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

B-200685

April 13, 1981

The Honorable Jack Brooks  
Chairman, Committee on Government Operations  
House of Representatives

Dear Mr. Chairman:

This responds to your letter, dated March 26, 1981, and the letter you attached from Congressman James R. Jones, Chairman of the House Committee on the Budget, concerning GAO's execution of its responsibilities under the Impoundment Control Act of 1974, Pub. L. No. 93-344, 31 U.S.C. 1400, et seq. The letters raise various procedural and legal issues concerning GAO's implementation of the Act.

[GAO

Incl.

EXPLANATION OF GAO PROCEDURES UNDER THIS ACT

Section 1012 and 1013 of the Impoundment Control Act, 31 U.S.C. 1402, 1403, require the President to submit a special message to the Congress on any impoundments--rescissions or deferrals--he wishes to initiate. Section 1014 requires that a copy of that message be transmitted to the Comptroller General on the same day it is sent to the Congress. The Comptroller General is to assist the Congress by reviewing each message and issuing a report on his findings as promptly as practicable.

The Office of General Counsel in GAO has arranged to receive a copy of the President's special message on the same day that it is transmitted to the Congress. Typically, on that same day, each proposed impoundment is assigned to the GAO division having audit responsibility for the program involved. GAO's auditors promptly contact agency budget and program officials to begin the process of verifying the information contained in the special message. Within the time constraints involved in the process, independent audit data also may be developed. The findings and conclusions of our audit personnel are reported back to the Office of General Counsel as the examinations are concluded.

As the audit examinations are being conducted, the Office of General Counsel examines the legal implications of each impoundment to determine if the proposal is in compliance with statutory authority. The most common legal issue is whether the Executive has authority to withhold funds during Congress' consideration of an impoundment proposal. It arises usually in the context of a rescission proposal in which the Executive invokes section 1012(b)

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of the Impoundment Control Act, 31 U.S.C. 1402(b), to withhold funds for 45 days of continuous congressional session. 1/

[In instances when GAO believes that information provided in the special message is inaccurate or incomplete, or that some aspect of the proposal is inconsistent with provisions of law, OMB or the agency involved, or both, are contacted.] Informal views are solicited, but time usually does not allow us to provide the Executive with an opportunity to respond formally. [If the issue is not quickly resolved to our satisfaction, we include information on our differences in our impoundment report to the Congress.] On a number of occasions we have reported withholdings that we, but not OMB, regarded as impoundments under the Act.

[After the process described above is completed, our attorneys prepare an impoundment report for review by the General Counsel. Subsequently, the report is transmitted to the Congress by the Comptroller General.] The Impoundment Control Act instructs the Comptroller General to issue a report as promptly as practicable. The compression of the various procedures described above has enabled GAO to issue its report to the Congress ordinarily within 4 to 5 weeks from the time the President transmits his special message.

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1/ Section 1012(b) provides that:

"Any amount of budget authority proposed to be rescinded or that is to be reserved as set forth in each special message shall be made available for obligation unless, within the prescribed 45-day period, the Congress has completed action on a rescission bill rescinding all or part of the amount proposed to be rescinded or that is to be reserved."

Since Congress can enact legislation rescinding an appropriation at any time, section 1012(b) is significant in the context of requiring that funds be made available at the expiration of the 45-day period. Thus, section 1012(b) has been construed since its enactment to authorize the Executive to withhold funds proposed for rescission during the 45-day period. See the Comptroller General's letter to Senator Edmund S. Muskie, B-115398, dated December 18, 1974.

The impoundment activity since the beginning of this calendar year, however, will affect the promptness with which we will be able to respond to some of the impoundment proposals. On January 15, 1981, President Carter proposed 51 impoundments in the third special message. President Reagan proposed one impoundment in the fourth special message on January 29, 1981, and 33 impoundments in the fifth special message on February 13, 1981. As part of his new economic plan, President Reagan proposed 32 more impoundments in the sixth special message (March 10, 1981), 86 impoundments in the seventh special message (March 17, 1981), and 34 impoundments in the eighth special message (March 19, 1981). In sum, there have been 237 impoundment proposals submitted within approximately 2 months. Five of the six special messages mentioned above are among the largest ever submitted under the Impoundment Control Act. GAO also has had to address numerous questions, most often from Congressmen and their staffs, about individual impoundment proposals. This workload is greater than that usually involved in an entire fiscal year. Nevertheless, we expect that delays in processing our impoundment reports will not be significant. In fact, our recent response to the President's March 10 message was completed within our usual 4-5 week timeframe, and we expect that our responses to the two remaining special messages, barring unforeseen problems or legal complications, should be completed within a week or two of our usual timeframe.

WITHHOLDING OF FUNDS PRIOR TO THE  
SUBMISSION OF A SPECIAL MESSAGE

Your letter states you understand that GAO has "acquiesced in the withholding of funds before an actual notification of deferral of budget authority was transmitted, in order to permit the batching of deferral and rescission requests and also to prevent the expenditure of funds by program personnel in anticipation of such deferral or rescission." Chairman Jones stated in his letter to you that he also understood "GAO has informally advised the President that he has the authority to order agencies to stop obligating funds in anticipation of a rescission or deferral \* \* \*." Similar positions recently have been attributed to GAO by other sources as well.

It is true that [we recognize the Executive, in proposing an impoundment, wishes to preserve funds it hopes Congress will agree should not be spent. We also acknowledge the Administration's view that the efficient administration of reporting impoundments would call for the "batching" of several proposed impoundments for the President's consideration at one time.]

However, in our 1977 report to the Congress, "Review of the Impoundment Control Act of 1974 After 2 Years," OGC-77-20, June 3, 1977, we expressed some skepticism that all delays are due entirely to "batching" for administrative convenience. More importantly, GAO also urged OMB in that report, and virtually from the time the Act was passed, to be more responsive to Congress' need to receive timely reports.

You suggest that [however expedient it may be for the President to withhold funds prior to notifying Congress of an impoundment, the Executive, not to mention GAO, must comply with the letter and spirit of the Impoundment Control Act.] We agree. However, [neither the letter nor spirit of the Act provides clear direction on this matter.]

Sections 1012(a) and 1013(a) of the Impoundment Control Act, 31 U.S.C. 1402(a) and 1403(a), require the President to transmit a special message whenever he wishes to propose impoundment of budget authority. The Act is silent on the matter of withholding funds incident to the preparation of a special message for the President's consideration, and to the ultimate determination of the President to propose impoundments. The Act does not contain a timetable or any other specific directive concerning when a special message must be submitted vis-a-vis the President's determination to withhold funds. Indeed, the statutory language directing the submission of a special message by the President when he determines to propose an impoundment, arguably suggests a reasonable period of time during which the immediate obligation of funds may be suspended by those who prepare the document that represents the instrument by which the President determines to withhold pursuant to the Act and, if he so determines, notifies the Congress in accordance with the Act.

The Executive consistently has implemented the Act so as to withhold funds during such period of time considered necessary to prepare and transmit special messages on impoundments. As explained above, [we have criticized the Executive in the past for unreasonable delay, and have reported the problem to Congress.] Section 1015 of the Act, 31 U.S.C. 1405, appears to address the matter indirectly by authorizing the Comptroller General to issue an impoundment report if the President "has failed" to do so. We view such "failure" to import some deficiency or negligence on the Executive's part, and conversely, to imply the contemplation of a reasonable period of time commensurate with administrative efficiency that does not constitute a "failure" to transmit the message. On a number of occasions, we have issued section 1015 reports in advance of

the President submitting a special message. <sup>2/</sup> In the majority of cases where we have exercised our authority under section 1015, the Executive disagreed with our conclusion that an impoundment existed, or had no plans to immediately report the impoundment. It is in these cases that GAO has concluded that the President "failed" to submit a special message.

In recent times, the need for the Comptroller General to invoke section 1015 has decreased. [In almost all cases when we learned that funds were withheld before the special message was transmitted, we discovered that staff personnel at OMB informally agreed that an impoundment existed, and already were in the process of preparing a special message for the President's signature and subsequent transmittal to the Congress.] In most cases, we could not have gathered all the necessary documentation and have issued our own section 1015 reports to the Congress more than a few days before the President submitted his special message. Furthermore, had it been possible to do so, GAO would have had to issue a continuing stream of section 1015 reports as the necessary information was developed. [It would appear inconsistent for GAO itself to "batch" its reports when it is the "batching" by the Executive that allegedly is a cause of whatever problem exists.] Congress then would have been faced with dealing with both these reports and whatever special messages were later submitted by the Executive. This not only would have resulted in a tremendous amount of paperwork for both GAO and the Congress, but also in having different 45-day periods for the various rescission proposals. In our judgement, undertaking such an exercise would have done more to create confusion than to have expedited the process. The extensive efforts it would have taken for GAO to issue such reports would not have been a prudent and beneficial use of our limited resources. Nevertheless, [we remain alert to the possibility of unreasonable delay in the Executive's reporting impoundments to the Congress, and ready to issue our own section 1015 reports when warranted by the circumstances of a particular delay.]

Our treatment of the recent special messages transmitted by President Reagan illustrates both our concern with the possibility of unreasonable delay and the practical limits on how much we can achieve. Because of all the publicity surrounding proposed cutbacks in a variety of programs, GAO was informed by

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<sup>2/</sup> For example, see the Comptroller General's reports dated June 19, 1975; July 9, 1975; July 29, 1975; April 20, 1976; March 21, 1977; August 2, 1977; and March 14, 1979.

congressional and other sources of alleged impoundments for which reports had not yet been transmitted. In contemplation of the possible need for GAO to issue a report to Congress in advance of the President's special message, it was necessary for us to undertake examinations of these allegations and to accumulate information necessary for such a report.

In none of the cases we investigated did OMB dispute the existence of the impoundment, and in each case OMB was already in the process of preparing its special message. The possibility of separate GAO reports being issued more than a few days before the President's special messages was usually remote. As a result of our discussions with OMB, however, rescission proposals R81-35, R81-36, and R81-37, affecting the Youth Conservation Corps and the National Consumer Cooperative Bank, were included in the March 10 message instead of the March 17 message.

RECLASSIFICATION OF IMPOUNDMENTS  
BY THE PRESIDENT

On January 15, 1981, [President Carter proposed 33 rescissions in the third special message.] The new administration wanted to reexamine these rescission proposals in light of President Reagan's economic strategy. It wished to postpone expenditures on those programs subject to the 33 rescission proposals until the new President had time to decide whether to retain in whole or in part any program funds that President Carter had sought to rescind, or to increase the amount proposed for rescission by proposing to eliminate or reduce additional programs. Had President Carter's proposals been left undisturbed, the 45 day period during which funds could be withheld might have expired by the time the new administration had decided what impact its economic strategy ought to have on the rescission proposals. There was substantial doubt on our part as to the extent the new President would have been entitled under the Impoundment Control Act to repropose rescissions of funds involving the same program and appropriation accounts, and incident to that reproposal withhold the availability of funds for 45 days. On the other hand, had Congress acted favorably on President Carter's proposal, funds for programs the new administration might wish to support would have been extinguished.

Thus, in his fifth special message, dated February 13, 1981, [President Reagan "reclassified" President Carter's rescission proposals as deferrals. More precisely, he withdrew

the rescission proposals, upon which the Congress had not acted, and notified the Congress that the same funds that had been proposed for rescission were now being deferred. [In his eighth special message dated March 19, 1981, the President repropoed the 33 rescissions.] In 27 of these proposals, funds were added to or deleted from those proposed by President Carter.)

The Impoundment Control Act does not explicitly address the situation which the incoming Administration faced. Executive Branch and congressional representatives expressed their concern to GAO as to how the situation could be handled. The concern was to afford a new President some reasonable degree of latitude without allowing for potential abuse of the authority in the Impoundment Control Act.

[We found nothing in the Impoundment Control Act or its legislative history to suggest that a President cannot withdraw an impoundment proposal. Nor did we find that the Act precluded a President from putting before the Congress one type of impoundment proposal instead of the type of proposal originally submitted if the original proposal had not yet been rejected by Congress.] Furthermore, [the reclassification of rescissions to deferrals was presented as a temporary measure to allow the new President to review the proposals of the previous President in the context of his overall economic plan. Consequently, we found no basis for concluding that the President's actions in his fifth special message were improper.] Also, we observed in our report on that message that [the conversion to deferrals should act to merely toll the running of the 45-day period, and that when the rescissions were resubmitted, the appropriate withholding period should be only that time which had not yet run on the original proposals.] Therefore, [since 22 days had already run before the conversion to deferrals occurred, the resubmitted rescission proposals would be subject to a 23-day withholding period.] We calculate the 23-day period for the rescission proposals contained in the message of March 19 to expire on April 27, 1981. We have checked with OMB and the House Committee on Appropriations and have found that they are using the same date.

We hope that the foregoing addresses the concerns expressed in your and Chairman Jones' letters.

Sincerely yours,



Acting Comptroller General  
of the United States