AGAZARIAN

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

15598

December 4, 1980

B-201035

Do not make available to Public reading

The Honorable John D. Dingell
Chairman, Subcommittee on Energy
and Power
Committee, on Interstate and
Foreign Commerce
House of Representatives

Dear Mr. Chairman: [Questions Concerning]

We refer to your letter of October 24, 1980, in which you present questions which arise out of the President's action in making recess appointments of five members of the Board of Directors of the United States Synthetic Fuels Corporation.

Title I, Part B of the Energy Security Act (Act), known as the United States Synthetic Fuels Corporation Act of 1980, Public Law 96-294, June 30, 1980, 94 Stat. 633, 611 established the United States Synthetic Fuels Corporation (Corporation). The purpose of the Corporation is to stimulate production of synthetic fuels.

Section 113 of the Act provides that Part B shall take effect on the date of enactment. Section 116 of the Act provides that the powers of the Corporation shall be vested in the Board of Directors, except for those powers and duties vested in the Chairman. Subsection 116(a)(2) further provides that the Board of Directors shall consist of a Chairman and six other Directors "appointed by the President by and with the advice and consent of the Senate."

On October 1, 1980, pursuant to Senate Concurrent Resolution 126, the Senate adjourned for a recess until November 12, 1980. At the time of adjournment the Senate had not acted on any of the nominations to the Board of Directors which the President had submitted. On October 5, 1980, effective that day, the President announced recess appointments to the Board of Directors of five individuals whose nominations were pending before the Senate.

You advise that on October 8, 1980, these five individuals held a meeting to conduct the business of the Corporation and scheduled another meeting for October 27, 1980.

513290/088412

In view of the fact that these individuals have not been confirmed by the Senate you have asked several questions concerning the legal status of their recess appointments and the validity of actions they have taken in the conduct of Corporation business.

The Presidents Recess Appointment Authority

You ask whether the provisions of the Vacancies Act, 5 U.S.C. §§ 3345-49, would provide the authority for these recess appointments. The Vacancies Act provides methods for the temporary filling of vacancies created by the death, resignation, sickness, or absence of the head of an executive or military department or the head of a bureau thereof whose appointment is not vested in the head of the department. The Vacancies Act, by its express terms, contemplates the vacancy of an office by the person occupying the position as a condition precedent to the application of its provisions. Accordingly, we have held that the Vacancies Act does not apply to positions which have never been filled. B-150136, May 16, 1978, copy enclosed. As none of the positions on the Board of Directors of the Corporation have ever been filled, the provisions of the Vacancies Act are not for application. In addition, we note that the Vacancies Act is only applicable to an "Executive department" and the Corporation does not appear to fall within such definition. See 5 U.S.C. § 101.

Because subsection 116(a)(2) of the Act provides that the Board of Directors shall be appointed by the President by and with the advice and consent of the Senate, you suggest that the Board does not exist in the absence of appointments thereto confirmed by the Senate. You ask what statutory authority the President has to make recess appointments to a body which has not yet been constituted.

We are not aware of any provision in the Energy Security Act or any other statute which would give the President authority to make appointments to the Board of Directors of the Corporation in a manner other than that provided for in Section 116 of the Act. /The President's authority to make recess appointments derives from article II, section 2, clause 3, of the Constitution which provides as follows:

> "The President shall have Power to fill up all Vacancies that may happen during the

> Recess of the Senate by granting Commissions which shall expire at the End of their next session."

The Appointments Clause of the Constitution, article II, section 2, clause 2, provides as follows with regard to the appointments of officers:

> "[The President] shall nominate, and by and with the Advice and Consent of the Senate shall appoint * * * 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 appointments of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Article II, section 2, clause 3, is essentially a proviso to the Appointments Clause. Unlike the Vacancies Act, it does not restrict the President's authority to fill offices to those vacancies in offices which have previously been filled.

In 19 Op. Atty. Gen. 261 (1889), the then Attorney General held that the President's power to make recess appointments under article II, section 2, clause 3, applies not only to vacancies which originate during recesses of the Senate, but also to vacancies which may have arisen while the Senate was in session. The Attorney General held that the President had the power to make recess appointments where a new office had been created by act of Congress, and existed during the session of the Senate, which had not been filled before the close of the session. As stated by the Attorney General at page 263:

> "The word 'vacancy' in the Constitution refers to offices, and signifies the condition where an office exists of which there is no incumbent. It is used without limitation as to how the vacancy comes to exist * * *. In the case submitted the law has created the office. The office, therefore,

> exists. There is no incumbent. There is, therefore, a vacancy, and the case comes under the general power to fill vacancies * * *."

In so concluding the Attorney General relied on the rationale in 12 Op. Atty. Gen. 32 (1866) wherein it had been held that the power to make recess appointments applies to vacancies which existed in the prior session of the Senate and continue into the recess as well as to vacancies which originate during a recess of the Senate. As stated by the Attorney General in 12 Op. Atty. Gen. 33 at 38 (1866):

> "The true theory of the Constitution in this particular seems to me to be this: that as to the executive power it is always to be in action, or in capacity for action; and that to meet this necessity, there is a provision against * * * vacancies in all the subordinate offices, and that at all times there is a power to fill such vacancies. It is the President whose duty it is to see that the vacancy is filled. If the Senate is in session, they must assent to his nomination. If the Senate is not in session, the President fills the vacancy alone * * *. There is no reason upon which the power to fill a vacancy can be limited by the state of things when it first occurred. On the contrary, the only inquiry is as to the state of things when it is filled."

Thus, where an office has been created by law, the President may fill such office pursuant to article II, section 2, clause 3, when the Senate is in recess even though the newly created position has not previously been filled by and with the advice and consent of the Senate. Section 113 of the Energy Security Act provides that Part B thereof, the United States Synthetic Fuels Corporation, shall take effect on the date of enactment (June 30, 1980). Subsection 115(a) provides that "There is hereby created the United States Synthetic Fuels Corporation" and subsection 116(a)(1) provides that the powers of the Corporation shall be vested in the Board of Directors,

except those functions, powers, and duties vested in the chairman. Since the positions on the Board of Directors were created incident to the establishment of the Corporation on June 30, 1980, it would appear that the vacancies in those positions come within the President's power to make recess appointments, insofar as the positions themselves are within the purview of the Appointments Clause.

The term "recess" not only refers to a formal termination of a session of the Senate but also means any temporary adjournment protracted enough to prevent the Senate from performing its function of advising and consenting to executive nominations in accordance with article II, section 2, clause 2 of the Constitution. See 33 Op. Atty. Gen. 20, (1921) and 28 Comp. Gen. 30 (1948), copy enclosed. The Attorney General has held that the President has the authority to make recess appointments during a 4-week adjournment of the Senate and that the President is necessarily vested with a large, though not unlimited, discretion to determine when there is a real and genuine recess which makes it impossible for him to receive the advice and consent of the Senate. 33 Op. Atty. Gen. 20 supra. Accordingly, the Senate's 6-week adjournment under Senate Concurrent Resolution 126 would appear to be so protracted as to be a recess during which the President may make appointments to office under article II, section 2, clause 3.

It should be noted that the commission issued pursuant to a recess appointment expires at the end of the Senate's next session following the adjournment sine die. The recent recess was not sine die, as Senate Concurrent Resolution 126 provides for a recess of the Senate until Wednesday November 12, 1980. Thus, appointments made by the President during that recess will expire at the end of the first session of the 97th Congress, unless the President calls a special session of Congress after the final adjournment of the 96th Congress, 2d Session. See 41 Op. Atty. Gen. 463 at 470 (1960). However, as such appointees serve at the pleasure of the President they may be removed by him prior to the expiration of their commissions. See 2 Op. Atty. Gen. 336 (1830).

The Status of Directors

The recess appointment authority of article II, section 2, clause 3, extends to positions covered by the Appointments

Clause. As suggested by your fifth question, the propriety of the recess appointments to the Board of Directors necessarily depends upon whether Directors are "Officers of the United States" within the meaning of article II, section 2, clause 2.

In view of subsection 117(c) of the Act which provides in part that "Except as specifically provided herein, Directors * * * shall not be subject to any law of the United States relating to governmental employment" you ask whether the members of the Board of Directors are "officers of the United States" under the U.S. Constitution.

The Courts have held that any person in the service of the United States who has been appointed in any of the modes prescribed in article II, section 2, clause 2, of the Constitution, is an "Officer of the United States." Hoeppel v. United States, 85 F. 2d 237 (D.C. Cir. 1936), cert. den. 299 U.S. 557. In Eltra Corporation v. Ringer, 579 F. 2d 294 at 300 (4th Cir. 1978) the Court held that the Librarian of Congress "by the nature of his appointment" is an officer of the United States. The Librarian is appointed by the President with the advice and consent of the Senate.

In Buckley v. Valeo, 424 U.S. 1 (1976), the Court strictly construed the requirement that officers of the United States must be appointed in accordance with Article II of the Constitution. The Court stated at 685 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' in United States v. Germaine, supra, [99 U.S. 508, 25 L. Ed. 482 (1879)] 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."

The legislative history of the Act clearly establishes that the Corporation is a Federal entity. The Senate Conference Report provides in pertinent part as follows:

> "Section 115(a) creates the United States Synthetic Fuels Corporation as a special purpose Federal entity to carry out the national synthetic fuel development program established in this part. Under this part the Corporation will provide financial assistance to the private sector for the purpose of bringing about the commercial production of synthetic fuel by private industry.
>
> "In order to expedite the achievement of the highly important national objectives of the legislation and obviate the delays that often beset programs administered by the departments and agencies of the Executive Branch this entity is established free of many of the constraints placed on such departments and agencies. The powers and authorities contained in Part B have been developed and perfected after months of effort in the House-Senate conference following passage by the Senate of S. 932 on November 8, 1979. Those new authorities contained in Part B are granted by the Congress exclusively for implementation by the independent Federal entity, the United States Synthetic Fuels Corporation."

See S. Conference Rep. No. 96-824, 96th Congress, 2nd Sess. 203. Also see H.R. Conference Rep. No. 96-1104, 96th Congress, 2nd Sess. 203.

A review of the powers of the Board of Directors pursuant to the Act shows that the members of the Board have substantial authority to carry out the Act. In order to encourage the development of means of producing synthetic fuels, the Board of Directors may provide financial assistance to private concerns, in the form of loans, loan guarantees, price guarantees, purchase agreements, and joint ventures. See sections 132 through 136 of the Act. Subsection 131(c) provides that all contracts, and instruments of the Corporation to provide or providing for, financial assistance shall be general obligations of the United States backed by its full faith and credit. In addition, the

Corporation is authorized to exercise the federal power of eminent domain with regard to Corporate construction projects for certain limited purposes. See subsection 171(c).

In view of subsection 116(a) of the Act providing that the Board of Directors shall be appointed in the manner prescribed by article II, section 2, clause 2 of the Constitution and as the Board members have substantial authority under the Act to carry out its provisions, including certain governmental functions, it appears that the members of the Board are "Officers of the United States" under Article II of the Constitution.

The legislative history of the Energy Security Act, shows that Congress was fully aware of the fact that Board members might be regarded as officers of the United States, notwithstanding the provisions of subsection 117(c).

The conference report on S. 932 includes the following discussion of the effect of subsection 117(c):

> "Except as specifically provided herein, Directors, officers and employees of the Corporation shall not be subject to the laws of the United States Government relating to Federal government employment (Sec. 117(c)).
>
> "It is acknowledged that the nature of the functions vested under this part with the Board of Directors of the United States Synthetic Fuels Corporation may impose upon the Directors the status of officers of the United States for Constitutional purposes, where performing such functions as (a) pledging the full faith and credit of the United States with respect to financial assistance agreements or (b) performing 'significant governmental duties' imposed by this part within the meaning of Buckley v. Valeo, 424 U.S. 1 (1976).
>
> "However, it is intended that irrespective of the constitutional status of the Board of Directors, neither the

> Directors, the officers or the employees shall be regarded as officers or employees of the United States, except as specifically provided herein. Thus, for example, Directors, officers and employees of the Corporation are not to be regarded as employees of the United States for the purpose of eligibility for civil service retirement benefits."

Senate Conference Rep. No. 96-824, supra, at 206. See also S. Rep. No. 96-387, 96th Congress, 1st Sess. 165 (1979).

The courts have recognized that statutory language broadly excepting employees of a Federal entity from Federal personnel laws does not necessarily change the status of those individuals as officers or employees of the United States. In Posey v. Tennessee Valley Authority, 93 F. 2d 726 (5th Cir. 1937) and Tennessee Valley Authority v. Kinzer, 142 F. 2d 833 (6th Cir. 1944) the Courts held that employees of the Tennessee Valley Authority (TVA), a corporate agency and instrumentality of the United States, are employees of the United States, even though the TVA has authority under what is now 16 U.S.C. § 831(b) (1976) to appoint, compensate, and define the duties of its officers and employees "without regard to the provisions of the Civil Service laws applicable to officers and employees of the United States."

In view of the above, we conclude that notwithstanding the provisions of subsection 117(c) of the Act, members of the Board of Directors of the Corporation are "Officers of the United States" for constitutional purposes. Specifically they are within the purview of the Appointments Clause. Thus, a vacancy in the office of a Director can be filled by a recess appointment under article II, section 2, clause 3.

Legislative Restrictions on the President's Authority to Make Recess Appointments

You have pointed out that in connection with section 116 of the Act, which requires that the Board of Directors be appointed by the President by and with the advice and consent of the Senate, you made the following statement in the floor debates on the Conference Report on Senate Bill S. 932:

> "We have also guarded against interim or recess appointments to the Board by requiring in section 116(b), that the Board consist only of those who have been appointed by the President by and with the advice and consent of the Senate. * * *" 126 Cong. Record H. 5719 (1980).

You indicate that this construction of subsection 116(b) is not contradicted by other expressions of legislative intent.

There is nothing in the legislative history other than the cited statement of June 26, 1980, which shows a legislative intent to restrict the President's power to make recess appointments. On the basis of the pertinent language and the legislative history of the Act, we cannot share your view that section 116 of the Act was intended to limit the President's constitutional authority to fill vacancies on the Board of Directors during a recess of the Senate. Moreover, we question whether the President's power to make recess appointments could be restricted in the manner suggested.

The Courts have refused to construe statutes in a manner which would restrict the President's power to make recess appointments under article II, section 2, clause 3.

In the matter of Henry P. Farrow and John S. Bigby, 3 F. Rep. 112 (Cir. Ct. N.D. Ga. 1880) the Court considered the effect on a recess appointment of a statute which provided for the circuit justice to fill a vacancy in the office of district attorney or marshall within any circuit, and for the person appointed to serve until an appointment is made by the President. The Court declined to hold that the circuit justice's exercise of his power of appointment precluded the President's exercise of his authority to make a recess appointment to the same position. The Court held that a recess appointment under article II, section 2, clause 3, constituted a valid Presidential appointment which terminated the appointment made by the circuit justice.

In Staebler v. Carter, 464 F. Supp. 585 (D.C., 1979) the matter under consideration was the construction to be given the appointment provisions of the Federal Election Campaign Act. Subsection 437c(a)(1) of title 2, United States Code, provides in pertinent part that the members of the Federal Election

Commission shall be "appointed by the President of the United States, by and with the advice and consent of the Senate." Subsections (a)(2)(B) and (D), respectively, provide that a member of the Commission may serve on the Commission after the expiration of his term until his successor has taken office and that any vacancy occuring in the membership of the Commission shall be filled in the same manner as in the case of the original appointment.

The plaintiff in Staebler was a Commission member who was "holding over" upon the expiration of his term of office. He argued that subsections 437c(a)(1) and 437c(a)(2)(D), in requiring any vacancy in the membership of the Commission to be filled by and with the advice and consent of the Senate, restricted the President's authority to make a recess appointment to the vacancy created by the expiration of his term. In rejecting this argument the Court indicated that it had serious reservations concerning Congress' power to limit the President's recess appointment authority. The Court stated at page 591:

> "Even assuming arguendo, without deciding, that Congress has the power to enact a prohibition on recess appointments with respect to vacancies occurring as a result of the expiration of terms of office (on the theory that it is then merely defining such terms of office and thus constraining the President's removal authority), it certainly lacks that authority, consistently with Article II, Section 2, Clause 3 of the Constitution, with respect to appointments to fill other vacancies. On that basis alone, therefore, the broad construction of clause (a)(1) and (a)(2)(D) advocated by plaintiff cannot stand.
>
> "Moreover, there is no basis either in the language of the statute or in its legislative history to support the conclusion that Congress meant to rein in the President in such an unprecedented manner. In the absence of a clearly expressed legislative intent, the Court will not speculate that the Congress sought to achieve a result which would

be both unusual and probably beyond its constitutional power."

The legislative history of the Act and the above-cited precedents lead us to conclude that the recess appointments made by the President to the Board of Directors of the United States Synthetic Fuels Corporation are not prohibited by law and are valid. Thus, such appointees may properly serve on the Board of Directors.

We believe that the above discussion answers your question concerning the effect of section 2 of article III of the bylaws of the Corporation adopted by the Board of Directors in their meeting of October 8, 1980. From the information which you have provided, this section of the bylaws appears to be no more than a restatement of the appointment authority of section 116, and it would be subject to essentially the same construction.

Validity of Board Meeting

The above determination provides a basis for responding to your additional questions concerning the legal status of the Board of Directors' meeting on October 8, 1980, and the actions taken by those present at the meeting.

In view of the President's recess appointments on October 5, 1980, the October 8, 1980 meeting appears to have been a valid meeting of the Board of Directors of the Corporation. The authority of the Board of Directors to hold meetings is contained in Section 116 of the Act. The actions taken by the Board of Directors at the October 8, 1980 meeting were apparently valid to the extent that those actions were within the scope of authority provided the Board under the Act. The Board as constituted would appear to have authority to obligate the United States to the extent contemplated by the Act and be empowered to authorize the sale of Treasury notes and other obligations pursuant to subsection 151(a)(1) of the Act. Because the Corporation has authority under subsection 171(a)(2) of the Act to use the United States mails under the same terms and conditions as executive departments, we doubt that its use of Department of Energy (DOE) envelopes would be improper. However, we are not aware of the precise nature of the arrangement between the Corporation and DOE concerning the use of penalty mail.

As part of your concern that the October 8 Board meeting may have been improperly convened, you point out that subsection 116(f)(1) requires public notice of meetings of the Board of Directors. Subsection 116(f) specifically provides that all meetings of the Board of Directors to conduct official business of the Corporation shall be open to the public and shall be preceded by reasonable public notice. You ask whether there was reasonable public notice of the particular meeting.

We have not been able to determine what notice, if any, was given of the meeting. However, it does not appear that lack of reasonable notice would invalidate any of the actions taken by the Board. The Corporation is not subject to 5 U.S.C. § 552b, commonly known as the Sunshine Act. Nonetheless, the provisions of subsection 116(f) on public notice parallel 5 U.S.C. § 552b(e)(1) and there is legislative history to suggest that Congress intended that subsection 116(f) be construed in a manner consistent with the Sunshine Act. See S. Conference Rep. No. 96-824, June 19, 1980, 96th Cong., 2d Sess. 205.

The Sunshine Act does not provide a basis to invalidate actions taken at a meeting convened without the reasonable notice required by its provisions. Subsection 552b(h)(2) provides:

> "* * * Nothing in this section authorizes any Federal court having jurisdiction solely on the basis of paragraph (1) to set aside, enjoin, or invalidate any agency action * * * taken or discussed at any agency meeting out of which the violation of this section arose."

See Consolidated Aluminum Corporation v. Tennessee Valley Authority, 462 F. Supp. 464 (M.D. Tenn. 1978), in which the Court held that, in view of subsection 552b(h)(2), the TVA Board's approval of a quarterly rate adjustment would not be invalidated by its failure to comply with the Sunshine Act.

Because the Directors appear to have been properly appointed and because the Board meeting appears to have been properly convened, there is no need to respond to your questions concerning possible legal recourse against the appointees for their participation in the October 8 meeting.

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

Sincerely yours,

Comptroller General
of the United States

Enclosures - 2