


January 16, 1981
*Pushed up by
WST 4:30 p.m.*MEMORANDUM FOR ZOE BAIRD
ASSOCIATE COUNSEL TO THE PRESIDENT

I am responding to your telephone request for our advice relating to the Corporation for Public Broadcasting. The question is whether the President is empowered to make recess appointments of the directors of the corporation, even though the corporation is not an agency or establishment of the United States Government, 47 U.S.C. § 396(b), and its directors are not, by reason of their status as such, deemed to be "employees of the United State, 47 U.S.C. 396(d)(2). Members of the Board are appointed by the President with the advice and consent of the Senate. 5 U.S.C. § 396(c)(1). It is our opinion that despite the nongovernmental status of the corporation and its directors the President can make recess appointments of its directors.

Our starting point is the fact that Congress in its wisdom chose to employ the constitutional technique provided by Article II, § 2, cl. 2, for the appointment of Board members. There is nothing in the Constitution to preclude this approach. It follows that the President has the authority to employ his recess appointment power provided by Article II, § 2, cl. 3, for the recess appointment power is appended to the basic power of making regular appointments. 

It is noteworthy that the same approach was used in making recess appointments of the incorporators of the Communications Satellite Corporation, a private corporation established by Congress. See 42 Op. A.G. 165, note 2 (1962). This action was not questioned by the Attorney General nor, as far as we are aware, by any member of Congress.

I am attaching a copy of a memorandum from Assistant Attorney General Roger Cramton, OLC, to the Counsel to the President dated January 3, 1973, coming to the same conclusion with respect to the Corporation for Public Broadcasting.

Leon Ulman
Deputy Assistant Attorney General
Office of Legal Counsel