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Comptroller General
of the United States

Washington, D.C. 20548

B-224882

April 1, 1987

To the President of the Senate and the
Speaker of the House of Representatives

On January 28, 1987, the President submitted to the Congress his fourth special impoundment message for fiscal year 1987. This message reports 25 new deferrals and one revised deferral. It also includes revised information with respect to seven rescission proposals made in the third special message, dated January 5, 1987. (All funds withheld pursuant to these rescission proposals were made available by the Office of Management and Budget (OMB) on March 16, 1987, for obligation by the agencies to which they were appropriated.) Enclosed is a copy of the President's listing of all impoundments reported in the fourth message.

We have reviewed these impoundments. We found that, with one exception, the deferrals are not in accordance with existing law. The laws and other authorities cited by the President do not permit 25 of the 26 reported deferrals.

As you know, the United States Court of Appeals for the District of Columbia, on January 20, 1987 (8 days before this message was submitted), invalidated section 1013 of the Impoundment Control Act (2 U.S.C. § 684), because of an unconstitutional legislative veto provision in that section. City of New Haven v. United States, No. 86-5319 (D.C. Cir. 1987), aff'g. 634 F. Supp. 1449 (D.D.C. 1986) (referred to herein as New Haven). Section 1013 was the sole general legislative authority for "policy deferrals". Policy deferrals are those which are "ordinarily intended to negate the will of the Congress by substituting the fiscal policies of the Executive Branch for those established by the enactment of budget legislation." New Haven, slip. op. at 3, emphasis in original.

The proscription of the New Haven decision was limited to policy deferrals; the court upheld the President's authority to defer and his responsibility to report under the Anti-Deficiency Act, as amended by the Impoundment Control Act, in order to achieve savings or greater efficiency, or to provide for contingencies. 31 U.S.C. § 1512(c).

Of the 26 deferrals in this message, the only one which we find to be in accordance with existing law is the revised

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deferral, Deferral No. 87-12A (Social Security Administration). This deferral is not for policy reasons; it is essentially to provide for contingencies, as authorized by the Anti-Deficiency Act.

The other 25 are policy deferrals. In each of those 25, the President is deferring budget authority, pending congressional action on his proposals that the Congress transfer the deferred budget authority to other accounts, in order to fund the costs of the January 1987 federal employee pay raise and of the new federal employee retirement system.

Neither the Anti-Deficiency Act nor the Impoundment Control Act is invoked as authority for the 25 policy-based deferrals in this message. Rather, for each deferral, the President cites as authority the acts authorizing and appropriating the funds deferred. In addition, according to pleadings filed in a lawsuit now pending over the legality of one of these deferrals (D87-33), the Administration relies, with respect to at least some of these deferrals, on a provision of the Continuing Resolution for fiscal year 1987 governing funding of a federal pay increase. Section 144(a)(3)(A), Pub. L. No. 99-591, 100 Stat. 3341-353.

In summary, the Anti-Deficiency Act precludes policy deferrals, except as specifically authorized by other law. Section 1013 of the Impoundment Control Act is no longer available to authorize policy deferrals. We find no basis for the Administration's position that specific statutory authority exists elsewhere which would justify these deferrals. Our analysis follows.

THE ANTI-DEFICIENCY ACT PERMITS POLICY DEFERRALS ONLY WITH SPECIFIC STATUTORY AUTHORITY AND THE IMPOUNDMENT CONTROL ACT NO LONGER PROVIDES SUCH AUTHORITY

The Impoundment Control Act, in addition to providing an express statutory procedure, in section 1013, for policy deferrals, also amended the Anti-Deficiency Act in several related respects. As a result, the two Acts must be read in tandem.

Under the Anti-Deficiency Act as amended, programmatic deferrals are permitted but no other deferrals--that is, no policy deferrals--are authorized except as specifically authorized by other law. 31 U.S.C. 1512(c). Section 1013 of the Impoundment Control Act constituted the "other law" permitting policy deferrals. Now, section 1013 having been held unconstitutional, the Anti-Deficiency Act provides the sole remaining general authority available to the President

to schedule the expenditure of appropriated funds. It permits him to apportion the funds, in order to achieve orderly obligation and avoid deficiencies, and to defer, but only for programmatic reasons consistent with the purpose of the appropriation.1/

Before enactment of the Impoundment Control Act, the President had asserted authority to impound for policy reasons without express statutory authority, based on theories similar to those now being asserted. At that time, the Anti-Deficiency Act permitted the establishment of reserves--creating what are now termed impoundments--either to provide for contingencies, or to effect savings whenever savings are made possible by (1) changes in requirements, (2) greater efficiency of operations, or (3) "other developments subsequent to the date on which such appropriation was made available."

The Administration argued at that time that the last-mentioned element of this statutory authority to impound--in order to effect savings made possible by "other developments"--permitted policy deferrals, for purposes which could be inimical to those of the appropriation being withheld. That position was inconsistent with the legislative history of the Anti-Deficiency Act and with prior executive practice, and was rejected by this Office and by the courts,2/ but was not abandoned by the Administration.

As a result, in enacting the Impoundment Control Act, the Congress at the same time amended the Anti-Deficiency Act. One purpose of the amendment was to make clear that the Anti-Deficiency Act could no longer plausibly be asserted as the basis for policy deferrals. To accomplish this, the amendment to the Anti-Deficiency Act repealed the authority to establish reserves to effect savings made possible by "other developments"--the language which had been relied upon by the President as authority for policy deferrals.

Also, the Congress intended, in amending the Anti-Deficiency Act, to restrict policy deferrals to those specifically authorized by law. The amendment preserved the authority to defer for non-policy reasons, in order "to provide for contingencies or to effect savings whenever savings are made

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1/ Of course, if a particular law mandates a schedule, or apportionment, the President must adhere to that schedule.

2/ See Letter to the Chairman, Subcommittee on Separation of Powers, Senate Judiciary Committee, from the Comptroller General, B-135564, July 26, 1973, and cases cited therein.

possible by or through changes in requirements or greater efficiency of operations." However, it specified that reserves might be established under the Anti-Deficiency Act "solely" for those two reasons. The amendment went on to say explicitly that "Except as specifically provided by particular appropriations Acts or other laws, no reserves shall be established other than as authorized by" the Anti-Deficiency Act. Sec. 1002, Pub. L. No. 93-344, 88 Stat. 332, codified with somewhat different wording as 31 U.S.C. 1512(c). (As with any codification, no substantive change may be presumed from the change in wording. H.R. Rep. No. 651, 97th Cong. 3-4 (1982), and cases cited therein.)

As a result of these amendments, the Anti-Deficiency Act now authorizes the creation of reserves solely (1) to provide for contingencies, (2) to effect savings (the two traditional bases), or (3) as specifically provided in particular appropriations acts or other laws. The term "other laws" includes the remainder of the Impoundment Control Act and, in particular, section 1013 (until that section was struck down in New Haven). B-115398, December 4, 1974.

The statutory scheme created, through amendment of the Anti-Deficiency Act, coupled with the enactment of the deferral procedure in section 1013 of the Impoundment Control Act, was one under which routine programmatic deferrals, of the kind traditionally governed by the Anti-Deficiency Act, continued to be authorized by that Act. Other deferrals, made for policy reasons, could be authorized only by section 1013 of the Impoundment Control Act or other specific statutory authority.

The Court in New Haven expressly refused the Administration's request that it strike down, along with section 1013 of the Impoundment Control Act, the amendment to the Anti-Deficiency Act. The court held that:

> "The amendment to the Anti-Deficiency Act . . . is fully consistent with the expressed intent of Congress to control presidential impoundments."

Consequently, with the Anti-Deficiency Act upheld and section 1013 invalidated, the only remaining authority to establish reserves is "as specifically provided by particular appropriations Acts or other laws." (As codified, this reads "as specifically provided by law." 31 U.S.C. 1512(c)(1)(C).) No basis exists for an argument that the President has discretion to reschedule the expenditure of appropriations, except for the two specific reasons permitted by the Anti-Deficiency Act, or pursuant to other specific statutory authority.

The Administration's appellate brief in New Haven contains at least implied recognition of the validity of this reasoning. The brief said that if section 1013 were to be struck down in its entirety, then "the amendment to the Anti-Deficiency Act must also be voided and the 'other developments' clause returned to that statute." At 63. Implicitly, this recognizes the difficulty in maintaining that policy impoundment authority survives with section 1013 invalidated and the Anti-Deficiency Act amendment remaining in effect.

The Administration cites neither the Anti-Deficiency Act nor the Impoundment Control Act as authority for the 25 deferrals here at issue. Rather, it relies on a variety of statutes. As discussed below, none of these provides an adequate basis for any of these deferrals.

NO SPECIFIC STATUTORY AUTHORITY EXISTS FOR THESE 25 DEFERRALS

The Administration maintains that specific statutory authority for these deferrals may be found in one or more of three sources. One is section 144(a)(3)(A) of the Continuing Resolution for fiscal year 1987, which deals with the funding of the 3 percent pay increase this year for federal civilian employees. Second, the Administration reads appropriations acts, unless they expressly require that funds be allocated in a particular way, as constituting specific statutory authority to defer. Finally, the Administration also relies on program legislation applicable to the accounts in which these deferrals are proposed: to the extent these laws do not mandate a schedule of expenditures, it is argued, they create discretion to defer.

Having examined the provisions relied upon, our view is that none satisfies the requirement for specific authority contained in the Anti-Deficiency Act. Here, we rely, for the Administration's position, primarily on two pleadings[3/] filed by it in Mid-Ohio Food Bank v. Lyng, No. 87-0252 (D.D.C. filed February 2, 1987) (Mid-Ohio). In that case, which is still pending although the deferral complained of has been legislatively overturned, the plaintiffs seek a declaration that the President lacks authority to defer. The Administration's legal arguments in that case are broadly applicable to all these deferrals and are consistent with our discussions of the Administration's position with OMB officials.

3/ Memorandum in Opposition to Plaintiffs' Motion for a Temporary Restraining Order, February 5, 1987, hereinafter referred to as Administration's TRO Memo; and Memorandum in Support of Defendant's Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, March 25, 1987.

The "Pay Act" Does Not Impliedly Authorize Deferrals

We deal first with an argument which applies to those deferrals in the fourth message which cite Public Laws 99-500 and 591, the continuing appropriations acts for 1987.[4/] Although the fourth message does not make this clear, the pleadings in Mid-Ohio, cited above, explain that the Administration relies on one particular provision of these laws, the so-called Pay Act, which increased pay and benefits for federal employees during fiscal year 1987, thus creating additional costs for the agencies which employ them. Section 144(a)(3)(A), Pub.L. No. 99-591, 100 Stat. 3341-353. Section 144(a)(3)(A) states that:

> "Notwithstanding any other provision of law, determinations relating to amounts to be appropriated in order to provide for the adjustment described in paragraph (1) [providing a 3 percent pay increase for federal civilian employees] shall be made based on the assumption that the various departments and agencies of the Government will, in the aggregate, absorb 50 percent of the increase in total pay for fiscal year 1987."

The Administration reads this as a clear indication by the Congress that the Executive Branch is to find ways to absorb 50 percent of the civilian federal pay raise from existing appropriations, "whether that is done by reprogramming within an account or by proposing legislative action to transfer funds between accounts." It follows, according to this argument, that "[t]o permit Congress time in which to consider such supplemental action, the deferral allows the status quo to be preserved," and that "absent express, prohibitory language, discretion exists to order a deferral to control the timing of making funds available."

Congress, it is argued, in enacting section 144(a)(3)(A), knew that it was not providing sufficient funds to meet the 3 percent pay raise, and knew that agencies could only absorb the costs from existing appropriations. Congress therefore

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4/ These are, for present purposes, identical. After Public Law 99-500 was signed, the enrolled version of the bill was found to contain omissions. The Congress therefore passed and the President signed Public Law 99-591 which, rather than amend Public Law 99-500, simply reenacted it with the necessary additions. The provision relied on by the Administration was identical in both versions and hereafter we refer only to the one now in effect, Public Law No. 99-591.

must have "intended the President to use his discretion to decide which funds from which programs would be used to absorb these costs" and, accordingly, must have "anticipated that the President would take the action necessary to preserve the funds he has so identified." Administration's TRO Memo, 15-16.

To recapitulate the argument, as we have done above, is to show that by no means can section 144(a)(3)(A) be regarded as the specific statutory authority for policy deferrals now required by the Anti-Deficiency Act: a lengthy chain of inference is required to deduce from the language of section 144(a)(3)(A) the conclusion that it authorizes deferrals. One link in that chain, which would stand the Anti-Deficiency Act requirement on its head, is that policy deferrals are permitted unless expressly prohibited.

Moreover, the language of section 144(a)(3)(A) does not lend itself to the Administration's interpretation--that, in enacting that provision, the Congress anticipated and sanctioned the use of deferrals, pending legislative transfer, as a mechanism for funding 50 percent of the costs of the mandated pay increase. A wide range of cost-cutting mechanisms has been used by and remains available to the President to absorb the required amount without deferring. These include shifting funds within lump sum appropriations, or reducing staffing through attrition, hiring freezes, or both. Nothing in the law nor, as far as we could determine, in the legislative history, suggests that Congress intended to provide additional legislative authority to defer.

Another serious flaw exists in the Administration's argument that section 144(a)(3)(A) was intended to provide the President with authority to propose transfers of funds, and to defer spending while awaiting enactment of those proposals. The argument relies on the unlikely assumption that the Congress intended, when it enacted section 144(a)(3)(A), to preserve the policy deferral authority of the President, even though one House had recently tried to deprive him of precisely such authority.

At the time section 144(a)(3)(A) was enacted (October 1986), the President's authority to defer under the Impoundment Control Act was under attack in New Haven. Although section 1013 had then been held unconstitutional by the District Court, the decision had been stayed pending appeal. 634 F.Supp. 1449 (D.D.C. 1986).

Given that background, of which we assume the Congress was aware (members of Congress were plaintiffs in the New Haven case, and the impoundment process had been the subject of several hearings in 1986), we cannot impute to the Congress an intention to confer authority on the President, independent of the Impoundment Control Act, to defer spending,

pending legislative transfer, in order to meet the 3 percent pay raise.

On the one hand, the Congress must have known, if it considered the question at all, that if section 1013 were ultimately to be upheld, no such additional authority to defer would be needed. This Office has long held that section 1013 permitted policy deferrals of the kind now proposed, while awaiting action on a bill which would transfer the funds to another account.

On the other hand, if the Congress anticipated that section 1013 might ultimately be invalidated, leaving the President at least arguably without authority to defer for policy reasons, then the Administration's argument must now be that the Congress intended partially to restore that authority by enacting section 144(a)(3)(A). We cannot accept that proposition. The House of Representatives had recently voted to take from the President his authority to defer for policy reasons, and had agreed in conference to delete that provision only in return for an agreement that the President would not, for the remainder of the year, exercise that authority. H.R. 5234, 99th Cong.; see H.R. Rep. No. 99-1502, 76 (1986). We find no basis to conclude that the House, by enacting section 144(a)(3)(A), intended to preserve for the President a power to defer for policy reasons which it had sought, only shortly before, to take from him, especially when the law and the legislative history reveal no such intent.

Appropriation Acts Do Not Impliedly Authorize Deferrals

The Administration finds statutory authority to defer in the text of the various appropriation acts. This argument is best set forth in the Administration's brief on appeal in New Haven. When funds are made available, without any particular schedule for obligation specified, the appropriating acts "by their silence . . . leave to the President, as the head of the Branch charged with faithful execution of the law . . ., the task of determining when the funds should be spent" including, presumably, the determination that they should be deferred to facilitate their transfer to another purpose entirely. At 53-4. We cannot agree.

This argument, like that with respect to the Pay Act, depends on the idea that the President possesses implicit statutory authority to order deferrals, unless a particular statute precludes him from doing so. As discussed above, the Anti-Deficiency Act requirement is precisely the reverse--that policy deferrals can only be made in reliance on specific statutory authority--and thus makes this argument untenable.

Even aside from the Anti-Deficiency Act, the Administration's arguments on this point are unconvincing. Two ideas are presented. First is the suggestion that, in the absence of mandatory spending language or an explicit spending schedule either in an appropriation act or in associated program legislation, the Administration has discretion for policy reasons to determine when the funds should be obligated. We discussed and dismissed a similar argument before enactment of the Impoundment Control Act, for reasons which seem equally applicable today. See Letter from Comptroller General to Chairman, Subcommittee on Separation of Powers, Senate Judiciary Committee, B-135564, July 26, 1973. We said then that "we do not believe it follows that by employing permissive language the Congress envisions the bulk of appropriation acts as carrying with them the seeds of their own destruction in the form of an unrestricted license to impound." We concluded that the discretion given by permissive appropriation language

> "is essentially co-extensive with that provided in the Anti-Deficiency Act, i.e., generally, to take measures designed to enhance the efficient and effective application of obligation authority to the purposes and objectives for which it is provided."

This conclusion seems even more true in this case where, as pointed out above, the appropriations in question were enacted at a time when the President's statutory authority under section 1013 to defer for policy reasons had been held unconstitutional by a United States District Court. That the Congress intended, in the appropriations acts, to restore by implication that authority to the President, in case section 1013 should be held unconstitutional, is not plausible.

The only new feature of the Administration's argument that appropriation acts impliedly authorize deferrals, as put forth today, compared to the 1973 version, is its reliance on cases decided in the interim. We find the cases to be inapposite.

The Administration relies primarily on two decisions: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Donovan, 746 F.2d 855 (D.C. Cir. 1984), cert. denied, 106 S.Ct. 81 (1985) (UAW); Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, at 864-66 (1984) (Chevron).

These cases have little relevance here because neither involves an impoundment at all, let alone one for policy reasons. Indeed, in UAW, which the Administration says is

"identical" to one of these deferrals, the court held that the decisions in earlier cases involving impoundments were not applicable because there was no impoundment; all the budget authority at issue had been obligated.

The holding in UAW was that the Labor Department, having been given a lump-sum appropriation available for five authorized programs, was permitted to divide the funds among only four of the five programs. UAW at 862-63. This conclusion follows from the proposition that a lump sum appropriation "leaves it to the recipient agency . . . to distribute the funds among some or all of the permissible objects as it sees fit." UAW at 861. Clearly, however, it does not follow from that proposition that the recipient agency is free not to distribute some or all of the funds among any of the permissible objects, that is, to defer.

The Chevron decision did not involve a spending statute. The Court, interpreting program legislation, found the Environmental Protection Agency's definition of a term used by, but not defined in, the legislation to be reasonable and consistent with the discretion afforded the agency by the legislation. As with UAW, this construction of agency discretion lends no support to the idea that statutory silence constitutes specific authority to defer spending.

Program Legislation Does Not Impliedly Authorize These Deferrals

Finally, the Administration suggests that the program legislation, in the case of the deferral at issue in Mid-Ohio Food Bank, permits the deferral by implication. Administration's TRO Memo, 16-20. Essentially the same reasoning is employed, with the same flaws, as in the argument discussed above relying on appropriation acts: if the program legislation is silent as to a schedule of expenditures, the President may defer for policy reasons.

The same argument was made in New Haven with respect to the funds involved in that case. (Administration's Brief on Appeal, at 52-57.) Most of the other deferrals at issue here also cite program legislation as authority. The following discussion is therefore generally applicable.

The Anti-Deficiency Act, for the reasons already given, requires specific authority to impound for policy reasons. The absence of a spending schedule in the program legislation

does not equate to an intention to permit the program's objectives to be thwarted, or at best delayed, by a deferral.

With respect to the statute involved in Mid-Ohio Food Bank, for example (section 204 of the Temporary Emergency Food Assistance Act), the Administration has not made a convincing case that it provides the required specific authority to defer. In fact, the Administration's argument is essentially that failure to prescribe a specific schedule of expenditure constitutes consent to impound, a premise which, for the reasons already given, we reject.5/

We have reviewed the program legislation cited by the Administration in the message as applicable to the other 24 deferrals. In none of these laws did we find any support for the notion that specific authority to withhold program funds for policy reasons was intended to be provided.

CONCLUSION

For the foregoing reasons, we do not find convincing any of the bases advanced by the Administration for these 25 deferrals, either in the message or in the Mid-Ohio suit. We are aware of no other basis on which these impoundments could be regarded as lawful. (Our 1973 opinion to the Chairman of the Senate Subcommittee on Separation of Powers, cited above, discussed and dismissed several other arguments advanced at that time by the President to justify impoundments not expressly authorized by law, including, for example, a constitutional right to impound, and a right based on the statutory debt limit or on statutes which impose spending ceilings.)

Despite our conclusion that these deferrals are not in accordance with existing law, we lack authority to take any action to compel release of the funds. Our authority to do so was linked to the now-invalidated section 1013 of the Impoundment Control Act.

5/ The implication of the Executive Branch's position is that, if the program legislation did prescribe a spending schedule, impoundment would not be permitted. Its practice has been wholly inconsistent, since it has asserted and exercised the power to defer even in programs which we held to be mandatory spending programs. See, for example, B-205053, February 5, 1982; OGC-82-9, March 10, 1982.

The Administration, if this fourth message is indicative, will continue to defer for policy reasons but will also continue to report these deferrals to the Congress. For our part, we will comment on these reported deferrals in the same manner called for by section 1013. We will also continue to report to the Congress those withholdings which come to our attention and which the President has not reported.

The courts, in the Mid-Ohio Food Bank case, referred to above, may definitively resolve the question whether policy deferrals remain lawful. However, even if that case is not dismissed as moot (an outcome the Administration urges because the deferral at issue has already been legislatively overturned and the funds released), a final decision will not come soon if, as seems likely, whichever decision is reached will be appealed. Therefore, the Congress may have to look to other means to control or curtail the President's deferrals of funds for policy reasons.

Milton J. Socolar

for Comptroller General
of the United States

Enclosure

ENCLOSURE

ENCLOSURE

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as reported by the President
(in thousands of dollars)

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