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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-202482

April 7, 1981

The Honorable Spark M. Matsunaga
United States Senate

NOT BEING AVAILABLE TO PUBLIC INSPECTION

Dear Senator Matsunaga:

We refer to your letter of March 12, 1981, in which you ask whether the President's dismissal of the nine members of the Native Hawaiians Study Commission was improper. Members

[The Native Hawaiians Study Commission was established] by Title III of Public Law 96-565, December 22, 1980, 94 Stat. 3321, 3324. The purpose of this Commission is [to conduct a study of the culture, needs and concerns of Native Hawaiians.] You advise us that on January 19, 1981, President Carter duly appointed the Commissioners and designated the Commission's Chairman and Vice-Chairman. You further advise that [President Reagan dismissed the nine Commissioners on March 11, 1981, and you ask whether such dismissal is improper.]

President's Removal Authority

With regard to appointments Article II, Section 2, clause 2, of the United States Constitution provides in pertinent part as follows:

"* * * [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."

[The Constitution is silent concerning the President's power to remove civil officers. However, it is well established that the President's power to remove executive officers is generally incident to his power of appointment.] Shurtleff v. United States, 189 U.S. 311 (1903) and Myers v. United States, 272 U.S. 52 (1926). As stated by the Court in Myers at 117:

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"The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. * * * As he is charged specifically to take care that they be faithfully executed, the reasonable implication even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible. * * *"

The Court in Myers further states at 119 that the reason for this long-standing principle of constitutional and statutory construction, that the power of removal is incident to the power of appointment, is that those in charge of and responsible for administering the functions of Government who select their executive subordinates, need to have the power to remove those whom they appoint in order to meet their responsibility. Thus, in Myers, the Court held that the Congress could not limit the President's removal power by requiring that the Senate assent to the President's removal of postmasters who had been appointed by the President, by and with the advice and consent of the Senate. The Court in Myers did not answer the question as to whether by placing the power of appointment in the President alone, the Congress could make the President's removal power more subject to congressional restriction. However, the Court stated that if this issue were addressed it might be difficult to avoid a negative answer. Myers at 161-162. In Humphrey's Executor v. United States, 295 U.S. 602 (1935) the Supreme Court limited the application of the Myers case to all "purely executive officers." The Humphrey case involved the President's removal for political reasons of a member of the Federal Trade Commission (FTC). The act creating the FTC provided for appointment of the FTC members by the President, by and with the advice and consent of the Senate. The act also provided for a specific term of office and expressly provided that any commissioner "may be removed by

the President for inefficiency, neglect of duty, or malfeasance in office* * *." The Court stated that the language and legislative history of the act demonstrated the congressional intent to create a body which would 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 department of the Government. In holding that Myers only extended to all "purely executive officers" so that such case would not control its determination, the Court in Humphrey stated at page 627:

"The Office of a postmaster is so essentially unlike the Office now involved that the decision in the Myers case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the Myers case finds support in the theory that such an officer is merely one of the units in the executive department and hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. * * *"

The Court found that in making investigations and reports thereon for the information of Congress the FTC acts like a legislative agency and, that under its authority to act as a master in chancery, it acts as an agency of the judiciary. The Court further found that to the extent that the FTC exercises any executive functions--as distinguished from executive power in the constitutional sense--it does so in carrying out its quasi-legislative or quasi-judicial powers or as an agency of the legislative or judicial departments of the Government. The Court held that the authority of Congress, to create quasi-legislative or quasi-judicial agencies to discharge duties independent of executive control could not be doubted, and that such authority included the power to fix the period during which the individuals appointed to those agencies continue in office and to forbid their removal except for cause. Thus, the Court ruled that the Congress had the authority to condition the

President's power to remove members of the FTC so that the President's removal action was improper. However, the Court refused to set forth a general rule concerning the President's removal power and stated that between the decision in Myers sustaining the unrestrictable power of the President to remove purely executive officers, and its ruling that such power does not extend to removal of FTC members, there remained a field of doubt. Cases falling within that field of doubt were for future consideration.

In Wiener v. United States, 357 U.S. 349 (1958) the Supreme Court considered the President's removal, for political reasons, of a member of the War Claims Commission established by the War Claims Act of 1948. The act provided that the Commissioners were to be appointed by the President, by and with the advice and consent of the Senate. The limitation on the Commission's life, 3 years after the expiration of the time for filing claims, was the mode by which the tenure of the Commissioners was defined and the act contained no provision for the removal of a Commissioner. The Court stated the essence of the Humphrey case was that it drew a sharp line of cleavage between those officials who were part of the executive establishment and were thus removable under the President's constitutional powers, and those who are members of a body "to exercise its judgment without the leave or hindrance of any other official or any department of the government." Humphrey at 625-626. The Court further stated that this sharp differentiation arises from the difference in functions between those officials who are part of the executive establishment and those whose duties require absolute freedom from executive interference. In view of the legislative establishment of the War Claims Commission as an adjudicatory body "not subject to review by any other official of the United States or by any other Court* * *" the Court held that the Constitution did not provide the President with the power of removal of the Commissioners on the basis that he desired his own appointees to serve and that such power could not be implied simply because the War Claims Act was silent on the matter of removal.

While the holdings in Humphrey and Wiener were based on the particular statutes under consideration these cases established that the President's unrestricted removal power is clear only with regard to "purely executive officers."

The Native Hawaiians Study Commission

An examination of the pertinent provisions of the Native Hawaiians Study Commission shows that, [except for its selection, the Commission is independent of control or influence by the President and that its function is essentially as an aid to the legislative power in that it is to gather information and make recommendations to the Congress.]

Section 302 of Public Law 96-565, supra, provides that the Commission shall be composed of nine members appointed by the President who shall also designate the Chairman and Vice-Chairman of the Commission at the time of appointment. Furthermore, this section provides that the President shall call the first meeting of the Commission not more than 90 days after the date of enactment of Title III. [The law contains no provision with regard to the removal of the Commissioners or the filling of vacancies on the Commission.]

Subsection 303(a) provides that the Commission is to conduct a study of the culture, needs, and concerns of the Native Hawaiians. Subsection 303(b) directs the Commission to conduct hearings and take such other actions it considers necessary in order to obtain full public participation in its study. Subsection 303(c) provides that within 1 year of its first meeting, the Commission shall publish a draft report of the study's findings and shall distribute copies of the draft report to appropriate Federal and State agencies, Native Hawaiian organizations and, upon request, to members of the public. It is to solicit written comments from those who receive the draft report. Subsection 303(d) provides that after taking into consideration any comments submitted, the Commission shall issue a final report of the study, together with copies of all written comments submitted, to the President and to the Senate Committee on Energy and Natural Resources and to the House Committee on Interior and Insular Affairs. Section 304 provides that except as provided in subsection (b) of section 307, upon the expiration of 60 days after the submission of its report, the Commission shall cease to exist. Subsection 307(b) provides in pertinent part that a reasonable portion of the funds appropriated for the Commission's study is to be reserved for the purpose of paying the transportation, subsistence, and reasonable expenses of the Commission members in testifying before Congress with respect to their duties and activities while serving on the Commission or on matters

involving the study's findings after the expiration of the Commission. Subsection 303(e) provides that the Commission shall make recommendations to the Congress based on the findings and conclusions of its study.

Your remarks on the floor of the Senate during its consideration of Title III of Public Law 96-565 clearly support the view that the essential purpose of the Native Hawaiians Study Commission is to provide the Congress with information which would provide a basis for taking appropriate action with regard to Native Hawaiians. 126 Cong. Rec. S. 11567 (December 4, 1980). Also during the consideration of Title III in the House of Representatives, Representative Burton stated that it was his sincere hope that the findings and recommendations of the Commission relative to the past and present problems of Native Hawaiians would enable the Congress to establish a base upon which the Congress could decide on the best possible approach to assist the Native Hawaiians. 126 Cong. Rec. H. 12137 (December 5, 1980). The limited legislative history of Title III does not contain any other comments concerning the function of the Commission.

We note that since Title III vests in the President alone the power to appoint the Commissioners and since Title III is silent as to the removal of the Commissioners or the filling of vacancies, (it may be argued that the Congress intended that the President have broad authority to determine the composition of the Commission and that such authority would necessarily include the power of removal.) However, in the absence of legislative history which would support such a view, we are not persuaded that the Congress intended that the President have the power to remove the Commissioners.) Accordingly, we believe that in view of the express provisions of Title III and the pertinent legislative history, (it can be concluded that the role of the Commission is to act as an aid to the Congress and that except for the manner of selection thereto, the Commission is essentially independent of the President.) Title III provides that the Commission shall provide copies of its draft report to appropriate Federal agencies, which presumably includes executive branch agencies, and that it shall solicit written comments therefrom. However, in context, these provisions do not subject the Commission to executive branch control. In addition, the Commission's providing the President with a copy of its final report may be viewed as no more than a courtesy by the Congress since Title III does not provide that the Commission will make recommendations to the President.

Although Buckley v. Valeo, 424 U.S. 1 (1976) did not involve the issue of the President's power of removal, it serves to support the position that the nature of the functions performed by the Commission are in aid of the legislative power so that the Commission may be viewed, at the least, as acting in a quasi-legislative capacity. The Buckley case involved the validity of appointments to the Federal Election Commission where the Federal Election Act provided that only two voting Commission members were to be appointed by the President and the remaining voting members were to be appointed by the designated congressional officers. The court held at 137-138 that the Commission as constituted could properly carry out the following functions which it viewed as merely an aid of the legislative function.

"Insofar as the powers confided in the Commission are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees, there can be no question that the Commission as presently constituted may exercise them. Kilbourn v. Thompson, 103 U.S. 168 (1881); McGrain v. Daugherty, 273 U.S. 135 (1927); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975). As this Court stated in McGrain, *supra*, at 175:

'A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information--which not infrequently is true--recourse must be had to others who do possess it. * * *'

We note that [it may be argued that the members of the Native Hawaiians Study Commission are not "Officers of the United States" but are individuals carrying out an exclusively legislative function. Such a view would appear to further cast in doubt the President's power to remove the Commissioners.]

In Buckley, the Court stated at 125-126 as follows:

"We think that the term 'Officers of the United States' as used in Art. II, defined to include 'all persons who can be said to hold an office under the Government'* * * is a term intended to have substantive meaning. We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article."

To the extent that the Election Commission's functions fall in the same general category as those powers Congress may delegate to one of its own committees, the Court held that the Commission's functions did not involve the powers of "Officers of the United States" who were defined as those who exercise "significant authority under the laws of the United States." Furthermore, in Buckley the Court stated at pages 138-139 as follows:

"Congress may undoubtedly under the Necessary and Proper Clause create 'offices' in the generic sense and provide such method of appointment to those 'offices' as it chooses. But Congress' power under the Clause is inevitably bounded by the express language of Art. II § 2, cl. 2, and unless the method it provides comports with the latter, the holders of those offices will not be 'Officers of the United States.' They may, therefore, properly perform duties only in aid of those functions that Congress may carry out by itself, or in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not 'Officers of the United States.'"

Accordingly, under Buckley Congress may provide the method of appointment to "offices" in the generic sense. Presumably this includes appointment by one of the modes set forth in Article II, Section 2, Clause 2, of the Constitution. In the light of the functions of the Commission it is possible to regard the Commissioners as not being Officers of the United States so that the Congress, if it so chose, could have vested

in itself the exclusive power to appoint the members of the Commission. Such a view would appear to compel a restrictive view of the President's power to remove the Commission members. We note that in B-194074, March 26, 1979, we held that the National Commission on Air Quality was a legislative rather than an executive branch agency notwithstanding that 7 of its 11 members were appointed by the President. The basis of this decision was that its reporting and advisory responsibilities are exclusively to Congress and that it has no regulatory or executive powers.

Since the Native Hawaiians Study Commission's duties and responsibilities are to aid the Congress by providing information on the needs and concerns of Native Hawaiians and to make recommendations thereon and since Title III does not provide the President with the authority to direct the action of the Commissioners, [it appears that the Commissioners are not "purely executive officers" such as those over whom the President would enjoy an unrestricted power of removal.]

We must note, however, that the decisions in Humphrey and Wiener were based on the particular statutes there involved and that while those decisions cast considerable doubt on the power of the President to remove officials who are essentially exercising non-executive powers independent of the executive departments, [the Supreme Court has not established a general rule with regard to the President's removal power. In fact, the court cautiously restricted the decisions to cases involving similar facts.]

As indicated above [the Native Hawaiians Study Commission is appointed by the President alone with no provision for congressional participation. Nor is any provision made for removal of members or for the filling of vacancies. Although this might be viewed as a delegation of authority to the President to control the composition of the Commission, we know of no court case which would support the application of such a conclusion to individuals appointed to perform a legislative function.]

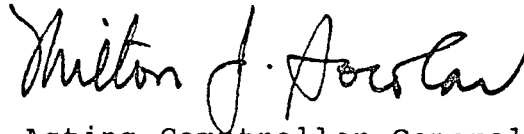
Finally, [the President apparently has not appointed members to the Commission to replace those removed.] Especially [in view of the requirement that the Commission meet within 90 days of the enactment] of Public Law 96-565, [the removal of the Commissioners appears to have thwarted, at least temporarily,

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the purpose of the legislation. However, the ultimate result of the President's action is not clear at this time.)

We trust that the above information serves the purposes of your inquiry.

Sincerely yours,

A handwritten signature in cursive script that reads "Milton J. Fowler". The signature is written in dark ink and is positioned above the typed name.

Acting Comptroller General
of the United States