D., who at this time, has not been transferred. J. D. was the only one who seriously attempted participation in a rehabilitative program—the Job Corps. Rehabilitation is a primary goal of the statute. Additionally, I have only had the opportunity to observe J. D. on the witness stand and his testimony and demeanor added further support to my determination to reserve decision on transferring J. D. J. D.'s slowness, unsophistication, limited understanding of the world, and concern for his mother contrasts with R. S.' pattern of incorrigibility at home and school, his "street-wise" demeanor, and with J. S.' lack of altruistic concern for others and his remoteness and secrecy from his family. Moreover, both R. S. and J. S. were armed with loaded weapons. A major factor in the passage of the Juvenile Delinquency statute was the threat to society posed by juvenile crime. In being armed, R. S. and J. S. constituted a more significant threat to society than J. D. who was not armed.

In light of these findings, the government's motion to transfer R. S. and J. S. is granted. A pretrial conference will be held on Tuesday, September 22, 1981 at 4:00 p. m.

This opinion is to be sealed.

IT IS SO ORDERED.

APPENDIX

On consent of all attorneys, this opinion is being submitted for publication with the defendants' names withheld.

Gordon A. MARTIN, Jr., Plaintiff,

v.

Ronald REAGAN, et al., Defendants.

Civ. A. No. 81-1714-S.

United States District Court,
D. Massachusetts.

Sept. 8, 1981.

Action was instituted to enjoin the President from terminating a one year appointment to the National Institute of Justice Advisory Board. On motion of plaintiff for preliminary injunction and motion of defendants to dismiss or, in alternative, for summary judgment, the District Court,

Skinner, J., held that provisions of the Justice System Improvement Act do not prohibit the President from either dismissing members of the National Institute of Justice Advisory Board or removing an appointee from the Advisory Board, even though the provisions do not expressly delineate the President's removal power, where the functions of the Advisory Board in recommending policies, creating peer review procedures, and recommending candidates for the position of Director of the National Institute of Justice fall into the category of "purely executive" and do not require "absolute freedom from Executive interference."

Motion of plaintiff denied, and motion of defendants for summary judgment allowed.

United States ⇐35

Provisions of the Justice System Improvement Act do not prohibit the President from either dismissing members of the National Institute of Justice Advisory Board or removing an appointee from the Advisory Board, even though the provisions do not expressly delineate the President's removal power, where the functions of the Advisory Board in recommending policies, creating peer review procedures, and recommending candidates for the position of Director of the National Institute of Justice fall into the category of "purely executive" and do not require "absolute freedom from Executive interference." Omnibus Crime Control and Safe Streets Act of 1968, §§ 201, 202(b, c), 204(a, c, d) as amended 42 U.S.C.A. §§ 3721, 3722(b, c), 3724(a, c, d).

Terry Philip Segal, Martin, Morse, Wylie & Kaplan, Boston, Mass., for plaintiff.

Donald R. Anderson, Asst. U. S. Atty., Larry L. Simms, Deputy Asst. Atty. Gen., Benna Solomon, Dept. of Justice, Boston, Mass., for defendants.

MEMORANDUM AND ORDER FOR JUDGMENT

This action seeks to enjoin the President of the United States from terminating plaintiff's one-year appointment to the National Institute of Justice Advisory Board prior to the expiration of plaintiff's term. The case is currently before me on plaintiff's motion for a preliminary injunction and defendants' motion to dismiss or, in the alternative, for summary judgment.

The facts are not in dispute. In response to a perceived inadequacy in the federal justice research effort, the Congress created the National Institute of Justice and the National Institute of Justice Advisory Board pursuant to the Justice System Improvement Act of 1979, Pub.L.No.96–157, 42 U.S.C. §§ 3701 *et seq.* The National Institute of Justice (hereinafter "NIJ") was placed within the Department of Justice "under the general authority of the Attorney General". 42 U.S.C. § 3722(a). The principal purpose of the NIJ is "to engage in and encourage research and development to improve and strengthen the criminal justice system and to disseminate the results of such efforts to Federal, State, and local governments". 42 U.S.C. § 3721. To achieve this objective, the NIJ is authorized to make grants to and enter into agreements with institutions and individuals performing research in the criminal justice field, as well as to conduct its own research. 42 U.S.C. § 3722(c). The Director of the NIJ is "appointed by the President, by and with the advice and consent of the Senate" and has "final authority over all grants, cooperative agreements, and contracts awarded by the Institute". 42 U.S.C. § 3722(b).

The National Institute of Justice Advisory Board (hereinafter "Advisory Board") "consists of twenty-one members who shall be appointed by the President". 42 U.S.C. § 3724(a). Its duties are to

(1) recommend the policies and priorities of the Institute;

(2) create, where necessary, formal peer review procedures over selected categories of grants, cooperative agreements and contracts;

(3) recommend to the President at least three candidates for the position of Director of the Institute in the event of a vacancy; and

(4) undertake such additional related tasks as the Board may deem necessary.

42 U.S.C. § 3724(d).

The term of office of each member is three years "except the first composition of the Board which shall have one-third of these members appointed to one-year terms, one-third to two-year terms, and one-third to three-year terms". 42 U.S.C. § 3724(c).

On November 7, 1980, then-President Jimmy Carter made the initial appointments to the Advisory Board, selecting plaintiff to serve a one-year term. On June 1, 1981, however, plaintiff was informed that the new President, Ronald Reagan, desired to reconstitute the Advisory Board and requested plaintiff's resignation at his "early convenience". Plaintiff rejected the President's request and sent a letter explaining his reasons to the Attorney General on June 2, 1981. On June 26, 1981, the Deputy Attorney General sent plaintiff a mailgram stating that "the President has determined that your service on the National Institute of Justice Advisory Board is no longer required[;] effective this date your appointment to the Board is terminated". The plaintiff's appointment was not scheduled to expire until November 6, 1981. No meeting of the Advisory Board has been convened to date.

The issue presented by these facts is whether the President may remove plaintiff from his position without cause prior to the expiration of plaintiff's one-year term. Plaintiff argues that the legislative history of the Justice System Improvement Act of 1979 reveals a clear intent on the part of Congress to insulate Advisory Board members from the President's removal power. The defendants take the position that Congress had no such intent, and that even if it did, such a restriction on the President's removal power would violate the separation-of-powers principle of the Constitution.

Although the Constitution is silent as to the removal power of the President, it is well established that "[i]n the absence of specific provision to the contrary, the power of removal is incident to the power of appointment". *In re Hennen*, 38 U.S. (13 Pet.) 230, 259, 10 L.Ed. 138 (1839); *see also Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926). The initial inquiry in a removal power case, therefore, is whether Congress sought to restrict the President's exercise of such power.

A difficulty often encountered in this type of case is that the Congress has failed to express any intent on the subject of removal from office. The Supreme Court was faced with this situation in *Wiener v. United States*, 357 U.S. 349, 78 S.Ct. 1275, 2 L.Ed.2d 1377 (1958). There, President Eisenhower dismissed the plaintiff from his position as a member of the War Claims Commission, an organization created by Congress to adjudicate certain claims relating to World War II, prior to the expiration of his term. The legislation establishing the Commission lodged the appointment of commissioners in the President's hands, but was silent as to the removal power. In the face of this silence, the Court noted, it was necessary to infer what Congress intended with respect to removal. Recognizing that this was a "problem in probabilities", the Court stated that "the most reliable factor for drawing an inference regarding the President's power of removal in our case is the nature of the function that Congress vested in the War Claims Commission". 357 U.S. at 353, 78 S.Ct. at 1278. Previous cases had made a sharp distinction between "purely executive" functions, for which the President's power of removal had to be unfettered, and quasi-judicial or quasi-legislative functions, which "require absolute freedom from Executive interference". *Id.; see Humphrey's Executor v. United States*, 295 U.S. 602, 631–632, 55 S.Ct. 869, 875, 79 L.Ed. 1611 (1935). On the facts in *Wiener*, the Court found that the adjudicatory nature of the War Claims Commission's tasks created an inference that "Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing". 357 U.S. at 356, 78 S.Ct. at 1279. Accordingly, it held that the Presi-

dent did not have the power to remove plaintiff. *Id.*

The Justice System Improvement Act of 1979 does not expressly delineate the President's removal power with respect to members of the Advisory Board. The Advisory Board's functions, however, fall into the category of "purely executive". The sole tasks of the Board are to recommend policies, create peer review procedures, and recommend candidates for the position of Director of the NIJ. None of these tasks require "absolute freedom from Executive interference". *Weiner, supra.* This conclusion is bolstered by an examination of the NIJ itself. The NIJ was placed within the Justice Department "under the general authority of the Attorney General". 42 U.S.C. § 3722(a). The Director of the NIJ serves at the pleasure of the President, as Congress did not establish a fixed term of office for him. Given the measure of control that the President exercises over the NIJ, it is unlikely that Congress intended to insulate the Advisory Board from presidential authority.[1]

Accordingly, I rule that the Justice System Improvement Act does not prohibit the President from dismissing members of the National Institute of Justice Advisory Board and that the President's removal of plaintiff from the Advisory Board was within the scope of his powers. Plaintiff's motion for a preliminary injunction is DENIED. Defendant's motion for summary judgment is ALLOWED and judgment shall be entered for defendants forthwith.

1. Contrary to plaintiff's assertion, the legislative history of the Act does not reveal an intent on the part of Congress to restrict the President's removal power. At most, it suggests that Congress wanted to keep the NIJ separate from other groups within the Department of Justice itself, not the President. See S.Rep.No. 96–142, 96th Cong., 1st Sess., pp. 50–51, *reprinted in* 1979 U.S.Code Cong. & Admin.News 2471, 2520–22.

Gary ELLEBRACHT, a minor, by and through his Next Friend and mother, Mrs. Mary W. Ellebracht, Plaintiffs,

v.

Gary SIEBRING, et al., Defendants.

No. 80–4063–CV–C–W.

United States District Court,
W. D. Missouri, W. D.

Sept. 10, 1981.

In products liability action, plaintiff alleged, in part, that farm implement manufactured by manufacturing company severely injured him in 1968. Defendants, who were Iowa residents and who presently owned manufacturing company, moved to quash service of process and dismissal of action for lack of personal jurisdiction. The District Court, Scott O. Wright, J., held that: (1) none of the three defendants were amenable to service of process under strictures of Missouri long-arm statute as active members of partnership which owned company which manufactured farm implement; (2) one of the defendants could not be served with process under Missouri long-arm statute as member of partnership by reason of assuming its debts; and (3) plaintiffs could not maintain personal jurisdiction pursuant to long-arm statute under theory of "successor corporation liability" since, under Iowa and Missouri laws, doctrine had not been adopted.

Motion to quash and to dismiss granted.

1. Federal Civil Procedure ⇐491

None of the three defendants in products liability action, who were residents of Iowa, were amenable to service of process under strictures of Missouri long-arm statute as active members of partnership which manufactured farm implement which al-

AT&T

Commission under the doctrine of *primary* jurisdiction (opinion, p. 1329). But for the reasons fully stated in the September 11 opinion, there is no basis for dismissing this antitrust action on FCC-exclusive-jurisdiction grounds. Indeed, in a thoughtful and exhaustive opinion issued within the past two weeks, Judge John F. Grady reached precisely the same conclusion, rejecting arguments very similar to those advanced here. *MCI Communications Corp. v. Am. Tel. & Tel.*, No. 74 C 633 (N.D.Ill., Oct. 6, 1978).[3]

Defendants next contend that the Court should have included the Federal Communications Commission, other independent regulatory bodies, and the United States Postal Service in the concept of the "United States" as plaintiff in this action for purposes of Rule 34 discovery. Inasmuch as defendants expressly disavow seeking reconsideration of the Court's pretrial order in this respect, there is nothing upon which the Court might rule.[4] Nevertheless, in view of the circumstances related in note 4, *supra*, and in order to afford defendants the benefit of every consideration of their claims, the Court has reviewed the arguments made, but has found nothing that would in any way impair the September 11 rulings contained in Part II of the opinion.

[20, 21] One new contention not previously considered is that the Department of Justice might secure from the Federal Communications Commission whatever documents defendants might seek for discovery purposes by causing the President to remove from office any member of that Commission who fails to vote to release such records for this purpose (memorandum, p. 144). However, as *Wiener v. United States*, 357 U.S. 349, 78 S.Ct. 1275, 2 L.Ed.2d 1377 (1958), makes clear, with respect to members of independent regulatory commissions "a power of removal exists only if Congress may fairly be said to have conferred it." In the absence of other legislative direction this means that removal can be effected only "for cause involving the rectitude of a member" (357 U.S. at 356, 78 S.Ct. at 1279). It goes without saying that failure to cooperate in Rule 34 discovery in a civil action brought by the Department of Justice on behalf of the Executive Branch is not "cause involving rectitude."[5]

[22] It is next argued once again that defendants should not be required to produce documents which were previously turned over to two private antitrust plaintiffs in actions in other districts (*Litton Systems, Inc. v. Am. Tel. & Tel. Co.*, No. 76 Civ. 2512 (S.D.N.Y.1976); *MCI Communications Corp. v. Am. Tel. & Tel. Co.*, Civil No.

3. Judge Grady concluded, *inter alia*, that there is no basis for concluding that AT&T is immune from the antitrust laws merely because it is a regulated common carrier (slip opinion, pp. 1322–1324); that a finding of immunity with respect to discrete conduct will not result in a dismissal where such conduct is alleged to be part of a pattern of monopolization (opinion, pp. 1325–1331); that the FCC has never authorized, approved, or sanctioned AT&T's allegedly improper conduct with respect to interconnection and that it has not supervised the interconnection practices so closely that its approval of such conduct could be inferred (opinion, pp. 1331–1337); and that AT&T's "sham" tariff filings were likewise not immunized from the antitrust laws by virtue of FCC regulation (slip opinion, pp. 1337–1340).

4. The Court denies defendants' unusual request that it take this aspect of defendants' motion under advisement "subject to defendants' right to call up their motion," presumably at any time of their choosing. Motions and other pleadings filed by the parties will be disposed of by the Court in accordance with established procedures (Rule 6, F.R.Civ.P., Local Rule 1–9) particularly where, as here, the process being proposed would merely cause prolonged uncertainty and confusion. In the Court's judgment, its ruling was correct, and there is thus nothing to take under advisement. Identical considerations apply to defendants' demand that the Court take under advisement pending future defense decision the jurisdictional rulings and the bulk of defendants' objections to the pretrial and discovery procedures embodied in Pretrial Order No. 12.

5. Defendants are not without a remedy, however, with respect to possible refusals of regulatory commissions to cooperate in discovery. As the Court has previously stated, it will assist defendants in this area "to the full extent of its authority with respect to any legitimate requests" under Rule 45, F.R.Civ.P. (opinion, p. 1337.

For references to other topics, see Descriptive-Word Index

already tendered his resignation of the salaried office, although it was not accepted until afterwards, such act constituted an exercise of the right of election, which prevented a vacancy in the outer office.

U. S. v. Harsha, 19 S.Ct. 294, 172 U.S. 567, 43 L.Ed. 556.

U.S.Ct.Cl. 1903. The general power of the President to remove a federal official for any reason he may think sufficient, even though such official was appointed by and with the advice and consent of the Senate, is not restricted, as regards general appraisers of merchandise, to a removal for "inefficiency, neglect of duty, or malfeasance in office" by the provision in Customs Administrative Act June 10, 1890, c. 407, § 12, 26 Stat. 136, which authorizes the appointment of such officials, that they "may be removed from office at any time by the President" for those causes.

Shurtleff, v. U. S., 23 S.Ct. 535, 189 U.S. 311, 47 L.Ed. 828.

A federal official, sought to be removed from office by the President for any of the causes specified by Congress as grounds for such removal, is entitled to notice and hearing.

Shurtleff v. U. S., 23 S.Ct. 535, 189 U.S. 311, 47 L.Ed. 828.

The removal of a federal official by the President without notice or opportunity to defend will be presumed to have been made for other causes than those specified by Congress as grounds for his removal.

Shurtleff v. U. S., 23 S.Ct. 535, 189 U.S. 311, 47 L.Ed. 828.

U.S.Me. 1906. The protection of the President's order of July 27, 1897, against removals from the civil service except upon written charges, with opportunity for defense, extends to an employé in the office of the United States Surveyor General for the state of Idaho, certified by the Secretary of the Interior as within the terms of Act Jan. 16, 1883, c. 27, § 6, 22 Stat. 406, and the executive order of May 6, 1896, made in pursuance thereof, extending the departmental service classified under that act so as to include all executive officers and employés outside of the District of Columbia, whether compensated by a fixed salary or otherwise, who are serving in a clerical capacity, or whose duties are, in whole or in part, of a clerical nature.

U. S. v. Wickersham, 26 S.Ct. 460, 201 U.S. 390, 50 L.Ed. 798.

U.S.Ct.Cl. 1920. Notwithstanding U.S. C.A.Const. art. 2, § 2, subd. 2, providing for the appointment of officers by the President, with the advice and consent of the Senate, Congress may vest the appointment of inferior officers in the President alone, in courts of law, or in the heads of departments.

Burnap v. U. S., 40 S.Ct. 374, 252 U.S. 512, 64 L.Ed. 692.

U.S.N.Y. 1925. "Officer of the United States" usually construed in limited constitutional meaning.

Steele v. U. S., 45 S.Ct. 417, 267 U.S. 505, 69 L.Ed. 761.

U.S.Ct.Cl. 1926. Association of removal with appointment of executive officers is not incompatible with republican form of government.

Myers v. U. S., 47 S.Ct. 21, 272 U.S. 52, 71 L.Ed. 160.

Restrictions on President's power of removal from office is not to be implied from U.S.C.A.Const. art. 2, requiring consent of Senate to appointment.

Myers v. U. S., 47 S.Ct. 21, 272 U.S. 52, 71 L.Ed. 160.

U.S.C.A.Const. art. 1, § 8, does not vest in Congress power to make provision for removal of executive officers appointed by the President with consent of Senate, under article 2.

Myers v. U. S., 47 S.Ct. 21, 272 U.S. 52, 71 L.Ed. 160.

Express provisions in Act Cong. May 15, 1820, 3 Stat. 582, for removal of officers appointed under the act, held not to indicate that President possessed no power of removal independently thereof, but, on the contrary, to show adoption in conformity to legislative decision of 1789, construing U.S. C.A.Const. art. 2, as authorizing removal by President.

Myers v. U. S., 47 S.Ct. 21, 272 U.S. 52, 71 L.Ed. 160.

U.S.Ct.Cl. 1935. Power of President to remove members of Federal Trade Commission is limited to removal for specific causes enumerated in statute permitting removal for inefficiency, neglect of duty, or malfeasance in office. Federal Trade Commission Act, § 1, 15 U.S.C.A. § 41.

Humphrey's Ex'r v. U. S., 55 S.Ct. 869, 295 U.S. 602, 79 L.Ed. 1611.

Whether President has power to remove officer in spite of congressional limitation on power of removal depends on character of office, and whether officer exercises quasi legislative or quasi judicial functions.

Humphrey's Ex'r v. U. S., 55 S.Ct. 869, 295 U.S. 602, 79 L.Ed. 1611.

Statute permitting President to remove members of Federal Trade Commission for

For later cases see same Topic and Key Number in Pocket Part

inefficiency, neglect of duty, or malfeasance in office, when construed to limit President's power to removal for causes thus enumerated, held valid restriction on authority of executive. Federal Trade Commission Act, §§ 1, 5, 6, 7, 15 U.S.C.A. §§ 41, 45, 46, 47.

Humphrey's Ex'r v. U. S., 55 S.Ct. 869, 295 U.S. 602, 79 L.Ed. 1611.

U.S.App.D.C. 1955. Under Executive Order authorizing Loyalty Review Board to review cases involving persons recommended for dismissal on grounds relating to loyalty by loyalty board of any department or agency and providing that such case may be referred to Loyalty Review Board either by employing department or agency or by officer or employee concerned, Loyalty Review Board does not have power to undertake review on its own motion. Executive Order No. 9835, pt. 2, § 3, pt. 3, § 1, subd. a, 5 U.S.C.A. § 631 note.

Peters v. Hobby, 75 S.Ct. 790, 349 U.S. 331, 99 L.Ed. 1129.

President's failure to express disapproval of Regulation which purported to authorize Loyalty Review Board to do things that Board was not authorized to do under Executive Order could not be deemed to constitute President's acquiescence in such regulation and, thus, an implied extension by President of Board's power under the Executive Order. Executive Order No. 9806, U.S.Code Cong. Service 1946, p. 1874; No. 9835, 5 U.S.C.A. § 631 note; No. 9835, as amended by No. 10241, U.S.Code Cong. and Adm. Service 1951, p. 1028; No. 10450, § 11, 5 U.S.C.A. § 631 note.

Peters v. Hobby, 75 S.Ct. 790, 349 U.S. 331, 99 L.Ed. 1129.

U.S.Ct.Cl. 1958. The President may remove officials who are part of the executive establishment but presidential power to remove members of a body created to exercise its judgment without hindrance of any other official exists only if congress has conferred it.

Wiener v. U. S., 78 S.Ct. 1275, 357 U.S. 349, 2 L.Ed.2d 1377.

Where War Claims Act of 1948 established a commission with authority to adjudicate war claims according to law and without right of review, and act contained no provision with respect to removal of commissioners, the President was without authority to remove commissioner merely to have personnel of his own selection. War Claims Act of 1948, §§ 1 et seq., 3, 5–7, 11, 50 U.S.C.A. Appendix §§ 2001 et seq., 2002, 2004–2006, 2010.

Wiener v. U. S., 78 S.Ct. 1275, 357 U.S. 349, 2 L.Ed.2d 1377.

⇐36. Appointment or employment and tenure of agents, clerks, and employees in general.

Library references

C.J.S. United States §§ 36, 37, 62–64.

U.S.Fla. 1867. Navy agents cannot be appointed in any other mode than that prescribed in the act of March 3, 1809, 2 Stat. 535, authorizing their appointment.

Strong v. U. S., 73 U.S. 788, 6 Wall. 788, 18 L.Ed. 740.

U.S.Ct.Cl. 1905. The existence of a collector of customs under Rev.St.U.S. § 2550, for the Georgetown district, which is defined in section 2550 as comprising "all the waters and shores of the Potomac river, within the state of Maryland and the District of Columbia, from Pomonkey creek to the head of the navigable waters of that river," precludes the Secretary of the Treasury from appointing, with a right to compensation, a disbursing agent for the funds appropriated for a post office at Washington, under section 3658, which authorizes such appointments only where there is no collector at the place of location of a public work.

Bartlett v. U. S., 25 S.Ct. 433, 197 U.S. 230, 49 L.Ed. 735.

U.S.App.D.C. 1906. The courts have no power, by mandamus or otherwise, to review the action of the head of an executive department of the government in removing a clerk from office, on the ground that the removal was not in accordance with the civil service rules requiring notice to be given and an opportunity to reply to charges, where the charge is that the clerk wrote and caused to be published a newspaper article derogatory to the President.

U. S. ex rel. Taylor v. Taft, 27 S.Ct. 148, 203 U.S. 461, 51 L.Ed. 269.

The power of appointment to the classified civil service of the United States carries with it the power of removal, which is unrestricted, except as controlled by the Civil Service Act Cong. Jan. 16, 1883, c. 27, 22 Stat. 403, 5 U.S.C.A. § 632 et seq., which does not limit the power of removal, except for the single cause of failure to contribute money or services to a political party.

U. S. ex rel. Taylor v. Taft, 27 S.Ct. 148, 203 U.S. 461, 51 L.Ed. 269.

U.S.Ct.Cl. 1920. Within Rev.St. § 169, 5 U.S.C.A. § 43, authorizing heads of departments to employ clerks and other employés, "the head of a department" is the Secretary in charge of one of the great divisions of the executive branch of the government, who is a member of the Cabinet, and does not include heads of bureaus or lesser divisions.

Burnap v. U. S., 40 S.Ct. 374, 252 U.S. 512, 64 L.Ed. 692.

TALKING MEMO

Question: Whether the Pres. has the authority to remove members of the RRRB from office, esp. holdovers.

Statute: 45 USC 231f.

Analysis: The question of whether a Pres. has authority to remove members of executive branch agencies has been considered by the Supreme Court in the Myers-Humphrey's-Wiener trilogy of cases.

Myers said the Pres. can remove officers, but this was later rejected as dicta in Humphrey's & Wiener, which dealt with the FTC and the War Claims Commission, respectively. Myers dealt with the removal of a postmaster.

In any case, the courts distinguished the cases on the following grounds:

1. Myers dealt with purely executive functions, not quasi-legislative or quasi-judicial.

2. The statutes creating the FTC and War Claims Comm. were designed to ensure independence from the executive branch, whereas this was not the case in Myers.

RRRB:

* 1. RRRB has quasi-judicial functions. It can subpeona witnesses, administer oaths, take testimony, and conduct investigations under 45 USC 362(a) (incl by reference)

2. RRRB was established as an "independent agency." It contains a statutory holdover provision (i.e. holdover of appointees was contemplated from one Administration to the next).

Unfortunately, there is no further explanation re RRRB in the committee reports or during floor debate at the time of its passage in 1935, or when amended in 1937 and 1964.

Conclusion: Pres. wouldn't appear able to remove member of RRRB.

* (b)(1) — make awards

45 USC 362 (a)
(b)
(d)
(h)

make findings

(b)(3) " power to make decisions on applications for annuities . . . "