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B-200685, Dec 23, 1980

Number: B-200685

Date: 1980-12-23

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HENRY M. JACKSON, UNITED STATES SENATE:

THIS RESPONDS TO YOUR LETTER OF NOVEMBER 6, 1980, EXPRESSING CONCERN THAT CONGRESSIONAL EFFORTS TO PROCEED WITH FILLING THE STRATEGIC PETROLEUM RESERVE (SPR) HAVE BEEN, AND MAY CONTINUE TO BE, HINDERED BY THE EXECUTIVE BRANCH. YOUR LETTER RAISES SEVERAL QUESTIONS CONCERNING THE OPERATION OF THE IMPOUNDMENT CONTROL ACT AND ITS APPLICABILITY TO THE EXECUTIVE BRANCH'S USE OR NONUSE OF FUNDS APPROPRIATED FOR SPR. SET FORTH BELOW ARE YOUR QUESTIONS AND OUR ANSWERS TO THEM.

QUESTION: IS THE IMPLEMENTATION OF THE SPR PROGRAM SUBJECT TO THE CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT? IS IT APPLICABLE TO BUDGET AUTHORITY THAT REMAINS AVAILABLE UNTIL EXPENDED? IS THERE A REQUIREMENT TO EXPEND FUNDS TO LIQUIDATE OBLIGATIONS IN A TIMELY MANNER?

ANSWER: THERE ARE TWO TYPES OF IMPOUNDMENTS COVERED BY THE IMPOUNDMENT CONTROL ACT, "RESCISSIONS" AND "DEFERRALS." THE TERM "RESCISSION" IS NOT SPECIFICALLY DEFINED IN THE ACT. HOWEVER, SECTION 1012, 31 U.S.C. 1402, PROVIDES GUIDANCE AS TO WHEN A RESCISSION EXISTS. SECTION 1012 REQUIRES THE PRESIDENT TO REPORT A PROPOSED RESCISSION -

"(A) WHENEVER THE PRESIDENT DETERMINES THAT ALL OR PART OF ANY BUDGET AUTHORITY WILL NOT BE REQUIRED TO CARRY OUT THE FULL OBJECTIVES OR SCOPE OF PROGRAMS FOR WHICH IT IS PROVIDED OR *** SHOULD BE RESCINDED FOR FISCAL POLICY OR OTHER REASONS *** OR WHENEVER ALL OR PART OF BUDGET AUTHORITY PROVIDED FOR ONLY ONE FISCAL YEAR IS TO BE RESERVED FROM OBLIGATION FOR SUCH FISCAL YEAR ***."

A "DEFERRAL" IS DEFINED IN SECTION 1011(1), 31 U.S.C. 1401(1), AS A WITHHOLDING OR DELAYING OF THE OBLIGATION OR EXPENDITURE OF BUDGET AUTHORITY (WHETHER BY ESTABLISHING RESERVES OR OTHERWISE) PROVIDED FOR PROJECTS OR ACTIVITIES, OR ANY OTHER TYPE OF EXECUTIVE ACTION OR INACTION WHICH EFFECTIVELY PRECLUDES THE OBLIGATION OR EXPENDITURE OF BUDGET AUTHORITY.

CERTAIN COMMON ELEMENTS MUST EXIST IN ORDER FOR THERE TO BE AN IMPOUNDMENT UNDER THE IMPOUNDMENT CONTROL ACT, WHETHER IT IS IN THE FORM OF A RESCISSION OR A DEFERRAL. FIRST, "BUDGET AUTHORITY" MUST BE INVOLVED. SECOND, THE BUDGET AUTHORITY MUST BE WITHHELD OR DELAYED FROM OBLIGATION OR EXPENDITURE BY EXECUTIVE ACTION OR INACTION. THE IMPOUNDMENT CONTROL ACT DOES NOT APPLY TO PROGRAM IMPLEMENTATION DECISIONS AS SUCH, I.E., IRRESPECTIVE OF THEIR IMPACT ON BUDGET AUTHORITY. IF A PROGRAM DECISION AFFECTING IMPLEMENTATION OF THE SPR PROGRAM DOES NOT PRECLUDE THE OBLIGATION OR EXPENDITURE OF FUNDS, AN IMPOUNDMENT

DOES NOT RESULT.

THE SPR PROGRAM IS FINANCED BY APPROPRIATED FUNDS. NOTHING IN THE LEGISLATION AUTHORIZING OR APPROPRIATING FUNDS FOR SPR EXEMPTS SUCH FUNDS FROM THE IMPOUNDMENT CONTROL ACT. CONSEQUENTLY, ANY EXECUTIVE BRANCH ACTION OR INACTION WHETHER BASED ON PROGRAMMATIC, BUDGETARY, OR OTHER FACTORS, IS POTENTIALLY SUBJECT TO THE IMPOUNDMENT CONTROL ACT IF IT PRECLUDES OR DELAYS, THE USE OF BUDGET AUTHORITY. THIS IS TRUE EVEN IF THE BUDGET AUTHORITY INVOLVES NO-YEAR FUNDS, THAT IS, FUNDS MADE AVAILABLE UNTIL EXPENDED. IN FACT OF THE 132 DEFERRALS AND RESCISSIONS REPORTED BY THE PRESIDENT DURING FISCAL YEAR 1980, OVER HALF INVOLVED NO-YEAR FUNDS. HOWEVER, THE TYPE OF APPROPRIATION - FISCAL YEAR, MULTIPLE YEAR, OR NO- YEAR - MAY AFFECT WHETHER AN EXECUTIVE BRANCH IMPOUNDMENT IS CHARACTERIZED AS A RESCISSION OR A DEFERRAL.

THE IMPOUNDMENT CONTROL ACT DOES NOT IMPOSE ANY SPECIFIC REQUIREMENTS ON THE EXECUTIVE BRANCH AS TO THE RATE AT WHICH BUDGET AUTHORITY MUST BE OBLIGATED OR EXPENDED. FURTHERMORE, THE MERE FAILURE TO OBLIGATE THE FULL AMOUNT OF AN APPROPRIATION BEFORE IT EXPIRES DOES NOT NECESSARILY MEAN THAT THERE HAS BEEN AN IMPOUNDMENT. THERE MUST BE SUFFICIENT EVIDENCE OF AN INTENTION TO REFRAIN FROM OBLIGATING OR EXPENDING AVAILABLE BUDGET AUTHORITY, BASED ON THE FACTS AND CIRCUMSTANCES OF EACH CASE.

QUESTION: WHAT DUTY DOES THE COMPTROLLER GENERAL HAVE UNDER THIS ACT TO REPORT IMPOUNDMENTS?

ANSWER: SECTION 1015 OF THE IMPOUNDMENT CONTROL ACT, 31 U.S.C. 1405, AUTHORIZES THE COMPTROLLER GENERAL TO REPORT IMPOUNDMENTS TO THE CONGRESS WHEN THE PRESIDENT DOES NOT REPORT THEM IN A SPECIAL MESSAGE UNDER SECTIONS 1012 AND 1013 OF THE ACT, 31 U.S.C. 1402 AND 1403. THE ACT PROVIDES THAT THE COMPTROLLER GENERAL'S REPORT IS GIVEN THE SAME EFFECT AS IF IT HAD COME FROM THE PRESIDENT.

IF THE CONGRESS REJECTS AN IMPOUNDMENT THROUGH THE APPROPRIATE MECHANISM PROVIDED IN 31 U.S.C. 1402(B) FOR RESCISSIONS AND 31 U.S.C. 1403(B) FOR DEFERRALS, THE BUDGET AUTHORITY IS REQUIRED TO BE MADE AVAILABLE FOR OBLIGATION. IF THE EXECUTIVE BRANCH THEN REFUSES TO RELEASE THE FUNDS, THE COMPTROLLER GENERAL IS AUTHORIZED BY SECTION 1016 OF THE ACT, 31 U.S.C. 1406, TO BRING A CIVIL ACTION IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA TO REQUIRE THE BUDGET AUTHORITY TO BE MADE AVAILABLE. THE COMPTROLLER GENERAL'S RIGHT TO BRING SUIT IS MADE SUBJECT TO A CONGRESSIONAL WAITING PERIOD. THE COURT IS AUTHORIZED TO ISSUE ANY ORDER NECESSARY TO COMPEL THE RELEASE OF THE IMPOUNDED FUNDS.

WHEN IT COMES TO OUR ATTENTION THAT AN UNREPORTED IMPOUNDMENT MAY EXIST, WE CONTACT THE APPROPRIATE OFFICIALS AT THE AFFECTED AGENCY OR THE OFFICE OF MANAGEMENT AND BUDGET. IN MOST OF THE CASES WHERE AN UNREPORTED IMPOUNDMENT DID EXIST, EITHER THE FUNDS WERE MADE AVAILABLE FOR OBLIGATION OR THE IMPOUNDMENT WAS REPORTED TO THE CONGRESS AS REQUIRED BY THE ACT.

QUESTION: THE COMPTROLLER GENERAL ISSUED A DECISION ON OCTOBER 2, 1978, B-193005, IN THE MATTER OF "OBLIGATION OF FUNDS FOR PURCHASE OF OIL FOR STRATEGIC PETROLEUM RESERVE." THAT DECISION HELD THAT THE DEPARTMENT OF ENERGY (DOE) ISSUANCE OF AN OIL ACQUISITION ORDER TO THE DEFENSE FUEL SUPPLY CENTER TO PROCURE OIL FOR SPR AND ACCEPTANCE OF THE ORDER BY THE CENTER CONSTITUTED A "BINDING AGREEMENT" BETWEEN THESE AGENCIES AND, THEREFORE, WAS AN "OBLIGATION" OF THE APPROPRIATED FUNDS FOR SPR OIL ACQUISITION UNDER 31 U.S.C. 200(A)(1).

WOULD SUCH AN "OBLIGATION" OF FUNDS IN THE FUTURE, ACHIEVED THROUGH ISSUANCE OF AN OIL ACQUISITION ORDER SUBJECT TO FURTHER ADMINISTRATION APPROVAL, IMMUNIZE THE DOE FROM THE REQUIREMENTS OF THE CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT?

ANSWER: IN THE DECISION REFERRED TO IN YOUR QUESTION, WE WERE ASKED TO DETERMINE WHEN DOE FUNDS WERE CONSIDERED TO BE OBLIGATED UNDER AN INTERAGENCY AGREEMENT BETWEEN DOE AND THE CENTER TO PROCURE PETROLEUM FOR SPR. THE PROCEDURE ESTABLISHED WAS AN INTERAGENCY AGREEMENT UNDER WHICH DOE SUBMITS AN OIL ACQUISITION ORDER TO THE CENTER AND THE CENTER SUBSEQUENTLY AWARDS A CONTRACT TO A SELLER OF PETROLEUM ON BEHALF OF DOE. FOR THE REASONS STATED IN OUR DECISION, WE DETERMINED THAT THE INTERAGENCY AGREEMENT BECAME A BINDING AGREEMENT WHEN DOE PLACED ITS ORDER FOR OIL WITH DFSC, AND, CONSEQUENTLY, AN OBLIGATION COULD BE RECORDED AT THAT TIME.

CONCERN HAS BEEN EXPRESSED BY THE COMMITTEE STAFF THAT OUR 1978 DECISION MAY IMPACT ON THE APPLICABILITY OF THE IMPOUNDMENT CONTROL ACT TO THIS SITUATION. THIS IS NOT THE CASE. THE DEFINITION OF "DEFERRAL" IN SECTION 1011 OF THE ACT, 31 U.S.C. 1401, APPLIES TO WITHHOLDING OR DELAYING EXPENDITURES, AS WELL AS OBLIGATIONS, OF BUDGET AUTHORITY. CONSEQUENTLY, IF THE ADMINISTRATION TAKES ACTION WHICH WOULD AMOUNT TO AN IMPOUNDMENT WITH RESPECT TO SPR EXPENDITURES, IT MUST COMPLY WITH THE REQUIREMENTS OF THE IMPOUNDMENT CONTROL ACT, EVEN IF THE FUNDS HAD ALREADY BEEN OBLIGATED.

QUESTION. DOE SUBMITTED A STATEMENT ON MARCH 13, 1980, TO THE HOUSE COMMITTEE ON APPROPRIATIONS, ENTITLED, "NECESSITY FOR RESCISSION OR DEFERRAL MESSAGES CONCERNING STRATEGIC PETROLEUM RESERVE OIL ACQUISITION BUDGET AUTHORITY." THIS STATEMENT DEFENDED DOE'S DECISION NOT TO SUBMIT A SPECIAL MESSAGE TO THE CONGRESS UNDER 31 U.S.C. 1402 OR 1403 REGARDING FUNDS THAT WERE APPROPRIATED BUT NOT USED FOR SPR OIL PROCUREMENT. ARE THE ARGUMENTS CONTAINED IN THE DOE STATEMENT DISPOSITIVE OF FUTURE FACT SITUATIONS, SO THAT IF BUDGET AUTHORITY FOR SPR OIL PROCUREMENT IS NOT USED IN THE FUTURE, NO SPECIAL MESSAGE PROPOSING A BUDGET DEFERRAL OR RESCISSION NEED BE SENT TO THE CONGRESS?

ANSWER: DOE SUGGESTS IN ITS STATEMENT A NUMBER OF REASONS WHY THERE WAS NO IMPOUNDMENT AND, THEREFORE, NO REQUIREMENT TO REPORT TO THE CONGRESS IN THE MANNER PROVIDED IN THE IMPOUNDMENT CONTROL ACT. THE QUESTION OF WHETHER AN IMPOUNDMENT OCCURRED IN THIS INSTANCE IS MOOT SINCE THE FUNDS INVOLVED WERE RESCINDED ON JULY 8, 1980, IN THE 1980 SUPPLEMENTAL APPROPRIATIONS AND RESCISSION ACT, PUBLIC LAW 96-304. HOWEVER, WE WOULD LIKE TO COMMENT ON SOME OF THE POSITIONS TAKEN BY DOE IN ITS STATEMENT CONCERNING THE PURPOSE OF THE IMPOUNDMENT CONTROL ACT AND ITS APPLICABILITY TO DOE'S USE OR NONUSE OF APPROPRIATIONS FOR SPR.

DOE ALLEGED THAT ITS FAILURE TO PURCHASE OIL FOR SPR WAS A POLICY DECISION REFLECTING ADVERSE MARKET CONDITIONS, BUT THAT ITS INTENT ALWAYS WAS TO RESUME PURCHASES WHEN CONDITIONS IMPROVED. DOE ARGUED THAT THIS "INTENT" REQUIRED THE CONCLUSION THAT NO IMPOUNDMENT OCCURRED. THIS IS NOT CORRECT. ANALOGOUS POLICY DECISIONS HAVE BEEN THE SUBJECT OF IMPOUNDMENT MESSAGES INVOLVING OTHER PROGRAMS ON MANY OCCASIONS. THE ADMINISTRATION SUBMITTED APPROXIMATELY 22 PART-OF-YEAR DEFERRALS IN FISCAL YEAR 1980 IN WHICH THE ADMINISTRATION INTENDED TO USE THE FUNDS DURING THE FISCAL YEAR, BUT WAS DELAYING THEIR USE FOR POLICY OR PROGRAMMATIC REASONS. IN FACT, DOE'S OWN STATEMENT THAT IT "WAS TEMPORARILY PRECLUDED BY CIRCUMSTANCES FROM OBLIGATING AND EXPENDING FUNDS FOR A PERIOD OF UNFORESEEABLE DURATION" SUGGESTS THAT THERE WAS A DEFERRAL.

THERE IS ALSO AN IMPLICATION IN THE DOE STATEMENT THAT A DEFERRAL WOULD HAVE BEEN INAPPROPRIATE BECAUSE IT WOULD RESULT IN A REDUCTION OF BUDGET AUTHORITY WHICH WOULD BE INCONSISTENT WITH THEIR INTENT TO USE THE FULL AMOUNT OF AVAILABLE FUNDS, WHEN MARKET CONDITIONS IMPROVED. THIS ARGUMENT REFLECTS A MISUNDERSTANDING OF THE EFFECT OF A DEFERRAL PROPOSAL. DEFERRAL MERELY PLACES FUNDS IN RESERVE TO REFLECT A DECISION TO TEMPORARILY DELAY THEIR OBLIGATION OR EXPENDITURE. A DEFERRAL DOES NOT REDUCE THE LEVEL OF BUDGET AUTHORITY, WHICH IS ESTABLISHED BY LEGISLATION THROUGH AUTHORIZATION AND APPROPRIATION ACTS. AS SOON AS THE FUNDS ARE NEEDED BECAUSE THE ADMINISTRATION IS READY TO RESUME THE PROGRAM, THE FUNDS CAN BE MADE AVAILABLE BY ADMINISTRATIVE ACTION. THEREFORE, WE DO NOT UNDERSTAND DOE'S ARGUMENT THAT A DEFERRAL WOULD HAVE REDUCED ITS FLEXIBILITY IN ADJUSTING TO CHANGING MARKET CONDITIONS.

DOE SEEMED TO PLACE GREAT EMPHASIS ON THEIR REQUEST FOR A REAPPROPRIATION AS A REASON FOR NOT REPORTING AN IMPOUNDMENT (THE FUNDS WERE NOT EXPECTED TO BE USED BEFORE THEY EXPIRED ON DECEMBER 31, 1980). WE FAIL TO SEE HOW THIS REQUEST WOULD BE A BASIS FOR RELIEVING THE ADMINISTRATION OF ANY RESPONSIBILITY TO REPORT AN IMPOUNDMENT. THERE ARE MANY WAYS IN WHICH THE ADMINISTRATION CAN INFORM THE CONGRESS OF ITS INTENT WITH RESPECT TO FUTURE ACTIVITIES INVOLVING A PARTICULAR PROGRAM, INCLUDING A REQUEST FOR FUTURE APPROPRIATIONS. HOWEVER, THE IMPOUNDMENT CONTROL ACT DOES NOT AUTHORIZE THE ADMINISTRATION TO DISREGARD ITS REQUIREMENTS BECAUSE THE CONGRESS IS KEPT INFORMED THROUGH SOME OTHER MECHANISM. A REQUEST FOR REAPPROPRIATIONS SPEAKS TO THE FUTURE AND DOES NOT ADDRESS ACTIVITIES PRESENTLY BEING TAKEN WITH REGARD TO FUNDS ALREADY PROVIDED. DOE'S ARGUMENT THAT ITS REQUEST FOR REAPPROPRIATION IS MORE APPROPRIATE THAN A NOTICE OF IMPOUNDMENT IGNORES THE FACT THAT THESE ARE TWO SEPARATE AND DISTINCT PROPOSALS AND THE DECISION TO REQUEST FUTURE APPROPRIATIONS HAS NO BEARING ON WHETHER AN IMPOUNDMENT MESSAGE IS REQUIRED.

IN CONCLUSION, WE DO NOT CONSIDER THE PARTICULAR ARGUMENTS PRESENTED BY DOE AS BEING DISPOSITIVE OF WHETHER AN IMPOUNDMENT MESSAGE SHOULD BE SUBMITTED IF SIMILAR CONDITIONS AND DECISIONS OCCUR IN THE FUTURE.

QUESTION: IF THE ADMINISTRATION FAILS TO AUTHORIZE THE SOLICITATION OF ADDITIONAL CONTRACTS IN FY 1981 FOR PROCUREMENT OF OIL FOR THE SPR, WOULD THIS CONSTITUTE A "DEFERRAL OF BUDGET AUTHORITY" UNDER THE DEFINITION OF THAT TERM IN 31 U.S.C. 1401(1)?

ANSWER: AS WE DISCUSSED IN RESPONSE TO YOUR FIRST QUESTION, THE IMPOUNDMENT CONTROL ACT ADDRESSES ADMINISTRATIVE DECISIONS WHICH IMPACT ON WHETHER BUDGET AUTHORITY IS USED, RATHER THAN ON HOW THE PROGRAM IS IMPLEMENTED. A DECISION NOT TO ISSUE THE SOLICITATIONS REFERRED TO IN YOUR LETTER, BY ITSELF, WOULD NOT CONSTITUTE AN IMPOUNDMENT, IF THE BUDGET AUTHORITY IS USED TO PURCHASE OIL BY A MEANS OTHER THAN BY THE SOLICITATIONS PRESENTLY PENDING. HOWEVER, IF THE DECISION NOT TO ISSUE SOLICITATIONS FOR OIL PURCHASES NECESSARILY MEANS THAT BUDGET AUTHORITY WILL GO UNOBLIGATED, THEN IT IS THIS IMPACT ON THE BUDGET AUTHORITY WHICH WOULD BE SUBJECT TO THE IMPOUNDMENT CONTROL ACT.

WE HOPE THE FOREGOING WILL BE OF ASSISTANCE TO YOU. IF WE CAN BE OF FURTHER ASSISTANCE, PLEASE CONTACT MR. JEFFREY JACOBSON OF OUR OFFICE OF GENERAL COUNSEL. IDENTICAL LETTERS ARE BEING SENT TO THE OTHER SENATORS WHO JOINED YOU IN YOUR REQUEST.