



**Comptroller General
of the United States**

Washington, D.C. 20548

February 20, 1990

B-237297.4

The Honorable Robert C. Byrd
Chairman
Committee on Appropriations
United States Senate

Dear Mr. Chairman:

This letter responds to your February 7, 1990 letter, also signed by Senator Mark O. Hatfield, regarding \$1,359,050,000 of fiscal year 1990 Defense Department appropriations recently deferred by the President, citing recent developments in Europe and the Soviet Union. In your letter, you point out that in his budget proposal the President has requested that these funds be transferred to other programs for fiscal year 1991. You asked that we review this matter to determine whether these funds are being deferred in accordance with applicable law. As explained in further detail below, we conclude that \$1,251,050,000 of the deferrals are not authorized under the Impoundment Control Act of 1974, as amended, 2 U.S.C. § 681 et seq.

We are continuing to review the remaining \$108,000,000 in deferrals and will address them in our upcoming report on the President's special message. We are also reviewing Defense Department programs and funding to assist the Congress in reaching its own judgment as to whether it wishes to make any adjustments in the Department's spending.

BACKGROUND

As you know, in its third special impoundment message, dated February 6, 1990, the Administration reported 19 deferrals of budget authority, totalling \$2,193,850,000, affecting several Department of Defense (DoD) programs. Although the special message does not so indicate, the Administration in its budget for fiscal year 1991 has proposed that the Congress transfer amounts in 16 of the deferrals, totalling \$1,359,050,000, to finance other programs in fiscal year 1991. Of these funds, the Administration has proposed \$860,300,000 for transfer to the appropriation "Procurement of Weapons and Tracked Combat Vehicles, Army," for the M-1 tank program. Budget of the United States Government Fiscal Year 1991, at A-577 (1990).

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The Administration also proposes that Congress transfer a total of \$498,750,000 to the appropriation "Aircraft Procurement, Air Force," to fund the F-15 aircraft program. Id. at A-583.

Of the 16 deferrals, deferral D90-22, Research, Development Test and Evaluation, Air Force, in the amount of \$100,000,000, involves a classified program. One of the other 15 deferrals, D90-23, Research, Development, Test and Evaluation, Defense, includes \$8,000,000 that the Administration has deferrred due to legal constraints on its obligation. We are continuing to gather information on these two deferrals. The remaining \$1,251,050,000 in these 15 deferrals is the subject of this opinion.1/

DISCUSSION

Section 1013 of the Impoundment Control Act, 2 U.S.C. § 684, as amended in 1987 by Pub. L. No. 100-119, 101 Stat. 754, permits the President to defer budget authority for only three purposes:

"(1) to provide for contingencies;

"(2) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or

"(3) as specifically provided by law."

2 U.S.C. § 684(b).

The Congress amended section 1013 of the Impoundment Control Act after the Court of Appeals for the District of Columbia Circuit invalidated the previous section 1013 because it

1/ The 15 deferrals are D90-10, OV-ID Aircraft modifications; D90-12, M483 155 mm Artillery Projectile; D90-13, Termination of Echelon Above Corps; D90-15, HARM Missile, Navy; D90-16, Fast Sealift Ships; D90-18, MH-60G Helicopter and F-4G Wild Weasel; D90-19, HARM Missile, Air Force and Minuteman II modifications; D90-20, Combined Effects Munitions; D90-21, National Guard Reserve Equipment, Defense; D90-23, Research, Development, Test and Evaluation, Defense (\$13 million for Defense Advance Projects Research Agency software efforts); D90-24, Military Construction Army; D90-25, Military Construction, Navy; D90-26, Military Construction, Army National Guard; D90-27, Military Construction, Air National Guard; D90-28, Military Construction, Army Reserve.

contained an unconstitutional legislative veto provision. City of New Haven v. United States, 809 F.2d 900 (D.C. Cir. 1987). The legislative history of the 1987 amendment makes it clear that it was also Congress's intention to limit deferrals to the routine withholding of funds in connection with the normal and orderly operation of the government, unless specifically authorized by law. In particular, Congress intended to prohibit so called policy deferrals which have as their purpose the furtherance of executive branch policies or priorities in the place of those policies established in the legislative process. See generally, H.R. Rep. No. 313, 100th Cong., 1st Sess. 67 (1987).

Section 1013 requires that the President report every deferral to the Congress in a special message that provides detailed information concerning the basis and effect of the deferral, including:

"(6) all facts, circumstances, and considerations relating to or bearing upon the proposed deferral and the decision to effect the proposed deferral, including an analysis of such facts, circumstances, and considerations in terms of their application to any legal authority, including specific elements of legal authority, invoked to justify such proposed deferral"

2 U.S.C. § 684(a)(6).

In our opinion, one of the purposes of this reporting requirement is to permit Congress to determine whether a deferral is, in fact, a proper exercise of the President's authority under the Act. The cryptic explanation that has been given for the deferrals proposed here, together with the intended uses planned for the amounts deferred, makes these deferrals highly suspect. Without a sufficiently detailed explanation underlying the deferrals, there is no basis for concluding that they fall within the limitations of the Act.

The Administration's entire explanation of the deferrals is that they are necessary because of "changes in requirements in view of the promising developments in the Soviet Union and Eastern Europe." This is not the detailed, reasoned explanation for the deferrals which section 1013 requires. It is no more than a generalized assertion that provides no direct nexus between the proposed deferrals and the asserted reasons for them. For example, in deferral D90-18 the President has deferred \$181,700,000 of funds appropriated in the lump-sum "Aircraft Procurement, Air Force," and intended for MH60-G helicopters and F-4G aircraft. The only justi-

fication advanced is that the deferral is necessitated by changed requirements brought about by "promising developments" in the Soviet Union and Eastern Europe. The justification fails to explain how the promising developments affect the requirement for these two weapons systems.

Deferral D90-24 is a more dramatic example of the same point. There the President has deferred \$3,200,000 in funds appropriated for "Military Construction, Army," because of the same "promising developments in the Soviet Union and Eastern Europe." The funds were provided for construction of an access road at the Tobyhanna, Pennsylvania, Army Depot. The justification does not explain how the events in the Soviet Union and Eastern Europe relate to, let alone justify, the decision to defer funds for construction of an access road in an Army Depot in Pennsylvania.

All the other deferrals at issue similarly fail to provide an adequate justification directly and specifically relating the changes in East-West relations to the requirements for the funds that are being deferred. The level of generality used to explain these deferrals could be employed across a wide range of DoD accounts suggesting that the choice of activities and programs being deferred relates less to routine operation of the government than to executive policy choices concerning activities that should or should not be funded.

In addition, as we noted earlier, the President has proposed the deferred funds for transfer to the M-1 tank and F-15 aircraft programs. It appears to us that the generalized assertions that are the basis for the deferrals are equally applicable to the M-1 and F-15 programs, adding support to the view that the deferrals are intended to substitute the President's priorities and policies for those already enacted in appropriations acts.

Further, our examination of the Administration's budget requests and the committee reports accompanying the fiscal year 1990 Defense appropriation act indicates that most of the deferrals involve appropriations that were not requested by the Administration but rather were added by the Congress during the legislative process. The President's choice to defer these appropriations rather than others to which the justification for the deferrals appears to be equally applicable is further evidence that the deferrals are for reasons of policy.

In sum, it is our opinion on the basis of the present record

that the \$1,251,050,000 of deferrals in issue here are not authorized under the Impoundment Control Act.

We are providing, by separate letter, a copy of our opinion to the Secretary of Defense and requesting his response. Further, we are reviewing the entirety of the President's special message and we will report to the Congress thereon in the near future in accordance with 2 U.S.C. § 685(b).

Sincerely Yours,

Milton J. Fowler
for Comptroller General
of the United States