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Mr. Jacobson



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

B-202472

March 25, 1981

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The Honorable Timothy E. Wirth
Chairman, Subcommittee on Telecommunications
Consumer Protection, and Finance
Committee on Energy and Commerce
United States House of Representative

Dear Mr. Chairman:

This responds to your letter, dated March 4, 1981, concerning the President's recent proposal under the Impoundment Control Act that a portion of funds appropriated to the Corporation for Public Broadcasting for fiscal years 1982 and 1983 be rescinded. Specifically, you asked for our opinion on (1) the legality of the President's rescission proposal, and (2) without regard to the President's authority, whether there is any bar to Congress' acting this year to reduce the Corporation's fiscal year 1982 appropriation. For the reasons stated below, we conclude that under the Impoundment Control Act, funds appropriated to the Corporation may not be withheld from availability during the 45-day withholding period prescribed by the Act. We also conclude, that the Congress is not barred from reducing a portion of the fiscal year 1982 appropriation for the Corporation.

PROVISIONS GOVERNING THE CORPORATION

The Corporation for Public Broadcasting was established by title II of the Public Broadcasting Act of 1967, Pub. L. 90-129. The present funding provisions were established in amendments to the Act, the Public Broadcasting Financing Act of 1975, Pub. L. 94-192, and the Public Telecommunications Financing Act of 1978, Pub. L. 95-567. The 1978 Act revised and restructured the financing provisions. The provisions governing the Corporation are found in 47 U.S.C. 396.

[The Corporation was established as a non-profit corporation which is not an agency or establishment of the United States Government.] 31 U.S.C. 396(b). Beginning in 1975, Congress provided multi-year appropriation authorizations for the Corporation. Further, in the fiscal year 1977 HEW appropriations act (Pub. L. 94-439), enacted September 30, 1976, the Congress established the principle of "forward funding" for the Corporation in advance of the year in which the appropriation is to be spent by providing a 2-year advance appropriation. The Congress has continued advance appropriations for the Corporation in subsequent appropriations acts.

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The 1975 legislation established the Public Broadcasting Fund as a fund in the Treasury administered by the Secretary. The 1975 and 1978 acts authorized a matching appropriation based on the amount of non-Federal money received by the Corporation from private sources during a specified prior period. Once the Corporation certified the amount of non-Federal financial support received for such period, the Secretary was directed to disburse to the Corporation the amount authorized for that year from amounts appropriated to the Fund.

Prior to 1978, the Corporation received its appropriation from the Fund on a lump-sum basis at the beginning of the fiscal year. However, the Corporation distributed funds to its grantees over the course of the year. Cash in excess of the Corporation's immediate needs was invested in Government securities. During consideration of the 1978 act, the Senate Committee on Commerce expressed concern that this investment practice resulted in interest earnings by the Corporation in excess of its immediate cash needs. The effect was to supplement the appropriation to the Fund while, at the same time, increasing the borrowing costs of the Treasury. S. Rep. No. 95-858, at page 14 (1978).

Accordingly, the 1978 act added the present provision that funds be disbursed by the Secretary of the Treasury on a quarterly basis, in such amounts as the Corporation certifies necessary to meet its obligations in the succeeding quarter. 47 U.S.C. 396(k) (2)(B). The Congress did not intend that this change in disbursement procedures to result in a change in the Corporation's ability to obtain necessary funds. Senate Report No. 95-858, at pages 14 and 15 states:

"Without intending in any way to disparage the prudent business practices of the Corporation, or to suggest that the Department of the Treasury should in any fashion exercise review powers over the amounts withdrawn from the Fund by the Corporation, it is the view of the Committee that a more orderly, yet flexible, system of disbursement of these funds is necessary to assure proper management of Federally appropriated funds. * * * Under no circumstances should the Secretary of the Treasury review, disapprove, or modify the amount certified by the Corporation."

Similar language is found in House Report No. 95-1178, at page 26 (1978).

APPLICABILITY OF IMPOUNDMENT CONTROL ACT

Because of the forward funding given the Corporation as discussed above, funds already have been appropriated to the Corporation for fiscal years 1982 and 1983, although these funds are not yet available for obligation or expenditure. The President proposed in his seventh special message for fiscal year 1981, dated March 17, 1981, (to rescind certain funds appropriated to the Corporation for fiscal years 1982 and 1983 (R81-105). Rescission proposals submitted pursuant to section 1012 of the Impoundment Control Act, 31 U.S.C. 1402, typically are accompanied by a withholding of funds by the President for up to 45 days of continuous congressional session during consideration of the proposal. Because the funds involved in R81-105 are for fiscal years 1982 and 1983 and therefore are not yet available to the Corporation, there is obviously no withholding of funds involved here.)

However, your letter suggests the broader question of whether the President could use the Impoundment Control Act to withhold funds appropriated to the Corporation. This question is important because of the possibility that an impoundment proposal might be submitted in the future concerning already available Corporation funds for which a withholding may be attempted.

Section 1001 of the Impoundment Control Act, 31 U.S.C. 1400, referred to as the disclaimer section, provides in part:

"Nothing contained in this Act, or in any amendments made by this act, shall be construed as--

* * * * *

"(4) superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder."

As previously discussed, funds appropriated to the Corporation are statutorily required to be made available to it without review or control of the Secretary of the Treasury. Thus 47 U.S.C. 396(k)(2) provides in part:

"(2)(A) * * * The Corporation shall determine the amount of non-Federal financial support received by public broadcasting entities * * * and shall certify such amount to the Secretary of the Treasury * * *. Upon receipt of such certification, the Secretary of the Treasury shall make available to the Corporation, from such funds as may be appropriated to the Fund, the amount authorized for each of the fiscal years pursuant to the provisions of this subsection.

"(B) Funds appropriated and made available under this subsection shall be disbursed by the Secretary of the Treasury on a quarterly basis, in such amounts as the Corporation certifies will be necessary to meet its financial obligations in the succeeding quarter."

As stated on page 26 of the House Report to the 1978 amendments (H. Rep. 95-1178):

"* * * The Treasury's role is intended to remain limited to disbursement of funds in accordance with the corporation's quarterly certification.* * *"

We view 47 U.S.C. 396(k)(2) as falling within the fourth disclaimer of the Impoundment Control Act, cited above. For purposes of the Impoundment Control Act, we see no distinction between a Congressional mandate to obligate or spend and the mandate in 47 U.S.C. 396(k)(2) to make funds available to the Corporation. Therefore, it is our opinion that the Impoundment Control Act cannot be used by the Executive branch to refuse to make funds available to the Corporation.)

CONGRESSIONAL AUTHORITY TO REDUCE APPROPRIATIONS

You also have asked whether there is any bar to Congress' acting this year to reduce the Corporation's fiscal year 1982 appropriation. (This appropriation, which as explained above is presently unavailable to the Corporation, remains unobligated.)

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We find nothing in the provisions governing the Corporation, nor are we aware of any other provision of law, which would prohibit the Congress from reducing this appropriation.)

Sincerely yours,

MILTON J. SOCOLAR

Acting Comptroller General
of the United States