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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

June 22, 1983

MEMORANDUM FOR David Gergen
Dennis Patrick
Mike Uhlmann

FROM: Mike Horowitz *MH*

SUBJECT: Historical background relevant to Administration
nominees to the U.S. Commission on Civil
Rights

1. It has been charged that the President's assumption that the members of the Commission serve at his pleasure is historically unprecedented. In fact, the opposite is the case.

—With the election of President Kennedy, all members of the Commission submitted their resignations. There was no question that Kennedy had the authority to replace the entire Commission, nor that they continued in office only because the President willed it:

"As President Kennedy took office in January, 1961, current reports as published in Newsweek, predicted he would wholly change the Civil Rights Commission 'from top to bottom'. They proved to be without foundation...after a presidential conference on February 7, the White House announced that the Commission would remain as presently established, with Hannah continuing as Chairman, and that it had the President's full confidence" (Foster Rhea Dulles, The Civil Rights Commission: 1957-1965, p. 99).

—When Lyndon Johnson assumed the Presidency in 1963, each of the Commissioners also submitted their resignations. Again, there was no question of the President's authority. According to Dulles, the then Chairman Hannah (originally designated to head the Commission by President Eisenhower and redesignated by Kennedy) "wrote the new President reporting on the previous correspondence with Kennedy and stating their willingness to continue in office with a 'minimum visibility' until Johnson had the opportunity to consider the possible reconstitution of the Commission...on January 21, 1964, Johnson definitely informed Hannah that he hoped they would continue in office and develop their future program along the lines outlined in the Kennedy correspondence" (Dulles, pp. 214-215).

—Upon his election in 1964, Johnson requested that all Commissioners submit their resignations. According to Theodore Hesburgh, members of the Commission were reluctant to comply, but five of the six members did so upon the recommendation of the Commission's Acting Staff Director. The dissenting

member argued that compliance with the President's request "would be an acknowledgement that we are not an independent agency, but are merely a part of the President's staff, holding office at the pleasure of the President" (Theodore M. Hesburgh, "Integer Vitae: Independence of the United States Commission on Civil Rights", 46 Notre Dame Lawyer (1971), p.454).

—The election of President Nixon was the first change in Administrations in which all or most members of the Commission did not tender their resignations (two submitted their resignations for "personal reasons"). It also saw, however, the first test of the President's authority to involuntarily remove a sitting member. In a law review article published in the Spring of 1971, Father Hesburgh (then Chairman of the Commission) opined that the "...legality of a demand for resignation remains unresolved...", explaining in a footnote that:

"It is generally assumed that the President has extensive power to remove executive officers, even if they are members of 'independent' bodies...Theoretically, Commissioners serve 'at the pleasure of the President' since Congress has not specified that they shall serve for fixed terms or otherwise limited the power of the President to remove them at will. It has been suggested, however, that Commissioners of the Civil Rights Commission may be among the exceptions to that rule...On the one hand, it can be argued that the independent nature of the Commission indicates that Congress meant to preclude the President from exercising a removal power. On the other hand, it can be said that while Congress may have intended the tenure of the first Commissioners to be coextensive with the life of the Commission, it did not intend to grant them a life tenure, and hence the President has the power to remove them". (Hesburgh, pp. 454-455).

The following year, President Nixon posed a practical test of this question by demanding Hesburgh's resignation (Hesburgh had been among the original members appointed by Eisenhower). Hesburgh complied.

—Of the 7 Presidents in office since the Commission was created, only Presidents Ford and Carter appear not to have exercised authority (through initial appointment—Eisenhower—or replacement or decision not to accept proffered resignations—Kennedy, Johnson, Nixon, Reagan) over the membership of the Commission except in the case of vacancies.

2. Nor is President Reagan the first President to use his appointment power to change the existing character of the Commission—nor the first to incur criticism for doing so. As originally established by President Eisenhower, the Commission had a balance of "northern" and "southern" viewpoints designed to promote a 'neutral' approach to civil rights issues ("I want to get the spectrum of American opinion on the matter" Eisenhower told a press conference", Dulles, p. 18).

As Foster Rhea Dulles has noted, Kennedy's nominations to the Commission in 1961 radically transformed the body:

"...while the new members maintained the bipartisan character of the Commission...they definitely changed its character...[the Commission] now had a clear majority openly in favor of the liberal civil rights position".

"The shift in the nature of the Commission...was now so strongly accentuated that the equal division between the northern and southern viewpoints which originally characterized [the Commission] was clearly a thing of the past. The prospective division on substantive questions dividing North and South was a majority for the North of at least four to two. This change was fully recognized. Southerners promptly protested that the Commission was more than ever 'getting out of balance'..." (Dulles, p. 99-100).

This direction was confirmed by later appointments by President Johnson. "...Senator Russell of Georgia promptly pointed out [that] the original division between northern sympathizers with civil rights and defenders of the southern way of life was now wholly a thing of the past" (Dulles, p. 216).

3. While Congressional debates contain continuing references to the Commission as an "independent agency" or body, the term in context seems to have the same meaning as "independent establishment" as defined in the U.S. Code: i.e., not a subunit of an Executive Department or another agency. Indeed, as noted in the following passage which Father Hesburgh quotes approval in discussing the Commission's "independence":

"Of course, 'independence' is only a relative term. All agencies have a large degree of independence, whether or not they are supervised by cabinet officers, but no agency is fully independent...the only difference has to do with presidential supervision".

Father Hesburgh notes that the only clear basis for the Commission's claims to a measure of "independence" from Presidential supervision are the Commission's "bi-partisan" membership and the "tradition that the President should not interfere in some types of business of the so-called independent agencies" (Hesburgh, pp. 446-447). The former speaks to legislative intent and the latter to actual practice. Neither provide any basis for the absolute independence some are now claiming for the Commission.

a. Congressional intent:

—Supporters of the Civil Rights Act of 1957 envisioned the Commission as similar in nature to the various Presidential Commissions appointed from time to time. Opponents and proponents of the bill recognized that the President could have established such a Commission on his own authority, and that legislation was being requested only to provide the body with subpoena power. According to Congressman Dingell, for example:

"...the setting up of the Commission...could be done by the President without any action of this Congress. And I must confess I find myself at a loss to explain why the Congress would have to do this except the committee has done this. They have provided for the subpoena power so that the President and the President's commission can use this power to enable them better to get the facts on the deprivation of voting rights".

—The Executive nature of the Commission was repeatedly noted by proponents and opponents of the legislation. Examples of the former:

* Dirksen: "What is proposed is very common. It would be amazing indeed if the Chief Executive's opinions or findings could not be implemented and fortified by reports from an objective commission, on a factfinding basis, whereby there could be obtained all of the facts and data necessary for a determination of the very delicate problem we are facing".

• Javits: "...Do we want a legislative commission which can be the focal point and lightning rod of the cockpit of emotions that exist in this particular field? I think it is a blessing that we have a Presidency and that we can have an executive commission" (Congressional Record, 1957, p. 13459).

—Indeed, after the Commission had been formed and was in operation, supporters of the Commission such as Paul Douglas (D-Ill) and Phillip Hart (D-MI) repeatedly referred to the body as the "President's Commission on Civil Rights".

—Congress amended the Civil Rights Act of 1957 to provide that the President, not the Commission, would select its Staff Director. Supporters of the bill recognized that this action made the Commission in many respects less autonomous than bodies created exclusively by Executive Order (Senator Clark, Pa.: "Such a procedure is highly unusual, if not actually unprecedented. Any Commission ought to be able to appoint its own executive director").

—Congress considered and rejected alternatives which would have established a body responsible only to Congress.

—There is considerable evidence that supporters of the Commission expected it to function in close coordination with other Executive agencies, and charged the President with a high degree of responsibility for the Commission's success. For example, Congressman James Roosevelt stated that: "...The Commission is charged with receiving complaints of civil rights violations and shall recommend new legislation if this is found to be necessary. It is to be presumed that there will be the closest coordination between the new Assistant Attorney General [for Civil Rights] and this Commission" (Congressional Record, 1957, p. 16099).

—In 1958 several supporters of the Commission chastised the Administration for not hiring staff during the months prior to Senate confirmation of the President's nominees. At its inception, the Commission was literally a creation of the President: The Commission was initially financed by \$200 thousand from the President's emergency fund.

—During the 1961 debates, several strong supporters of the Commission advocated making it a cabinet department, or creating a successor agency with cabinet status. Such proposals recurred in subsequent years.

b. Executive practice.

Neither has the Executive taken a consistent "hands off" position in regard to the Commission:

—As noted above, the Commission in its first months was financed and staffed by the White House.

—In the Kennedy Administration, the Commission was included with the Department of Justice in a "subcabinet" committee on civil rights.

—During the Kennedy Administration, the Commission on several occasions complied with directions of the Attorney General regarding scheduling of hearings which would have conflicted with the Department of Justice's litigation objectives. As Commissioner Griswold stated regarding one such instance, the Commission "felt it advisable to obey [the Attorney General's] command". As Dulles notes, the Commission was at particular pains to publicize the fact that a decision to postpone hearings in Mississippi was not an independent judgment but in response to Administration direction: "Smarting under the criticism they were receiving from civil rights organizations, the Commissioners...decided that the responsibility for not holding the hearing should 'get back to the Administration where it belonged'".

—Nor was such executive direction provided, or sought, only in regard to hearings. After resignations and other staff problems, Dulles writes: "...Chairman Hannah wrote a rather bluntly phrased letter to President Kennedy on October 10 [1963] discussing...the urgent need for some guidance as to what the Commission should do... 'Before it can act intelligently', Hannah concluded in respect to the Commission's future, 'it needs to know what your desires are'" (Dulles, p. 213).

—When Lyndon Johnson assumed the Presidency in 1963, Dulles writes, "Hannah immediately wrote the new President reporting on the previous correspondence with Kennedy and stating their willingness to continue in office with a 'minimum visibility' until Johnson had the opportunity to consider the possible reconstitution of the Commission". "...on January 21, 1964, Johnson definitely informed Hannah that he hoped they would continue in office and develop their future program along the lines outlined in the Kennedy correspondence". (Dulles, pp. 213-215).

—The Commission was subject to the normal executive agency requirement to clear testimony on pending legislation with the Executive Office of the President until 1966 (Hesburgh, p. 455).

—Johnson later in his Administration moved actively to shape the work of the Commission, treating it as a normal executive department in a reorganization of civil rights enforcement in the executive branch and making a substantial contribution to its agenda:

"The Commissioners asked at their September meeting whether the results of current activities were wholly commensurate with an expanding budget. Even as such doubts were being expressed...a reorganization of the whole civil rights program of the Federal Government helped to mark out the path the Commission might be expected to follow...The Commission on Civil Rights retained its special and distinct status as a wholly independent agency in this reorganization. Its functions were somewhat enlarged by the transfer from the Community Relations Service of such clearing-house or data collecting activities as the latter agency had undertaken, but no significant change was made in its overall responsibilities. Some two months later, however, the President assigned it a new task. He asked the Commission to make a new intensive survey of 'the problem of race and education' throughout the entire country".

4. The current Commissioners have interpreted the scope of the Commission's authority as covering any issue which they view as related to civil rights (e.g., funding levels for aid to education and food stamps). It is therefore particularly significant that Congress considered and rejected proposals that the Commission study "social and economic aspects" of civil rights problems. Throughout the 1957 debates, it is clear that the Commission was to be limited to legal, law enforcement, and equal protection issues. Congress even rejected language permitting the Commission to study the use of economic pressure to frustrate the right to vote.

Significantly, only opponents of the Commission's creation asserted that the Commission's scope would be as wide as it claims today. Moreover, supporters of the creation of the Commission were at some pains to discredit such assertions:

Keating: "...Now these three provisions here regarding what this Commission would investigate were the subject of hours of study and work by the subcommittee and much discussion again in the full Committee..."

Celler: "...I want to confirm what the gentleman from New York...has stated. We had many provisions in this bill, many more powers that could be exercised by the Commission, but we cut them down almost to the bone, to the principles that are outlined in the bill before you". (1957, p. 9041).

—Later revisions and additions to the duties of the Commission by Congress have been carefully limited to issues involving "discrimination" and "denials of equal protection of the laws". Chairman Hesburgh, for example, conceded these stringent limits in 1972 testimony:

"A second unique feature of the Commission on Civil Rights is the broadness of its mandate. Other study commissions have tended to have specific, often narrow mandates. The mandate of the Commission...however, extends to the limits of the equal protection clause of the Constitution with respect to invidious distinctions based on race, color, religion, or national origin" (Hearing before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, June 16, 1972; p. 11)

[Counsel]. Father Hesburgh, is the Commission's jurisdiction coextensive with the 14th amendment equal protection clause, or do you have less jurisdiction than that particular clause would encompass?

HESBURGH. I would think it is reasonably coextensive. But, on the other hand, I think we have that qualifying phrase of race, color, religion, and national origin spelled out very carefully for us in the Commission statute. At times, we get complaints that I feel might be complaints under the 14th amendment, but they are beyond our legislative mandate.

Would that be correct, Mr. Powell?

POWELL (Commission General Counsel). Yes" (Ibid., p. 19).

—References to the Commission as "quasi-legislative" or "quasi-judicial" were largely limited to opponents of establishing or extending the Commission. Proponents, almost uniformly, describe it as a fact finding body which, while bipartisan and objective, would work in cooperation with the

remainder of the Executive Branch and Congress. Moreover, Congress rejected proposals for an independent Commission responsible only to Congress, and repeatedly rejected proposals by the Commission or members of Congress to expand the Commission's authority (e.g., independent authority to seek court enforcement of subpoenas, authority to require agencies to respond promptly to Commission requests for information, authority to direct President to dispatch Federal registrars in voting rights cases, quasi-judicial functions in regard to voting rights violations).

5. The legislation which created the Commission was based on the premise that the Constitution and laws should operate in a colorblind manner. These principles, as enunciated by the principal architects and supporters of the Civil Rights Act of 1957, are precisely those of the President's nominees:

—Representative Celler (D-NY): "Coming generations, I am sure, will find it difficult to believe that so much had to be said—so much had to be written—so much had to be discussed about a relatively simple matter...The Constitution of the United States was not drafted with a color chart before it".

—Senator Kuchel (R-CA): The Civil Rights Act of 1957 was enacted "with...indefatigable devotion to the cause of equal treatment under law". "When an American citizen is denied equal treatment under law in this country, something uglier takes place—the scrapping of our constitutional process".

—Senator Morse (D-OR): "In this country the people...are bound by the constitutional guarantees of the organic law of this Republic. Under that organic law there is no justification for...discrimination based upon race...".

—Representative Anfuso: "One of the primary concepts in the development of the American way of life is the belief that each individual should be judged on the basis of his ability and his achievements rather than on his origin, his faith, or the color of his skin. Where judgment is based on a person's race or religion, that is sheer discrimination and cannot be reconciled with American principles of justice, democracy, and the brotherhood of man".

"...to continue the practice of discrimination against our fellow citizens is most injurious to our way of life and to everything that this nation has accomplished in the last two centuries. It is intolerable at all times. It is morally wrong under any circumstances...".

This supplements my memorandum of June 22, 1983 on the subject, and provides additional historical data bearing on issues likely to be raised at the confirmation hearings of the President's nominations to the Civil Rights Commission.

1. Regarding previous Presidential use of appointment power to change what many regarded as the "character" of the Commission, the following description is particularly useful:

"The new President also altered an established government body in a significant way. Through his appointments, Kennedy consciously set out to liberalize the Civil Rights Commission. In theory, Erwin Griswold (a white Republican and Dean of Harvard Law School) and Spottswood Robinson (a Virginia Negro, a Democrat and Dean of Howard Law School) preserved the Commission's balances of Democrats and Republicans, Northerners and Southerners. But in fact, their addition to the investigative and reporting panel changed its outlook. Gone from the Commission were the Southern governors who had taken the sting out of its reports and sometimes dissented from its recommendations. In addition, its new staff director, Berl Bernhard, was much more progressive than his predecessor. Hence, the Commission's voice would soon become united, outspoken, and eventually an annoyance to the administration". (Carl M. Brauer's, John F. Kennedy and the Second Reconstruction [New York: Columbia University Press, 1977], pp. 72-73).

2. In the June 22 memorandum, Father Hesburgh was quoted to the effect that, aside from its bipartisan membership, the only basis for the Commission's claims to independence from Presidential supervision is a supposed history of Presidential restraint in dealing with the Commission (Hesburgh, pp. 446-447). There is substantial additional evidence that previous

administrations did not pursue a "hands off" policy with respect to the Commission.

a. Kennedy Administration.

—Harris Wofford served as Kennedy's chief assistant in regard to civil rights matters. According to Wofford:

° Kennedy made the decision on the appointment of the Commission's Staff Director in tandem with other decisions on Administration civil rights officials. It was expected that he, the Staff Director, the Assistant Attorney General for Civil Rights, and the Democratic National Committee's specialist on civil rights matters "...should all be able to work together and get things done in a careful and effective manner without too much fanfare" (Harris Wofford, Of Kennedys and Kings, New York: Farrar Strauss Giroux, 1980; p. 133). That the Administration expected the designee (Berl Bernhard) to function as a typical political appointee was clear. E.g., "Bernhard reported the news to the Attorney General and asked what reason he should give the press the next morning. 'If you're not smart enough to give a good reason', Kennedy said, 'I don't know why my brother nominated you. And remember, you never talked to me'" (Wofford, p. 163). [Historian Carl Brauer notes that, in another instance, Bernhard "tipped off" then Vice President Johnson regarding some impending criticism (Brauer, p. 218)].

° "Once a week the key administration men on civil rights met in my office to share information and discuss strategy: Burke Marshall from Justice, Berl Bernhard from the Civil Rights Commission; Louis Martin from the Democratic National Committee[!]; John Field, who had become the director of the President's Committee on Equal Opportunity; and others from time to time. To assist with the fact-finding necessary for overall coordination of federal policy, William Taylor, an imaginative and persistent attorney on the Civil Rights Commission's legal staff, was informally assigned to my office" (Wofford, p. 134, emphasis added.) NOTE: Bill Taylor of Catholic University's Center for Policy Review is now a leading figure in the civil rights coalition—and one of the most prominent in asserting that the Commission is uniquely independent of the Executive. The subsequent collaboration was extensive, e.g.: "...with the adroit help of Bill Taylor from the Civil Rights Commission, we [the White

House] encouraged departments to implement their affirmative recommendations..." (p.147).

° Indeed, the expectation of comity and cooperation was so fundamental that Wofford was greatly surprised when friction did occur between the Commission and the Department of Justice (pp. 160-161): "When bureaucratic warfare between Burke Marshall and commission staff director Beryl Bernhard first broke out, I couldn't believe it..."

—Wofford's book contains further evidence of the Commission's (however grudging) responsiveness to Executive direction. E.g., in regard to a scheduled Commission hearing (in Louisiana): "Bernhard argued back, but [Robert] Kennedy just repeated, 'You tell the commission to call it off. Get in touch with them now, and call it off'. [Commissioner] Storey, who was to be chairman of the hearing, agreed to talk with the other commissioners and at about 2 a.m. telephoned Bernhard to say the hearing should be postponed. To Bernhard's protest, the former president of the American Bar Association explained, 'We just can't ignore the request of the Attorney General of the United States when he thinks our timing would be harmful'." (Wofford, pp. 162-163).

—Carl M. Brauer furnishes a similar example in regard to hearings scheduled in Mississippi:

"The Attorney General wrote [Chairman Hannah] that 'public hearings now in the area of race relations by any federal agency' in Mississippi were bound to hinder the work of his department....[parallel work by the Justice Department, according to Kennedy] although not a 'complete reason' for the Commission to refrain from making its own investigation, it did seem to him 'relevant in balancing the needs of the federal government at the moment'. Bowing to these arguments, Hannah wrote the Attorney General that 'the Commission would be remiss not to yield to your request to forego, for the time being, its scheduled public hearing'".

—Indeed, the Commissioner's awareness of the agency's status as a agent of the Executive was such that, following its clash with the Justice Department, they proposed that the Commission be given additional Executive responsibilities (which would have entailed additional Presidential supervision and control):

"The Civil Rights Commission's turnabout on the Mississippi hearing in response to Robert Kennedy's urging reflected a certain ambivalence in its feeling about its own role. Initially it had served essentially as an investigatory body. However, by mid-February 1963...[the Commissioners] believed that they had already uncovered sufficient information...Indeed, were investigation 'to continue to be the only function of' the Commission', they 'would recommend that the agency be terminated'. They proposed instead that the Commission be given 'an operational role', perhaps including mediating local racial conflicts...or serving as a guarantor of nondiscrimination in federal programs..." (Brauer, pp. 217-218).

b. Johnson Administration.

--An Executive role was assigned to the Commission during the succeeding administration. In Executive Order 11197, President Johnson explicitly recognized that Commission's Executive Branch status. That order noted that "a number of Federal departments and agencies have been charged...with specific responsibility for eliminating...discrimination and promoting equal opportunity" and that "there is a need for a single body to review and assist in coordinating [those activities]". It created the "President's Council on Equal Opportunity" to perform this function, chaired by the Vice President, on which the Chairman of the Civil Rights Commission served along with: the Secretaries of Defense, HEW, Agriculture, Commerce, and Labor; and the heads of the Civil Service Commission, EEOC, GSA, and other Federal agencies. The Council exercised a number of responsibilities for developing, implementing, and overseeing Executive policy and action relating to civil rights.

c. Carter Administration.

--One of the first initiatives announced by the Carter Administration was to reduce the number of Federal advisory committees. The Carter Administration did not hesitate to apply this policy to the Commission, and in fact attempted a radical intervention in the way the Commission does business (eliminating 51 state advisory committees and replacing them with 10 regional advisory committees). No distinction between the Commission on Civil Rights and other Federal entities was recognized in implementing this directive addressed to the "heads of all Executive departments and agencies" (February 25, 1977; 1977 Weekly Compilation of Presidential Documents, p 249. See also pp. 1012,1495):

° The memorandum itself was clearly a directive to Federal entities considered to be under the control of the President (e.g., "...I am ordering a government-wide, zero-base review of all advisory committees...") and the inclusion of the Commission among the recipients of the memorandum therefore is in itself evidence that the Carter Administration considered the Commission to be such an entity.

° The Carter Administration's view of the Commission's status was even more evident in its execution of the memorandum. As with other Federal agencies, the Commission was under considerable pressure to adopt OMB's "recommendations" (as Chairman Flemming testified, "I discussed this with my colleagues and with staff, and we decided as a Commission to indicate to the Office of Management and Budget that we would be willing to proceed along those particular lines. After that second conversation, we recall a communication from OMB that in effect was a directive to proceed along those lines...". "We accepted that idea when it was first presented to us by the Office of Management and Budget. We then got a directive from them to operate along those particular lines, and we have been proceeding to implement...").

° As Representative Drinan later summarized, "We had [Flemming] here the other day. He didn't quite say it, but he wasn't thrilled about the decision, I gathered" ("U.S. Commission on Civil Rights Authorization Extension", Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, House of Representatives, 1978 (hereinafter cited as Hearings), pp. 34-36; 50-57).

° The move was aborted only when Congress amended the statute creating the Commission to require one advisory Committee per state. Even the Commission's most vociferous partisans, however, made clear that the issue was the wisdom of this particular initiative, not the President's authority to affect the management of the Commission (e.g. Congressman Drinan's questioning of an OMB official assumed that the Executive's authority extended to "micro management": "Did you consider other options? ...I wonder if you people considered the possibility of going back over the record of all these State advisory committees and say that we will suspend, at least for the present, advisory committees, in let's say, Montana, because they don't seem to find things to do, but keep the

ones as in California and New York, where a lot of things are happening".)

--Although the Carter Administration elected not to include the Commission in its reorganization of Executive branch civil rights activities (as the Johnson Administration had done); it was clearly certain that it had the authority to do so. For example, Wayne Grandquist, OMB Associate Director for Management and Regulatory policy, testified that Commission would be included in the review of Executive civil rights activities then underway by the President's Reorganization Task Force:

"There are no [OMB recommendations regarding continuing or terminating functions of the Commission] at this time. We will, in the President's Reorganization Project, Congressman, be looking at the operations of the Civil Rights Commission and produce some recommendations....The first phase of that study was completed last week when the President announced his plans on the EEOC. We will have a similar study that looks at civil rights activities in other areas, including the Civil Rights Commission".

(It will be recalled that the "study" of the EEOC resulted in far-reaching changes in that agency).



EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

July 5, 1983

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MEMORANDUM FOR: David Gergen
Dennis Patrick
Mike Uhlmann

FROM: Mike Horowitz **MH**

SUBJECT: Supplemental Memorandum: Historical background
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"The Attorney General wrote [Chairman Hannah] that 'public hearings now in the area of race relations by any federal agency' in Mississippi were bound to hinder the work of his department....[parallel work by the Justice Department, according to Kennedy] although not a 'complete reason' for the Commission to refrain from making its own investigation, it did seem to him 'relevant in balancing the needs of the federal government at the moment'. Bowing to these arguments, Hannah wrote the Attorney General that 'the Commission would be remiss not to yield to your request to forego, for the time being, its scheduled public hearing'".

—Indeed, the Commissioner's awareness of the agency's status as a agent of the Executive was such that, following its clash with the Justice Department, they proposed that the Commission be given additional Executive responsibilities (which would have entailed additional Presidential supervision and control):

"The Civil Rights Commission's turnabout on the Mississippi hearing in response to Robert Kennedy's urging reflected a certain ambivalence in its feeling about its own role. Initially it had served essentially as an investigatory body. However, by mid-February 1963...[the Commissioners] believed that they had already uncovered sufficient information...Indeed, were investigation 'to continue to be the only function of the Commission', they 'would recommend that the agency be terminated'. They proposed instead that the Commission be given 'an operational role', perhaps including mediating local racial conflicts...or serving as a guarantor of nondiscrimination in federal programs..." (Brauer, pp. 217-218).

b. Johnson Administration.

—An Executive role was assigned to the Commission during the succeeding administration. In Executive Order 11197, President Johnson explicitly recognized that Commission's Executive Branch status. That order noted that "a number of Federal departments and agencies have been charged...with specific responsibility for eliminating...discrimination and promoting equal opportunity" and that "there is a need for a single body to review and assist in coordinating [those activities]". It created the "President's Council on Equal Opportunity" to perform this function, chaired by the Vice President, on which the Chairman of the Civil Rights Commission served along with: the Secretaries of Defense, HEW, Agriculture, Commerce, and Labor; and the heads of the Civil Service Commission, EEOC, GSA, and other Federal agencies. The Council exercised a number of responsibilities for developing, implementing, and overseeing Executive policy and action relating to civil rights.

c. Carter Administration.

—One of the first initiatives announced by the Carter Administration was to reduce the number of Federal advisory committees. The Carter Administration did not hesitate to apply this policy to the Commission, and in fact attempted a radical intervention in the way the Commission does business (eliminating 51 state advisory committees and replacing them with 10 regional advisory committees). No distinction between the Commission on Civil Rights and other Federal entities was recognized in implementing this directive addressed to the "heads of all Executive departments and agencies" (February 25, 1977; 1977 Weekly Compilation of Presidential Documents, p 249. See also pp. 1012,1495):

° The memorandum itself was clearly a directive to Federal entities considered to be under the control of the President (e.g., "...I am ordering a government-wide, zero-base review of all advisory committees...") and the inclusion of the Commission among the recipients of the memorandum therefore is in itself evidence that the Carter Administration considered the Commission to be such an entity.

° The Carter Administration's view of the Commission's status was even more evident in its execution of the memorandum. As with other Federal agencies, the Commission was under considerable pressure to adopt OMB's "recommendations" (as Chairman Flemming testified, "I discussed this with my colleagues and with staff, and we decided as a Commission to indicate to the Office of Management and Budget that we would be willing to proceed along those particular lines. After that second conversation, we recall a communication from OMB that in effect was a directive to proceed along those lines...". "We accepted that idea when it was first presented to us by the Office of Management and Budget. We then got a directive from them to operate along those particular lines, and we have been proceeding to implement...").

° As Representative Drinan later summarized, "We had [Flemming] here the other day. He didn't quite say it, but he wasn't thrilled about the decision, I gathered" ("U.S. Commission on Civil Rights Authorization Extension", Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, House of Representatives, 1978 (hereinafter cited as Hearings), pp. 34-36; 50-57).

° The move was aborted only when Congress amended the statute creating the Commission to require one advisory Committee per state. Even the Commission's most vociferous partisans, however, made clear that the issue was the wisdom of this particular initiative, not the President's authority to affect the management of the Commission (e.g. Congressman Drinan's questioning of an OMB official assumed that the Executive's authority extended to "micro management": "Did you consider other options? ...I wonder if you people considered the possibility of going back over the record of all these State advisory committees and say that we will suspend, at least for the present, advisory committees, in let's say, Montana, because they don't seem to find things to do, but keep the

ones as in California and New York, where a lot of things are happening".)

--Although the Carter Administration elected not to include the Commission in its reorganization of Executive branch civil rights activities (as the Johnson Administration had done), it was clearly certain that it had the authority to do so. For example, Wayne Grandquist, OMB Associate Director for Management and Regulatory policy, testified that Commission would be included in the review of Executive civil rights activities then underway by the President's Reorganization Task Force:

"There are no [OMB recommendations regarding continuing or terminating functions of the Commission] at this time. We will, in the President's Reorganization Project, Congressman, be looking at the operations of the Civil Rights Commission and produce some recommendations....The first phase of that study was completed last week when the President announced his plans on the EEOC. We will have a similar study that looks at civil rights activities in other areas, including the Civil Rights Commission".

(It will be recalled that the "study" of the EEOC resulted in far-reaching changes in that agency).

August 8, 1983

FOR: EDWIN MEESE III
ROGER PORTER

FROM: MICHAEL M. UHLMANN

SUBJECT: "Independence" of Civil Rights Commission

Attached is an outline of all CRC meetings since 1958, which notes the relationship between the CRC and outsiders, especially the Executive. The most obvious fact which emerges, of course, is that the Commission worked hand-in-glove with the Kennedy and Johnson Administrations.

But among the other nuggets in this vein is the fact that nominees were invited to participate in Commission meetings prior to their confirmation. This suggests a tactic to be considered for the September meeting.

With your approval, I will find out whether Penny is amenable to extending such an invitation to the nominees and, if so, ask him to speak with each of them about the possibility.