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B-125187 September 11, 1973

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The Honorable John B. Anderson House of Representatives

Dear. Mr. Anderson:

Your letter of August 15, 1973, raises several questions concerning executive branch actions and plans with respect to the National Industrial Equipment Reserve (NIER).

NIER was established by the National Industrial Reserve Act of 1948, approved July 2, 1948, ch. 811, 62 Stat. 1225, as amended, 50 U.S.C. 451-462, as a means whereby a nucleus of "excess industrial property"-- defined therein as property, including machine tools and industrial manufacturing equipment, controlled by Federal agencies but not required for the immediate needs of such agencies--would be available for the immediate use of the military in a national emergency.

The Secretary of Defense is authorized and directed by the act to (1) determine which excess industrial property should become part of the reserve; (2) formulate a "national security clause" setting for th restrictions in the documents of lease or sale of such property in order to guarantee its availability when needed for national defense purpose; and (3) to consent to waiver or modification of the national security clause when he determines that specific property is no longer essential to national security or that a lesser interest will adequately fulfill the purposes of the act. 50 U.S.C. 435. Machine tools and industrial manufacturing equipment designated by the Secretary for inclusion in the reserve are to be transferred to the General Services Administration (GSA) for maintenance, repair and restoration and for leasing or other disposal by GSA. 50 U.S.C. 454(b), 455.

The Secretary of Defense is accorded general supervisory authority over GSA's treatment and disposal of reserve tools and equipment, including authority to permit and regulate the lending of such property to nonprofit schools when (a) he determines that a school's use thereof will contribute to national defense, and (b) the school agrees to make adequate provision for maintenanace of such property and for its return to GSA if needed. 50 U.S.C. 456. The act also established an "Industrial Review Committee" to annually review the justification for retention of property in the reserve and, among other things, to recommend to the Secretary disposition of property which it considers of insufficient strategic value to warrant retention in the reserve. 50 U.S.C. 459, 460.

Your letter to us states in part:

"*** As you may know, prior to fiscal 1973, NIER was funded under and managed by the General Services Adminstration, acting on behalf of the Department of Defense. In fiscal 1973, however, when the Administration proposed that NIER funding be shifted to the DoD budget, the Congress balked and NIER was not provided for under either the DoD or GSA regular appropriation. GSA subsequently terminated its operation of NIER in December of 1972, closing down the two storage facilities at Terre Haute, Ind., and Burlington, N. J., and discontinuing its 'tools for schools' loan program.

"In order to put NIER back on the track, I offered an amendment to the first supplemental appropriation bill of 1973 (H. J. Res. 496) to restore $1.8 million for NIER under the GSA budget. This was accepted in the House and Senate and thus became part of Public Law 93-25, enacted April 26th. Despite this clear indication of congressional intent with respect to the continuation of NIER, the Office of Management and Budget issued a directive to DoD on May 24, 1973, (copy attached) ordering the dismantlement of NIER. OMB has subsequently released $900,000 of the NIER supplemental appropriation to reimburse GSA for operating the reserve during the first half of fiscal 1973, and, according to testimony by GSA Assistant Administrator G.C. Gardner, Jr., OMB intends to release the other half for disposing of NIER machinery."

The memorandum form the Deputy Director of the Office of Management and Budget (OMB) to the Secretary of Defense dated May 24, 1973, attached to your letter, reads in partinent part:

The NIER program today does not serve as critical a defense used as it did in 1948. Continuation of the program in its current form does not seem necessary since:

"--The number of tools in the reserve is insignificant to the total inverntory of machine tools in the general economy--less than one-half percent.

"--Hardly any of the reserve tools have been mobilized since GSA assumed operating responsibility for the program (an annual average of 218 items for the 1960-1971 period and 383 items for the Vietnam build-up period of 1964-1968 were transferred to defense contractors in support of military contract requirements). Other sources probably would have been used if the tools had not been available in the reserve inventory.

"--The tools could be excessed with a national security clause which would permit effective recall in a national emergency. Further, under Title I of the Defense Production Act the President has the authority to take machine tools off production lines if shortages should jeopardize defense production priorities.

"--Manpower training objectives would be not if the tools were surplused since they could then be donated on a priority basis to educational institutions.

"Alternatives to the present NIER program have been given careful consideration and were subsequently reviewed in light of the congressional action on the 1973 supplemental appropriation. As discussed with members of your staff, we have determined that, rather than reactivate the NIER program, the tools should be decalred excess so that they might be donated to schools for vocational training purposes. If appropriate, a national security clause should be placed ont he

excessed tools as a contingency for effective recall in time of emergency. Furthermore, if in your judgement some of these tools are required for defense purposes, they can be transferred to the Defense General Industrial Reserve.

"In order to assure early delivery of these tools to the schools, immediate step shoul be taken to declare the tools excess and work out arrangements with the General Services Administration to assure an effective and orderly transition. Such arrangements should provide for Government disinvestment of the tools now in reserve as well as those in the future which would otherwise be added to the NIER inventory."

Also attached with your letter to us is a copy of your remarks appearing in the Congressional Record for August 3, 1973, at pages E 5349-50. You state therein that a total of $900,000 of the appropriation for NIER made by Public Law 93-25 has now been released to GSA as reimbursement for expenses incurred in the operation of the program during the first half of fiscal year 1973. You also refer to testimony by GSA's Assistant Administrator for Administration inddicating his understanding that OMB intends to utilize the remaining $900,000 of the appropriation to implement the alternative plan outlined in the OMB memorandum of May 24. See Hearings before a Subcommittee of the House Appropriations Committee on Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1974 (Part 4), page 813. Finally, your remarks of August 3 quote from a letter to you from GSA, dated June 12, 1973, which describes the procedures which would be required under the OMB plan as follows:

"Implementation of the Office of Management and Budget (OMB) plan for termination of the NIER program would require, first that the NIER tools be declared excess to the needs of the Department of Defense (DoD). They would then be screened among the Federal agencies for possible Federal utilization. If no further Federal need for the tools were determined, the equipment would be declared surplus and be made available for donation by the General Services Administration through the Department of Health, Education, and Welfare (HEW).

"Under existing DHEW procedures the tools would be allocated to State agencies for Surplus Property, not directly to schools. The distribution to schools or other eligible donees within each State would be accomplished by the State Agency."

In view of the foregoing, you request our opinion (1) whether OMB has legal authority to direct the Secretary of Defense to declare all NIER machinery excess and dispose of it through the surplus property donation program, and (2) whether OMB can authorize the expenditure of funds appropriated for NIER for the purpose of abolishing NIER.

Our Office has had occasion to study the impoundment aspect of current executive branch actions with respect to NIER. The $1.8 million appropriation to GSA contained in Public Law 93-25 was made for the purpose of restoring and carrying on the NIER program, and was necessarily based upon a congressional determination that the program should continue- -at least pending further congressional review. By contrast, it is clear that OMB's actions and plans with respect to NIER, discussed previously, amount to termination of the program envisioned and provided for in Public Law 93-25. Thus the congressional determination upon which the appropriation is based has been reversed by OMB.

OMB's most recent report pursuant to the Federal Impoundment and Information

Act, as amended, submitted to the Congress and to our Office on July 16, 1973, indicates that as of June 30,1973, $850,000 of the appropriation for NIER made by Public Law 93-25 has been placed in reserve, i.e., impounded. See page 31 of the itemized list of impoundments set forth therein. This impoundment is "explained" in the report by refernce to two standard "reason(s) for reserve action." These reasons, which purport to invoke the authority of the so-called Antideficiency Act, 31 U.S.C. 665, read as follows:

--"To achieve the most effective and economical use' of funds available for periods beyond the current fiscal year (31 USC 665 (c)(1)). This explanation includes reserves established to carry out the Congressional intent that funds provided for periods greater than one year should be so apportioned that they will be available for the future periods." and

--"Temporary defferal pending the establishement of administrative machinery (not yet in place) or the obtaining of sufficient information (not yet available) properly to appportion the funds and to insure that the funds will be used in 'the most effective and economical' manner (31 USC 665 (c)(1)). This explanation includes reserves for which apportionment awaits the development by the agency of approved plans, designs, specifications."

The NIER appropriation is available until expended, and is thus within the applicaiton of 31 U.S.C. 665 (c)(1). However, in view of OMB's actions and plans, we do not understand how the $850,000 reserve from this appropriation can be justified as an effort to achieve the most effective and economical use thereof. We certainly do not believe that this reserve can in amy sense be considered in furtherance of, or even consistent with, congressional intent. The second reason apprently refers to a deferral pending implementation of the OMB plan by the Secretary of Defense, since neither the appropriation nor the authorizing statute would seem to require the development of any elaborate plans, designs, or specifications by GSA.

In our judgment, neither of the reasons cited by OMB provides any legal basis for the current impoundment of the NIER appropriation. It is clear that the Antideficiency Act does contemplate, and in fact requires, reserve or impoundment actions which are designed in good faith to promote the economical and efficient application of appropriations to the purposes for which provided. However, we have on several occasions expressed the opinion that the Antideficiency Act does not authorize impoundments based upon general economic, fiscal or policy considerations which are inderogation of the purposes of an appropriation. We believe that the NIER impoundment must be placed in the latter category as a policy impoundment whereby OMB has substituted its judgment as to the desirability of NIER for that of the Congress.

For the reasons stated above, it is our opinion that he appropriation made by Public Law 93-25 requires that the NIER program be reactivated and carried on as provided for in the National Industrial Reserve Act. Accordingly, we conclude in general that here is no legal basis for OMB's plan to "redirect," "disinvest" or otherwise terminate NIER; nor do we believe that the appropriation may be impounded or divereted from its intended purposed in connection with the OMB plan.

With specific reference to your first question, the OMB Deputy Director's memorandum to the Secretary of Defense, set forth previously herein, states that OMB has "determined" not to reactivate NIER. It is further stated that NIER

tools should be declared excess so as to permit their donation to schools, although provision is made for transfer to the Defense General Industrial Reserve of any NIER tools which the Secretary determines are still required for defense purposes.

The OMB memorandum appears by its terms to afford the Secretary the option of either declaring items of NIER equipment excess or transferring them to the general reserve. On the other hand, it clearly deprives the Secretary of any discretion to retain any equipment in NIER. Such discretion is expreslly committed to the Secretary under the National Industrial Reserve Act, and we do not believe that OMB has any authority to interfere with its exercise. The act does contemplate periodic reviews of NIER equipment excess to the needs of the Department of Defense or to transfer items to the general reserve. However, such determinations are by statute his alone. It might be noted that the Secretary has no authority to donate excess property to schools. As indicated in GSA's letter to you, such property would first have to be declared surplus to the needs of the Federal Government by GSA and then transferred through the Department of Health, Education, and Welfare to a State agency for donation by the State agency.

With reference to your second question, we believe for the reasons stated previously that the appropriation made by Public Law 93-25 is available for expenditure only in connection with reactivation and operation of NIER. No portion of the $1.8 million appropriation has been or apparently will be used for these purposes. GSA's letter to you indicates that the amounts apportioned thus far were treated as reimbursement to that agency's operating expense account for costs relating to NIER incurred prior to April 30, 1973. While this account was used in the past to finance NIER, it appears in view of OMB's plan that the funds apportioned will ultimately be used for some other activity serviced by the same account. We have no way of knowing precisely when or how these amounts will actually be disbursed. It is also unclear precisely how the remaining $850,000 of hte appropriation now in reserve will be used even if the OMB plan is implemented. In this regard, GSA's letter to you states that additional funds would not be required to handle the normal offering of NIER tools for further Federal use of for donation, and that out-handling costs could be recovered from recipients. In any event, as stated previously, it is our opinion that the appropriation made by Public Law 93-25 is required to be used to implement the National Industrial Reserve Act, and is not available for any other purpose or activity.

Sincerely yours,

Elmer B. Staats Comptroller General of the United States