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THE PRESIDENTIAL HANDWRITING FILE

THE WHITE HOUSE

WASHINGTON

March 17, 1975

MEMORANDUM FOR THE PRESIDENT

FROM: PHILIP W. BUCHEN *P.W.B.*

SUBJECT: Equal Employment Opportunity Commission (EEOC)

1. Background: Conditions of mismanagement and dissension within the EEOC and its staff have led your staff to recommend to you that changes be made in the composition of the Commission (now consisting of four members, including Chairman John Powell, with one Democrat vacancy) and in the position of General Counsel (now held by William Carey).

The statute (42 U.S.C.A. §2000● et. seq.) provides:

"Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years . . . The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman."

"There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years."

Chairman Powell's term on the Commission started 15 months ago, and it does not expire until 1978. Counsel Carey took office in early 1973, and his 4-year term does not expire until 1978.

The statute makes no provision for removal from office of any of the Presidential appointees. However, the President has been held in the courts to have unlimited authority to remove any appointed official within the Executive branch. This principle was last restated

by the Supreme Court in a decision of 1926, and by a Circuit Court of Appeals in 1940. Yet this principle has been departed from in Supreme Court decisions of 1935 and 1958, which involved appointees to an independent regulatory agency or to one having adjudicatory powers.

It is the opinion of the Department of Justice that EEOC is not an independent regulatory agency or one having adjudicatory powers. Its functions are primarily to investigate and conciliate complaints of discrimination, although it is also entitled when it finds probable cause to bring court actions to have complaints adjudicated. Therefore, it is the further view of DOJ that you have removal power over the persons in question, based on the present state of the case law, but they do believe there is risk that litigation of the issue may in today's climate bring a contrary holding. Only on your authority to designate another member of the Commission as Chairman would there be no risk of litigation, because this designation is not for any specified term.

Although the statute is silent even on removal for cause, it could be argued that a better case for removal authority could be made if you acted to remove for cause. However, the DOJ raises a note of caution that a court may still require administrative due process before upholding removal for cause and could review the adequacy of the administrative finding of cause warranting removal.

On the question of whether an appointee who claims he has been unlawfully removed may get preliminary injunctive relief, the answer in the past would have been he could not because of his adequate remedy at law for damages. But as you know courts are currently giving unprecedented early injunctive relief, and the DOJ is concerned on this issue.

2. Positions taken by the appointees.

With much help from Dick Cheney and Bill Walker, I have sought the immediate resignations of Powell as both Chairman and Commissioner and by Carey as General Counsel. Carey says he will resign but only after Powell resigns and his resignation is announced. He contends that otherwise he can only be removed for cause. Powell indicates he may resign as Chairman on

Wednesday, because he knows you can readily remove him from that office, but he would only resign as a Commission member if and when he found another acceptable opportunity. He too thinks he is protected from removal except for cause.

3. Options

a) Send removal letter immediately explaining the concerns which have led to your actions but not predicating the removal on any administratively determined cause.

Pro argument:

-- A resolution quickly of two major personnel problems which if coupled with top-notch replacements could lead to a much improved functioning of the Commission and a reduction in its vast case backlog.

Con arguments:

-- Risk of litigation.

-- Public reaction from those who would regard the steps as precipitous and unfair.

-- Congressional offense at your defying the statutory terms of the appointees.

b) Removal only after administrative hearings and findings of adequate casue.

Pro arguments:

-- Avoids risk of losing litigation on due process issue.

-- Better public and Congressional reaction.

Con arguments:

-- Delay and more turmoil before hearings can be completed.

-- Uncertainty over appropriate mechanism for hearings and findings when the arguments and evidence are likely to be extensive and confusing.

c) Removal of Powell as Chairman, interim designation of another member as acting Chairman, and naming of new Republican, when the next position for such an appointee opens in May 1975, who would be truly qualified to be designated as Chairman.

Pro argument:

-- Avoids risk of litigation and most risk of adverse public and Congressional reaction.

-- Would still permit trying to get resignations by persuasion.

Con argument:

-- Leaves prime sources of trouble in position to continue making difficulties.

4. Decision

Approve option "a" _____.

Approve option "b" _____.

Approve option "c" _____.

See me to discuss _____.